



Australian Government

Department of Finance

David Tune PSM
Secretary

Our Ref: SEC0010293

Senator Cory Bernardi
Chair
Senate Finance and Public Administration Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Bernardi

I enclose a submission from the Department of Finance (Finance) to the Senate Finance and Public Administration Legislation Committee's Inquiry into the *Public Governance, Performance and Accountability Amendment Bill 2014* (PGPA Amendment Bill) in relation to the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

The submission details the:

- background to the PGPA Act and Amendment Bill, including the legislative history and objectives of the Act and Bill;
- consultation process for developing the amendments contained in the Bill; and
- particular provisions in the Bill.

Finance does not consider the information in the submission to be such that it needs to be kept confidential.

Yours sincerely

David Tune
5 June 2014

Inquiry into the *Public Governance, Performance and Accountability Amendment Bill 2014*

Senate Finance and Public Administration Legislation
Committee

Submission by the Department of Finance

JUNE 2014

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Introduction

The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) consolidates into a single piece of legislation the governance, performance and accountability requirements of the Commonwealth, setting out a framework for regulating resource management by the Commonwealth and relevant entities. The PGPA Act aims to promote a consistent approach to public sector governance by bringing together the better elements of each of the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act). The substantive provisions of the PGPA Act come into force on 1 July 2014.

The PGPA Act is principles-based and will be supported by rules and guidance. The guiding principles for the resource management framework are that:

- Government should operate as a coherent whole;
- Public resources are public resources, and a common set of duties should apply to all resources handled by Commonwealth entities;
- Performance of the public sector is more than financial;
- Engaging with risk is a necessary step in improving performance; and
- The financial framework should support the legitimate requirements of the Government and the Parliament in discharging their respective responsibilities.

This fifth principle has been newly inserted on the recommendation of the Joint Committee of Public Accounts and Audit in its Report 441 – *Inquiry into Public Governance, Performance and Accountability Act 2013 Rules Development*.

The *Public Governance, Performance and Accountability Amendment Bill 2014* (the Bill) would, if enacted, amend the PGPA Act to:

- make technical amendments to improve the understanding and operation of the PGPA Act;
- provide greater certainty over the use and management of public resources and the capacity of an accountable authority to issue instructions on resource management and governance matters within entities;
- include a requirement that Commonwealth entities must provide annual reports to their Minister by the 15th day of the fourth month after the end of the reporting period; and
- clarify the nature of various legislative instruments, including the introduction of a new Part to the PGPA Act (Part 4-1A). This is to deal with other instruments related to procurements and grants legislative instruments, but not subject to disallowance. This continues comparable arrangements under the FMA Act and instruments that relate to arrangements for intelligence and security agencies which are declared not be legislative instruments because their content would not be suitable for publication.

The process of developing the supporting rules and identifying consequential amendments to the enabling legislation of Commonwealth entities has also provided an opportunity to further refine and improve particular provisions of the PGPA Act and to ensure that the technical provisions in the supporting rules are properly supported in the primary legislation and can be read as part of a coherent scheme of legal requirements.

Related legislative activity

The PGPA Act was given Royal Assent on 29 June 2013, with the first five sections being effective from 1 July 2013. Sections 6 to 112 of the Act come into effect on 1 July 2014.

The intervening 12 month period has been taken up with the development of supporting rules to give effect to the operation of the Act and an assessment of any consequential amendments that may be required to the legislation of Commonwealth entities arising from the introduction of the PGPA Act and the replacement of the FMA and CAC Acts.

Consultation

The PGPA Act was presented to the previous Parliament in June 2013 following two years of consultation and consideration of issues.

Since July 2013, Finance has continued to engage in an extensive program of consultation with stakeholders within and outside government. It has established a Project Board supported by five separate steering committees considering issues in relation to:

- appropriations and resourcing;
- planning and reporting;
- governance and risk management;
- streamlining and reducing red tape; and
- legislation and rules.

All of the steering committees include wide representation from across government, and arrangements have been put in place to consult with other jurisdictions and sectors as part of an ongoing approach to seeking views on how to develop and implement the aims of the broader reform agenda.

These consultation efforts have been supplemented with extensive consultations with Commonwealth entities based in Sydney, Melbourne, Adelaide, Townsville, Alice Springs and Darwin, and telephone and email discussions with entities located in other parts of Australia.

The period since its passage has provided an opportunity for reflection and consultation on the provisions of the Act and whether they could be further improved. Several of the proposed amendments included in the Bill are the result of consultation with Commonwealth entities about their enabling legislation and its operation. These consultations have identified instances where the wording of particular provisions in the PGPA Act could be improved to accommodate the particular requirements of these agencies. For example:

- Proposed amendments to the wording in sections 8, 10, 12 and 57 of the PGPA to allow for matters given effect “by or under an Act”. Indigenous Land Councils, for example, are established under, rather than by, an Act, would not otherwise be properly recognised for the purposes of the PGPA Act.

In addition, in the process of consulting on the content of PGPA rules, issues have been identified that are better dealt with in the primary legislation itself, rather than the rules. For example:

- Section 105D (Instruments relating to intelligence or security agencies or listed law enforcement agencies) – after consultation with affected agencies on the current arrangements in relation to “operational money”, it is proposed to make obligations on the relevant entities and the role of responsible Minister and the Finance Minister explicit on the face of the Act. This is proposed to provide greater transparency to the Parliament of the processes involved as well as providing greater clarity on specific responsibilities.

Finally, in the period since the passage of the PGPA Act, issues have been raised by key stakeholders that require particular amendments to support the interest of better accountability in the Commonwealth. These include:

- amendments of sections 25 to 28 of the PGPA Act to better align the general duties of officials and the provisions in the APS Code of Conduct contained in section 13 of the Public Service Act 1999, at the recommendation of the JCPAA in its Report 441 of May 2014; and
- amendments to section 46 of the PGPA Act, to set a requirement that Commonwealth entities must provide annual reports (under section 46) to their Minister by the 15th day of the fourth month after the end of the reporting period to allow annual reports to be tabled in the Parliament in time for Senate Supplementary Budget Estimates, at the request of the Chair of the Senate Standing Committee on Finance and Public Administration, in a letter dated 6 December 2013.

JCPAA Inquiry into rules

On 13 February 2014, the Joint Committee of Public Accounts and Audit (JCPAA) resolved to inquire into the PGPA Act rules development. The terms of reference for the inquiry were

to ‘consider the process for the development of the rules, the impact of the rules, and the purpose of the rules in the context of the broader Public Management Reform Agenda’.

The JCPAA, in its Report 441 of May 2014, made ten recommendations—two of which relate to proposed amendments that are included in this Bill.

<p>Recommendation 3</p> <p>The Committee recommends that the Department of Finance work to ensure that any necessary amendments are made to the <i>Auditor-General’s Act 1997</i> such that the Australian National Audit Office has the power to audit the full planning, performance and accountability framework under the <i>Public Governance, Performance and Accountability Act 2013</i>.</p>	<p>Finance has worked with the ANAO and the PGPA Amendment Bill includes a note to Section 40 to put beyond doubt the continuing powers of the Auditor-General to conduct a performance audit of a Commonwealth entity at any time.</p>
<p>Recommendation 4</p> <p>The Committee does not recommend a change to the <i>Public Governance, Performance and Accountability Act 2013</i> (PGPA Act) at this time, to address the potential confusion from dual coverage with the <i>Public Service Act 1999</i> (Public Service Act). Instead, the Committee recommends that the Department of Finance and the Australian Public Service Commission work together to draft the necessary amendments to the PGPA Act and/or the Public Service Act to remove overlaps and reduce potential confusion from dual coverage, and that amendment proposals be put to the Parliament.</p>	<p>Finance has worked collaboratively with the APSC and the Department of Parliamentary Services to draft amendments to the PGPA Act, Public Service Act and Parliamentary Service Act to achieve greater alignment in the duties of officials and to reduce the potential for confusion.</p> <p>The government moved amendments from the floor to the PGPA Amendment Bill to make the necessary changes to the PGPA Act. Reciprocal changes are expected to be proposed by the Government to the Public Service Act and the <i>Parliamentary Service Act 1999</i> (Parliamentary Services Act), to more completely to align those Acts with the PGPA Act.</p>

PGPA Amendment Bill

The *Public Governance, Performance and Accountability Amendment Bill 2014* (the Bill) would, if enacted, amend the PGPA Act to:

- make technical amendments to improve the understanding and operation of the PGPA Act;
- provide greater certainty over the use and management of public resources and the capacity of an accountable authority to issue instructions on resource management and governance matters within entities;

- include a requirement that Commonwealth entities must provide annual reports to their Minister by the 15th day of the fourth month after the end of the reporting period; and
- clarify the nature of various legislative instruments, including the introduction of a new Part to the PGPA Act (Part 4-1A). This is to deal with other instruments related to procurements and grants legislative instruments, but not subject to disallowance. This continues comparable arrangements under the FMA Act and instruments that relate to arrangements for intelligence and security agencies which are declared not be legislative instruments because their content would not be suitable for publication.

The detail of each of the proposed amendments to the PGPA Act contained in the Bill is outlined in the Explanatory Memorandum for the Bill.

The JCPAA in its *Report 44* of May 2014 recommended that, in order to reduce the potential confusion created by APS employees being subject to two sets of requirements, there should be better alignment between the APS Code of Conduct and the duties of officials under the PGPA Act.

In responding to this, the Government moved amendments to the PGPA Amendment Bill from the floor of the House of Representatives on 5 June 2014. These amendments propose minor changes to sections 26, 27 and 28 of the PGPA Act, which relates to the General Duties of Officials, to achieve better alignment with the APS Code of Conduct contained in Section 13 of the Public Service Act 1999.

These amendments are to:

- include the word “honestly” in section 26 of the PGPA Act to align with the wording in section 13(1) of the Public Service Act and to clarify the duties on officials to act honestly, in good faith, and for a proper purpose
- include the phrase “or seek to gain a benefit” in subsections 27(a) and 28(a) for the duties relating to use of position and the use of information to align it with wording in section 13(10) of the Public Service Act and to clarify that officials are not to gain, or seek to gain, a benefit or advantage for themselves or any other person; and
- include the phrase “or seek to cause” in subsections 27(b) and 28(b) for the duties relating to use of position and the use of information to align it with wording in section 13(10) of the Public Service Act and to clarify that officials are not to cause, or seek to cause detriment to the entity, the Commonwealth or any other person.

Reciprocal changes are expected to be proposed by the Government to the Public Service Act and the *Parliamentary Service Act 1999* (Parliamentary Services Act), to more completely to align those Acts with the PGPA Act.

The Bill in the context of broader reform activities

The Commonwealth's financial framework provides rules for the governance of Commonwealth entities and Commonwealth companies and for the proper management and use of public resources. The framework supports the government in meeting its obligations and responsibilities to the public and the Parliament. It is an important feature of an accountable and transparent public sector and guides the daily work of Commonwealth entities and Commonwealth companies, including the work of office holders and employees.

The PGPA Act is the key component of a broader Public Management Reform Agenda (PMRA), which aims to encourage cultural change in the way government does business.

The reforms seek to deliver long-lasting benefits, including:

- improved quality of information to Parliament to support its constitutional role in relation to Commonwealth expenditure;
- a more mature approach to risk across the Commonwealth;
- improved productivity and performance of the Commonwealth public sector with accompanying benefits for a broad range of stakeholders; and
- reduced red tape within the Commonwealth and for partners who contribute to delivering Australian Government programs and services, including grant recipients.

The aim of the reform agenda, through the PGPA Act, is to create a financial framework where entities have the flexibility and incentives to adopt appropriate systems and processes that help them to achieve diverse policy and statutory objectives efficiently and effectively. The Act is also intended to underpin other aims in reducing red tape, achieving appropriate simplification, and encouraging joint ventures with partners both within and external to government.

These reforms acknowledge that acceptance of some risk is necessary to improve performance, allow for more effective joining-up with others beyond the Commonwealth and reduce unnecessary administrative burden. An increased focus on risk management, and better dialogue about risk within Government and with the Parliament, will lead to more informed strategic and operational decision-making in the public sector.

In this context, the public management reform agenda should support the Government's deregulation agenda. Officials that are better able to engage with risk are less likely to develop regulatory frameworks that are unnecessarily prescriptive. The amendments contained within this Bill go to supporting a better way for the Commonwealth doing its business.

The overall direction of the reforms has won wide support from both within and outside government, including professional bodies and groups.

It will take several years to implement the reforms and integrate them fully into the practices and processes of Commonwealth entities and Commonwealth companies. Gradual introduction of the reforms will ensure that they are appropriately tested and refined in light of experience.

PGPA rules and other instruments

The PGPA rules and other instruments made by the Finance Minister under the PGPA Act will replace a range of instruments under current legislation, including the FMA Regulations, CAC Regulations and Finance Minister's Orders. They will be used to prescribe the requirements and procedures necessary to give effect to the governance, performance and accountability matters covered by the PGPA Act.

For an Act to enable rules, rather than regulations, is consistent with current drafting practice. The Office of Parliamentary Counsel reserves the use of regulations to a limited range of matters, which it considers are more appropriately dealt with in regulations made by the Governor-General than in an instrument made by some other person. Matters in this category include offence provisions, powers of arrest or detention, entry provisions and search or seizure provisions. The rules will be legislative instruments subject to disallowance by Parliament and will sunset under the provisions of the *Legislative Instruments Act 2003* (LI Act).

The majority of rules are to be in place for 1 July 2014, and will be presented to Parliament before that date for the 15 sitting days of the disallowance period for legislative instruments of this type. A number of rules do not need to be in place for 1 July 2014. The Department of Finance intends to engage in further consultation with stakeholders, including the Parliament, before these rules are released in late 2014. Amongst these proposed rules are the rules in relation to corporate planning, performance statements and annual reports. Time will be taken to provide stakeholders with the opportunity to provide their views on the form and content of these rules.

The Bill would also allow the Finance Minister to make other instruments that are not disallowable under the LI Act. This arrangement in relation to procurement and grants is consistent with existing arrangements under the FMA Act. An exemption from the LI Act for modified arrangements in relation to intelligence and security agencies and listed law enforcement agencies is consistent with arrangements operating under the FMA and CAC Acts.

Consequential amendments

The Consequential and Transitional Bill would, if enacted, amend approximately 250 Acts across the Commonwealth to support the implementation of the PGPA Act and its related rules and instruments. The intent of the Consequential and Transitional Bill is to clarify specific resource management and governance matters for Commonwealth entities and ensure the effective implementation of the rules that will support the operation of the PGPA Act and

the broader financial framework of the Commonwealth by amending the enabling legislation of Commonwealth entities and companies so as to:

- replace references to the FMA and CAC Acts with the equivalent provisions in the PGPA Act;
- simplify enabling legislation where provisions of the PGPA Act cover a matter previously dealt with in enabling legislation; and
- amend enabling legislation to clarify which matters are covered by the PGPA Act and which matters are covered by the enabling legislation, such as in the case of planning and reporting, or disclosure of interest arrangements where an entity may have additional obligations over and above those imposed through the PGPA Act.

The variety of entity governance and operational arrangements across the Commonwealth is such that the degree of amendment required to enabling legislation varies from entity to entity, but the overall approach is one of seeking alignment between the PGPA Act and enabling legislation in introducing a more consistent and coherent framework that does not impinge on the ability of an entity to meet its statutory obligations to Parliament and to the community.

Other Submissions to the Committee's Inquiry

The Clerk of the Senate made a Submission to the Committee inquiry on 4 June 2014. The Clerk sought further information on the effect and intent of the proposed amendment to the definition of Parliamentary Departments in the PGPA Act.

These changes are technical amendments to ensure consistency with changes to the definition of a Department of State in terms of prescribing who is (or is not) a member of the entity for the purposes of the finance law.

The circumstance might arise, for example, where a new statutory officer was established and needed to be assigned to a Parliamentary Department for the purposes of the PGPA Act. The amendment therefore effectively provides choice to the Presiding Officers and the accountable authorities of their departments as to how to allocate that officer to a particular Parliamentary Department. That is, the amendment creates the option of allocating that official through the relevant enabling legislation; alternatively, it could be effected through a PGPA rule issued by the Finance Minister. In the case of a PGPA rule, the Finance Minister would consult with the Presiding Officers in the process of and prior to making the rule which will be subject to disallowance.

The Clerk also suggests that the PGPA Act use or invoke a definition of Presiding Officer or Presiding Officers as defined in the Parliamentary Services Act. Finance supports this position and will seek to have it addressed in a legislative amendment bill that is expected to come-forward in the next sittings of Parliament.