



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_sdlc

3 September 2020

Senator the Hon Mathias Cormann
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: financeminister@finance.gov.au

CC: DLO-Finance@finance.gov.au; plc@finance.gov.au

Dear Minister,

Public Governance, Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020 [F2020L00782]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation).

The Public Governance, Performance and Accountability Rule 2014 (the PGPA Rule) allows prescribed officials to exercise powers, perform functions and discharge duties under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act). The Public Governance, Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020 [F2020L00782] (the instrument) amends the PGPA Rule to allow prescribed officials to also exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997* (the FFSP Act).

Subsection 9(1) of the PGPA rule provides that consultants, independent contractors and their employees are prescribed as officials of non-corporate Commonwealth entities. The instrument therefore appears to enable consultants and independent contractors and their employees, to make, vary and administer arrangements or grants of financial assistance as per sections 32B and 32C of the FFSP Act. The explanatory statement notes

that the instrument is intended to facilitate greater administrative flexibility for accountable authorities managing arrangements under the FFSP Act.

Allowing consultants, independent contractors and their employees to exercise powers, perform functions or discharge duties in relation to Commonwealth expenditure is a significant matter. Provisions which authorise non-APS/non-Commonwealth employees (who may not be bound by relevant codes of conduct) to exercise significant powers should ordinarily be set out in primary legislation. The significance of the powers provided for in this instrument is amplified as they appear to facilitate the allocation of Commonwealth money by non-APS/non-Commonwealth employees.

The committee requests your detailed advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to allow consultants and independent contractors of non-corporate Commonwealth entities (and their employees) to exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

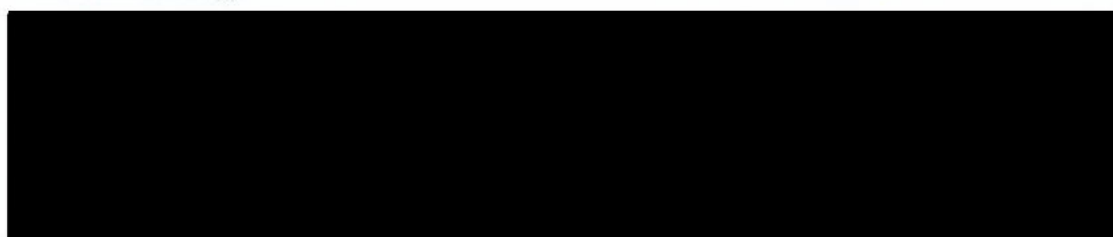
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **17 September 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Leader of the Government in the Senate

REF: MC20-002594

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee
for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600


Dear Senator

I refer to your letter of 3 September 2020 seeking further information on the *Public Governance Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* [F2020L00782] (Amendment Rule).


Your letter requested detailed advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to allow consultants and independent contractors of non-corporate Commonwealth entities, and their employees, to exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997*.

The technical appendix to this letter provides my response and additional information providing context and further clarification on the operation of the Amendment Rule.

I trust this information addresses the Committee's concerns.

Thank you for bringing the Committee's views to the attention of the Government.

Mathias Cormann
Minister for Finance

 23 September 2020

RESPONSE BY THE MINISTER FOR FINANCE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION

The Senate Standing Committee for the Scrutiny of Legislation (the Committee) has sought a response to the question below:

The committee requests your detailed advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to allow consultants and independent contractors of non-corporate Commonwealth entities (and their employees) to exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997*.

SUMMARY

The practise of permitting consultants and independent contractors of non-corporate Commonwealth entities to exercise certain powers is of long-standing.

The recent *Public Governance Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* (amending rule) is operational in nature.

The amending rule puts in place a more restrictive set of arrangements than previously applied, while remaining consistent with the intent of primary legislation and the *Public Governance, Performance and Accountability Rule 2014 (PGPA Rule)*.

INTRODUCTION

This paper provides detailed advice in response to the Committee.

The paper provides historical context and outlines the technical reasoning that led to the current process prescribing consultants and independent contractors of non-corporate Commonwealth entities (and their employees) (referred to as contractors) as officials through delegated rather than primary legislation.

HISTORICAL CONTEXT - THE PREVIOUS APPROACH UNDER THE FMA ACT

Prior to the introduction of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), non-corporate Commonwealth entities were governed by the *Financial Management and Accountability Act 1997* (FMA Act). In turn, the FMA Act derived from the *Audit Act of 1901*.

Under the FMA Act, the *Financial Management and Accountability Regulations 1997* was designed to 'allocate' persons who were not officials as officials of the relevant agency by default, whenever they performed a 'financial task'¹ – even if their services did not specifically require them to exercise a particular power. Under this approach, it was possible for a contractor to be classed as an official without their knowledge.

¹ 'financial task' was very broadly defined under the FMA Act framework. Essentially, it meant any task that involved the expenditure of money – including the entering of arrangements for the allocation of resources.

By contrast, the current framework is based on the idea that a contractor is not an official, unless they are specifically required as part of their services to exercise powers. They also must be able to be identified by name to be prescribed as an official.

The current framework is therefore more specific in relation to who is an official, and how they are designated as officials, than the previous framework. This has also enabled a more rigorous accountability framework to be put in place than under the FMA framework.

CLASSIFYING CONTRACTORS AS OFFICIALS UNDER PRIMARY LEGISLATION

The PGPA Act contains the concept of an ‘official’ in order to identify that group of persons who:

- can be delegated powers, functions and duties under the PGPA Act and who can receive binding instructions from accountable authorities of Commonwealth entities; and
- will be subject to the PGPA Act’s code of conduct on officials, the duties of officials, at sections 25 to 29 of the PGPA Act².

Officials under the PGPA Act do not need to be APS employees or Commonwealth employees. An official can be any person, or group of persons, that an Act or the PGPA Rules defines as an official.

Section 13 of the PGPA Act³ defines officials of Commonwealth entities. The definition in section 13 primarily focuses on defining officials by classes of persons. The definition captures entire groups of persons in the identified class.

Contractors are generally not classed as officials of Commonwealth entities.⁴ This is intentional as contractors are rarely required to exercise powers, discharge duties or perform functions and therefore do not need to be subject to the code of conduct on officials at sections 25 to 29 PGPA Act. It would not be appropriate to extend the coverage of the PGPA Act over particular classes of persons when the need is not there.

However, the PGPA Act supports the principles of devolved management, operational independence and efficiency in the use of resources by accountable authorities to achieve Commonwealth objectives. Through the delegated legislation of the PGPA Rule, the PGPA Act permits the prescribing of contractors as officials in a targeted and selective manner.

The current amending rule builds upon the existing capacity to prescribe contractors as officials at subsection 9(1), item 1A of the PGPA Rule, when their services:

“require the exercise of a particular power, the performance of a particular function, or the discharge of a particular duty, conferred on any person [by the PGPA Act or a rule made under it, or the *Financial Framework (Supplementary Powers) Act 1997*]”.

This approach is intended to enable the selective targeting of certain contractors for prescription when it is operationally necessary for them to be classed as officials. It enables them to exercise delegated statutory power as part of the efficient conduct of Commonwealth

² See Attachment A for these sections.

³ See Attachment A for this section

⁴ Refer to PGPA Act paragraph 13(4)(c).

functions, while subject to the code of conduct on officials at sections 25 to 29 of the PGPA Act.

Primary legislation could not as effectively adopt such a selective approach. Attempting to define contractors as officials through the PGPA Act would likely result in all contractors in the Commonwealth being captured by the definition of official, even when their role does not require them to exercise statutory powers and make decisions in respect of the allocation of Commonwealth resources.

THE CURRENT OPERATION OF PGPA RULE SUBSECTION 9(1) ITEM 1A

Since 1 July 2015, sub section 9(1), item 1A of the PGPA Rule has permitted contractors, where the requirements of the Rule are met, to exercise powers, perform functions and discharge duties under the PGPA Act and PGPA Rule.

This means that contractors, as prescribed, can exercise powers, with a written delegation such as, though not limited to, the powers in section 23 of the PGPA Act, permitting the entering of arrangements and approval of a commitment of relevant money.

This power is comparable to the power in section 32B of the *Financial Framework (Supplementary Powers) Act 1997* FF (SP) Act, as both powers result in the allocation of Commonwealth resources.

THE RELATIONSHIP BETWEEN THE FF (SP) ACT AND THE PGPA ACT

The FF (SP) Act is a separate Act from the PGPA Act but the two Acts have a close relationship to one another in the Commonwealth's resource management framework, as evidenced by section 6 of the FF (SP) Act.⁵

The FF (SP) Act relies on concepts and definitions provided by the PGPA Act for its operation.

One of those definitions is 'official' and, like the PGPA Act, in terms of the FF (SP) Act, being an official (or a Minister) is a prerequisite to exercising statutory power.

Under the FF (SP) Act where officials are not themselves accountable authorities, authority is provided through the written delegation of relevant statutory power by accountable authorities or Ministers.

EXERCISING POWERS UNDER THE FF (SP) ACT WITH PARTICULAR REFERENCE TO DEPARTMENTS OF STATE

The FF (SP) Act contains powers to enter into arrangements on behalf of the Commonwealth, where the arrangement is specified in the FF (SP) Regulations 1997.⁶ This legislative mechanism provides the necessary legislative authority for a range of Commonwealth activities and functions, such as Grants and other programs.

⁵ See Attachment A for this section.

⁶ Refer to section 32B FF (SP) Act.

Departments of State rely upon the legislative authority provided by the FF (SP) Act to carry out significant functions, which would not otherwise be possible.

Under the FF (SP) Act only the following persons can exercise powers in that Act:

- Ministers;
- Accountable authorities of non-corporate Commonwealth entities (as defined by the PGPA Act); and
- Officials of non-corporate Commonwealth entities, when delegated power by either of the above.⁷

Departments of State do not have establishing legislation and must rely entirely upon the definition of official provided by the PGPA Act at section 13.

By contrast, statutory bodies have establishing legislation, usually in primary legislation. Statutory bodies that are non-corporate Commonwealth entities often use their establishing legislation to define who is an official of the entity.

THE OPERATIONAL REQUIREMENT TO PERMIT CONTRACTORS TO EXERCISE POWERS, DISCHARGE DUTIES OR PERFORM FUNCTIONS UNDER THE FF (SP) ACT

The Commonwealth engages consultants, independent contractors, and their employees because they have particular expertise in areas that are not otherwise available to the relevant entity.

At times, it is operationally necessary to permit contractors to exercise delegated statutory powers on behalf of the Commonwealth.

A targeted control mechanism is therefore necessary to give entities the flexibility to take advantage of the skills and expertise of contractors in exercising certain statutory powers. This supports the principles of devolved management, operational independence and efficiency in the use of resources by accountable authorities to achieve Commonwealth objectives.

The Committee has expressed a concern that contractors are not APS employees subject to codes of conduct.

While it is true that contractors are not APS employees, not all officials under the PGPA Act are APS employees under the Public Service Act. The PGPA Act covers many officials who are employed under arrangements outside the Public Service Act.

For example officials can be;

- statutory office-holders;
- board appointees; or
- employees of a State or Territory.

As officials, not under the Public Service Act, these persons can exercise powers, discharge duties and perform functions, including in relation to the allocation of Commonwealth resources.

⁷ See sections 32B and 32D FF (SP) Act.

To ensure high standards of conduct across the Commonwealth with respect to governance, performance and accountability for resource allocation, including for those persons not in the APS, the PGPA Act imposes a code of conduct on all officials. The code imposed is similar to those set out in the Public Service Act, through the duties set out at section 25 to 29 of the Act.

This is an important safeguard to regulate the conduct of all officials subject to the PGPA Act, including those who would be prescribed as officials by the amending Rule.

THE SAFEGUARDS UPON PRESCRIBED OFFICIALS UNDER THE AMENDING RULE

The amendments made by the amending Rule to subsection 9(1) item 1A, PGPA Rule will allow the accountable authorities of relevant entities to determine if it is operationally necessary for contractors, rather than an existing official, to exercise particular powers, perform particular functions, or discharge particular duties under the FF (SP) Act.

When the legislative criteria of the Rule are fulfilled, the Rule, by operation of law, prescribes that individual, who must be identifiable by name for a clear line of accountability, as an official of the relevant non-corporate Commonwealth entity.

Contractors will not be prescribed unless their services, specifically:

“require the exercise of a particular power, the performance of a particular function, or the discharge of a particular duty, conferred on any person [by the PGPA Act or a rule made under it, or the *Financial Framework (Supplementary Powers) Act 1997*”.

Contractors prescribed in this way will be officials of the relevant non-corporate Commonwealth entity and will have the statutory obligations of officials upon them, such as the duties of officials at sections 25 to 29 of the PGPA Act.

In addition, they will be required, as part of the finance law⁸, to comply with instructions and directions from the relevant accountable authority. They will not be able to exercise any statutory power without a written delegation to do so.

Further, accountable authorities have an obligation, under section 16 of the PGPA Act, to establish and maintain systems relating to risk and control. This includes managing contractors who work for the entity.

When a contractor is prescribed as an official, this arrangement is likely to be subject to change, including to expire at some future time. The current arrangement allows for delegations to be withdrawn. The contractor would therefore no longer be able to exercise powers, nor be prescribed, under the Rule as an official. The current mechanism is therefore much more flexible than if it had been embedded in primary legislation.

⁸ See section 8 PGPA Act.

ATTACHMENT A

PGPA Act – section 13 definition of officials

Section 13 Officials

- (1) Each Commonwealth entity has officials.

Officials of Commonwealth entities (other than listed entities)

- (2) An **official** of a Commonwealth entity (other than a listed entity) is a person who is in, or forms part of, the entity.
- (3) Without limiting subsection (2), an **official** of a Commonwealth entity (other than a listed entity) includes:
 - (a) a person who is, or is a member of, the accountable authority of the entity; or
 - (b) a person who is an officer, employee or member of the entity; or
 - (c) a person, or a person in a class, prescribed by an Act or the rules to be an official of the entity.
- (4) Despite subsections (2) and (3), each of the following is not an **official** of a Commonwealth entity (other than a listed entity):
 - (a) a Minister;
 - (b) a judge;
 - (c) a consultant or independent contractor of the entity (other than a consultant or independent contractor of a kind prescribed by an Act or the rules for the purposes of paragraph (3)(c));
 - (d) a person, or a person in a class, prescribed by an Act or the rules not to be an official of the entity.

Officials of listed entities

- (5) An **official** of a Commonwealth entity that is a listed entity is a person who is prescribed by an Act or the rules to be an official of the entity.

PGPA Act – sections 25 to 29 Duties of officials

Section 25 Duty of care and diligence

- (1) An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person:
 - (a) were an official of a Commonwealth entity in the Commonwealth entity's circumstances; and
 - (b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.
- (2) The rules may prescribe circumstances in which the requirements of subsection (1) are taken to be met.

Section 26 Duty to act honestly, in good faith and for a proper purpose

An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose.

Section 27 Duty in relation to use of position

An official of a Commonwealth entity must not improperly use his or her position:

- (a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or
- (b) to cause, or seek to cause, detriment to the entity, the Commonwealth or any other person.

Section 28 Duty in relation to use of information

A person who obtains information because they are an official of a Commonwealth entity must not improperly use the information:

- (a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or
- (b) to cause, or seek to cause, detriment to the Commonwealth entity, the Commonwealth or any other person.

Section 29 Duty to disclose interests

- (1) An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.
- (2) The rules may do the following:
 - (a) prescribe circumstances in which subsection (1) does not apply;
 - (b) prescribe how and when an interest must be disclosed;
 - (c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).

FF (SP) Act – Section 6

Section 6 Relationship with the finance law

This Act and the regulations are to be read together with the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).



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8 October 2020

Senator the Hon Mathias Cormann
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: financeminister@finance.gov.au

CC: DLO-Finance@finance.gov.au; plc@finance.gov.au

Dear Minister,

**Public Governance, Performance and Accountability Amendment (2020 Measures No. 3)
Rules 2020 [F2020L00782]**

Thank you for your detailed response dated 23 September 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 7 October 2020. On the basis of your advice, the committee has resolved to seek your further advice about the issues outlined below.

Matters more appropriate for parliamentary enactment

Amongst other matters, your response advises that the use of delegated legislation, rather than primary legislation, enables the more selective targeting of certain contractors for prescription as officials. Your response further explains that defining contractors as officials on the face of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) would likely result in all Commonwealth contractors being captured by the definition of official, including those contractors whose role does not require the exercise of statutory powers or decision making in relation to Commonwealth resources.

Whilst the committee acknowledges that delegated legislation can facilitate greater flexibility and specificity in the administration of a scheme, it does not generally consider these qualities, of their own, to constitute a sufficient justification for including significant elements of a regulatory scheme in delegated legislation. In this instance, the committee notes that the list of persons who are official of Commonwealth entities in section 9 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) has only been altered on three occasions in the last six years. Moreover, the committee notes that, as drafted and amended, section 9 of the PGPA Rule captures broad classes of persons who share certain attributes. Accordingly, it remains unclear to the committee why this approach could only be achieved via the use of delegated legislation.

In addition, it is unclear to the committee why the insertion of provisions equivalent to section 9 of the PGPA Rule into the PGPA Act would likely have the effect of capturing all Commonwealth contractors within its scope, regardless of what their role entails.

The committee therefore requests your further advice as to why the prescription of certain consultants and independent contractors as officials cannot be set out on the face of primary legislation, noting that officials can exercise significant delegated statutory powers on behalf of the Commonwealth, including the allocation of public money.

Availability of accountability safeguards

Your response also states that contractors will be subject to a range of accountability measures and safeguards set out in section 16 and sections 25 to 29 of the PGPA Act. In this regard, the committee notes that sections 25 to 29 of the PGPA Act provide for standard public administration duties and conflict of interest requirements, while section 16 imposes a duty on the accountable authority of a Commonwealth entity to establish and maintain appropriate systems of risk oversight and management and internal control.

The committee welcomes your advice about the availability of these safeguards. However, noting the broad and significant powers that may be performed by Commonwealth officials, it is unclear to the committee whether persons prescribed as officials of non-corporate Commonwealth entities are subject to other, independent public accountability safeguards, including the obligations of the *Freedom of Information Act 1982* and *Privacy Act 1988*, independent merits review, and oversight by the Commonwealth Ombudsman and Auditor-General.

The committee therefore requests your advice as to:

- **whether persons who are prescribed as officials of non-corporate Commonwealth entities are subject to independent accountability mechanisms, including obligations under the *Freedom of Information Act 1982* and *Privacy Act 1988* and oversight by the Commonwealth Ombudsman and Auditor-General; and**
- **whether decisions made by these officials are subject to independent merits review.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **22 October 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Leader of the Government in the Senate

REF: MC20-002897

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee
for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to your letter of 8 October 2020 seeking further information on the *Public Governance Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* [F2020L00782] (Amendment Rule).

Your letter requested additional detailed advice as to:

1. why the prescription of certain consultants and independent contractors as officials cannot be set out on the face of primary legislation, noting that officials can exercise significant delegated statutory powers on behalf of the Commonwealth, including the allocation of public money;
2. whether persons who are prescribed as officials of non-corporate Commonwealth entities are subject to independent accountability mechanisms, including obligations under the *Freedom of Information Act 1982* and *Privacy Act 1988* and oversight by the Commonwealth Ombudsman and Auditor-General; and
3. whether decisions made by those officials are subject to independent merits review.

The technical appendix to this letter provides my response to your questions, including examples of a current prescribing practice and an arrangement that would benefit from the Amendment Rule. I trust this information addresses the Committee's concerns.

Thank you for bringing the Committee's views to the attention of the Government.

Kind regards

Mathias Cormann
Minister for Finance

22 October 2020

RESPONSE BY THE MINISTER FOR FINANCE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION ADDITIONAL QUESTIONS

SUMMARY

The recent *Public Governance, Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* is operational in nature. The concept of an official as being a person who is in, or forms part of, the entity, is a significant element of the Commonwealth resource management framework and this definition is included in primary legislation. The ability to prescribe certain consultants and contractors when they are forming part of the entity is subsidiary to the concept of an official and can be addressed in delegated legislation. This follows the intended design of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) as setting out the fundamental elements of a coherent resource management framework for all Commonwealth entities, underpinned by detailed rules issued by the Finance Minister.

Examples are provided at the end of this discussion to illustrate why contracted service providers are currently prescribed as officials where the circumstances of their engagement make it appropriate that they should be prescribed. The first example covers the scenario under the current prescribed officials Rule where insurance services are provided to the Commonwealth through Comcover. The second example describes circumstances in which, if allowed to under the amended rule, the Department of Education, Skills and Employment has proposed to prescribe contractors as officials to exercise powers under the *Financial Framework (Supplementary Powers) Act 1997* (FF (SP) Act) to assist jobseekers.

Consultants and contractors who are prescribed as officials of non-corporate Commonwealth entities are subject to the same accountability measures that apply to all Commonwealth officials.

QUESTION 1: SIGNIFICANT MATTERS IN DELEGATED LEGISLATION

The Committee asked: *Why the prescription of certain consultants and independent contractors as officials cannot be set out on the face of primary legislation, noting that officials can exercise significant delegated statutory powers on behalf of the Commonwealth, including the allocation of public money.*

The PGPA Act sets out the fundamental elements of a coherent resource management framework for all Commonwealth entities. This principles-based legislation is underpinned by detailed rules issued by the Finance Minister to clarify the requirements of, or give detail to, the primary legislation. The rules are disallowable instruments; either the House of Representatives or the Senate may disallow them.

The PGPA Act, and the FF (SP) Act, include the power for accountable authorities of non-corporate Commonwealth entities to enter arrangements and commit relevant money. The Acts also include the power of delegation so that accountable authorities can empower officials to undertake this function. Accountable authorities are responsible for maintaining appropriate systems of internal control that regulate how officials undertake such functions (section 16 of the PGPA Act). These include directions attached to the delegations (section

110 of the PGPA Act) and instructions issued to officials on any matter relating to finance law (section 20A of the PGPA Act). Through these internal control mechanisms, it is open to the accountable authority to limit the value, time period and nature of an arrangement that a particular official or group of officials can be delegated to enter into on behalf of the Commonwealth. These limitations necessarily vary by entity, according to their activities.

Section 13 of the PGPA Act defines who is an official of a Commonwealth entity. Consistent with the principles-based nature of the PGPA Act, section 13(2) outlines in broad terms that an official of a Commonwealth entity (other than a listed entity¹) is a person who is in, or forms part of, the entity. Section 13(3) goes on to clarify that:

- the accountable authority, or members of the accountable authority, are officials of the entity; and
- an officer, employee or member of the entity, is an official of the entity.

Section 13(3) also recognises that this is not exhaustive and that other persons may be officials of the entity if prescribed as such by an Act or the rules. This is consistent with the approach to defining officials for listed entities (section 13(5) of the PGPA Act) which describes officials as persons prescribed by an Act or the rules to be an official of the entity. For example, Schedule 1 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) lists consultants for entities such as the Australian National Preventative Health Agency, the Australian Taxation Office, and the Fair Work Ombudsman and Registered Organisations Commission Entity as officials of those entities.

The PGPA Rule is important in providing a necessary mechanism to apply the principles of the PGPA Act. It would be impractical and inconsistent with the principles-based nature of the PGPA Act for it to detail in all cases who is to be considered to be an official for all 187 Commonwealth entities and the range of contracted arrangements that they may enter into. For this reason the legislation envisages other categories of persons who may be defined as officials, such as those for listed entities, being defined in the rules.

This approach to prescribing officials for entities recognises that there may be specific circumstances where persons who are consultants or contractors are engaged in a way that is consistent with the definition of an official, that is, they are ‘in, or form part of, the entity’ (section 13(2)) and are required to exercise PGPA Act (or in this case FF (SP) Act) powers in the course of their duties.

As persons prescribed as officials, they are subject to the controls set by the accountable authority, the same way other officials are, including directions on the use of the delegated power, instructions issued by the accountable authority under section 20A of the PGPA Act, and the duties on accountable authorities under sections 25 to 29 of the PGPA Act.

The design of the PGPA Act and Rule is consistent with the Legislation Handbook issued by the Department of the Prime Minister and Cabinet and the Committee’s Scrutiny Principle (j). The broad concept of an official, ‘being in, or forming part of, the entity’ is significant, and therefore contained in the PGPA Act, as they undertake an important role in the stewardship of public resources and carry the trust of the Australian taxpayer. However, since 2015 it has been recognised in the PGPA Rule that, in limited circumstances, a consultant or contractors’

¹ See Attachment A to this appendix for the definition of a listed entity.

role may make them more akin to an official and require them to exercise powers under the PGPA Act. Therefore they may be prescribed as an official when the services provided require the exercise of a particular power, the performance of a particular function or the discharge of a particular duty conferred by the PGPA Act or PGPA Rule, and they are capable of being identified by name by the accountable authority of the entity. This current amendment would now include similar situations under the FF (SP) Act. This matter is subsidiary to the main definition of an ‘official’ and correctly resides in the PGPA Rule. It is not intended to apply to all consultants and contractors, but only in those limited circumstances and for the duration in which where their role is more like that of an official and they are required to exercise delegated powers.

As the accountable authority is responsible for the prescribed officials’ use of delegated powers, through directions and instructions, a consultant or contractor is not exercising powers outside the framework set for officials – they are subject to the same requirements as officials.

Various examples from across Government demonstrate how these processes are used for exercising delegated powers under the PGPA Act and Rule, and how they can be used through the extension in the proposed amendment to the PGPA Rule to include the exercise of delegated powers under the FF (SP) Act.

To illustrate the way this process is currently used, Finance is responsible for providing insurance services to the Commonwealth, through Comcover. Fund member services are delivered through a combination of in-house staff and outsourced service providers. Due to the high volume of low value claims requiring assessment and settlement, staff of the private sector claims management provider are required, in limited circumstances, to enter into arrangements on behalf of the Commonwealth, using PGPA powers to do so. To enable this, staff of the provider are prescribed as officials of Finance and are required to comply with the requirements and specific limitations of the Finance Secretary’s delegation and Accountable Authority Instructions in exercising their powers.

An example of how this process can be applied under the FF (SP) Act is in the Department of Education, Skills and Employment, which operates a Contact Centre dealing with calls and inquiries to assist job seekers. The FF (SP) Act provides legislative authority for this program. The staff in this contact centre are required to exercise powers under the FF (SP) Act in discharging these functions. Some of the staff in the contact centre are contractors and are engaged because of their particular expertise in relation to employment and national labour markets. This expertise is not generally found among APS officials. The proposed amendment to the PGPA Rule would permit the accountable authority of the Department to delegate FF (SP) Act powers, with controls, to selected contractors where required, to permit more efficient management of this process.

Arrangements for consulting and contracted services across Government vary and a homogenous approach to delegation using primary legislation could introduce risk to operational flexibility (by being too prescriptive and un-timely) or to Commonwealth resources (by being too generic).

Finance has issued guidance on the process and requirements of prescribing officials – this is available on the Finance website ([Resource Management Guide 212, Prescribing officials for non-corporate Commonwealth entities](#)).

QUESTION 2: INDEPENDENT ACCOUNTABILITY MECHANISMS FOR PRESCRIBED OFFICIALS

The Committee asked: *Whether persons who are prescribed as officials of non-corporate Commonwealth entities are subject to independent accountability mechanisms, including obligations under the Freedom of Information Act 1982 and Privacy Act 1988 and oversight by the Commonwealth Ombudsman and Auditor-General.*

Persons who are prescribed as officials of non-corporate Commonwealth entities are subject to the same accountability measures that apply to all Commonwealth officials. The *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act) contain specific provisions that capture the activities of contracted individuals to ensure they remain transparent and accountable. Other mechanisms apply to all officials in the Government regardless of whether they are a consultant or contractor, including employees of Commonwealth entities.

PRIVACY ACT

Section 95B of the Privacy Act requires a Department, when entering into a Commonwealth contract, to take contractual measures to ensure that a contracted service provider for the contract does not do an act, or engage in a practice, that would breach an Australian Privacy Principle if done or engaged in by the Department. The standard contracts non-corporate Commonwealth entities use to engage consultants and contractors apply this basic requirement.

FOI ACT

Section 6C of the FOI Act requires a Department to take contractual measures to ensure that Department receives a document from a 'contracted service provider' if the:

- Department receives an FOI request for access to the document,
- document relates to the performance of a 'Commonwealth contract', and
- document is created by, or is in the possession of, the contracted service provider.

Any person engaged as a consultant or contractor, who is then prescribed as an official under the PGPA Act, will also be a contracted service provider of the entity for which they are exercising powers. The existing contracts non-corporate Commonwealth entities have with consultants and contractors will be consistent with this requirement.

OTHER MECHANISMS

In addition to the Privacy Act and the FOI Act, there are other independent accountability mechanisms which apply to prescribed officials. As outlined above, prescribed officials are subject to the duties of officials in the PGPA Act, which applies a code of conduct to their behaviour. Breaches of this code of conduct are dealt with by individual accountable authorities in a manner that is consistent with their internal practices to regulate the conduct of officials.

In addition to mechanisms imposed by the accountable authority themselves, the Commonwealth Ombudsman and the Auditor-General have oversight of the actions of prescribed officials. Both the Commonwealth Ombudsman and the Auditor-General have broad powers of review that will apply to the actions of prescribed officials.

The Commonwealth Ombudsman has scope to investigate the administrative actions of Australian Government departments and Commonwealth service providers following complaints or on their own motion. Any member of the public can bring a complaint to the Commonwealth Ombudsman, provided the complaint has been raised with the agency first. This process is not hindered because decisions were made by a consultant or contractor as a prescribed official, and actions taken by a prescribed official are not listed as one of the matters the Ombudsman is not authorised to investigate under section 5(2) of the *Ombudsman Act 1976*.

The Auditor-General has broad scope to conduct a wide range of audits of Commonwealth entities and of individuals. Section 8(4) of the *Auditor-General Act 1997* states that the Auditor-General has complete discretion over their actions and is not subject to direction from anyone in relation to whether an audit is conducted. This means the Auditor-General is not prevented from auditing a prescribed official and ensures those consultants and contractors can be held accountable for their actions while representing the Commonwealth.

QUESTION 3: MERITS REVIEW

The Committee asked: *Whether decisions made by those officials are subject to independent merits review.*

Independent merits review of decisions made by any official is not provided for by the PGPA Act, PGPA Rule or the FF (SP) Act. However, judicial review of decisions under these acts could be sought in accordance with general administrative law principles.

Attachment A

PGPA Act – section 8 The Dictionary

listed entity means:

- (a) any body (except a body corporate), person, group of persons or organisation (whether or not part of a Department of State); or
 - (b) any combination of bodies (except bodies corporate), persons, groups of persons or organisations (whether or not part of a Department of State);
- that is prescribed by an Act or the rules to be a listed entity.

Privacy Act – section 95B Requirements for Commonwealth contracts

- (1) This section requires an agency entering into a Commonwealth contract to take contractual measures to ensure that a contracted service provider for the contract does not do an act, or engage in a practice, that would breach an Australian Privacy Principle if done or engaged in by the agency.
- (2) The agency must ensure that the Commonwealth contract does not authorise a contracted service provider for the contract to do or engage in such an act or practice.
- (3) The agency must also ensure that the Commonwealth contract contains provisions to ensure that such an act or practice is not authorised by a subcontract.
- (4) For the purposes of subsection (3), a *subcontract* is a contract under which a contracted service provider for the Commonwealth contract is engaged to provide services to:
 - (a) another contracted service provider for the Commonwealth contract; or
 - (b) any agency;for the purposes (whether direct or indirect) of the Commonwealth contract.
- (5) This section applies whether the agency is entering into the Commonwealth contract on behalf of the Commonwealth or in the agency's own right.

FOI Act – section 6C Requirements for Commonwealth contracts

- (1) This section applies to an agency if a service is, or is to be, provided under a Commonwealth contract in connection with the performance of the functions or the exercise of the powers of the agency.
- (2) The agency must take contractual measures to ensure that the agency receives a document if:
 - (a) the document is created by, or is in the possession of:
 - (i) a contracted service provider for the Commonwealth contract; or
 - (ii) a subcontractor for the Commonwealth contract; and
 - (b) the document relates to the performance of the Commonwealth contract (and not to the entry into that contract); and
 - (c) the agency receives a request for access to the document.

Ombudsman Act 1976 – section 5(2) Functions of Ombudsman

- (2) The Ombudsman is not authorized to investigate:
- (a) action taken by a Minister; or
 - (aa) action that constitutes proceedings in Parliament for the purposes of section 16 of the *Parliamentary Privileges Act 1987*; or
 - (b) action taken by a Justice or Judge of a court created by the Parliament; or
 - (ba) action by the chief executive officer of a court or by a person who, for the purposes of this Act, is to be taken to be a member of the staff of the chief executive officer of a court:
 - (i) when exercising a power of the court; or
 - (ii) when performing a function, or exercising a power, of a judicial nature; or
 - (c) action taken by:
 - (i) a magistrate or coroner for the Australian Capital Territory, Norfolk Island, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or
 - (ii) a person who holds office as a magistrate in a State or the Northern Territory in the performance of the functions of a magistrate conferred on him or her by or under an Act; or
 - (d) action taken by any body or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment, including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person; or
 - (g) action taken by a Department or by a prescribed authority with respect to the appointment of a person to an office or position established by or under an enactment, not being an office or position in the Australian Public Service or an office in the service of a prescribed authority.

Auditor-General Act 1997 – Section 8(4) Independence of the Auditor-General

- (4) Subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:
- (a) whether or not a particular audit is to be conducted; or
 - (b) the way in which a particular audit is to be conducted; or
 - (c) the priority to be given to any particular matter.



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate/sdlc

12 November 2020

Senator James Paterson
Chair
Senate Finance and Public Administration Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: fpa.sen@aph.gov.au

cc: Senator the Hon Simon Birmingham, Minister for Finance,
DLO-Finance@finance.gov.au


Dear Chair,

Matters of interest to the Senate

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instrument appears to contain significant policy matters relating to the exercise of powers by consultants and independent contractors, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw it to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Public Governance, Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020 [F2020L00782]	To amend the Public Governance, Performance and Accountability Rule 2014 to extend the capacity for consultants or independent contractors and their employees to exercise powers under the <i>Financial Framework (Supplementary Powers) Act 1997</i> , in addition to the <i>Public Governance, Performance and Accountability Act 2013</i> .	30/11/2020

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

Should you have any questions, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



AUSTRALIAN
SENATE

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Scrutiny of Delegated Legislation
Parliament House, Canberra ACT 2600
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12 November 2020

Senator the Hon Simon Birmingham
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: Senator.Birmingham@aph.gov.au

CC: DLO-Finance@finance.gov.au; plc@finance.gov.au


Dear Minister,

**Public Governance, Performance and Accountability Amendment (2020 Measures No. 3)
Rules 2020 [F2020L00782]**

Thank you for your response of 22 October 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.


The committee considered your response at its private meeting on 11 November 2020. On the basis of your advice, the committee has concluded its examination of the instrument as a technical scrutiny matter.

However, noting that the use of delegated legislation to authorise consultants, independent contractors and their employees to exercise significant powers is an important matter and that this is a systemic issue, the committee has resolved to draw the instrument to the attention of the Senate, pursuant to Senate standing order 23(4).

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,


Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation