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## Commonwealth Authorities and Companies Amendment Bill 2008

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## Commonwealth Authorities and Companies Amendment Bill 2008

**Date introduced:** 13 February 2008

**House:** House of Representatives

**Portfolio:** Finance and Deregulation

**Commencement:** The operational provisions commence on various dates, but the majority commence on either Royal Assent or 1 July 2008, whichever is the latest date.

**Links:** The *relevant links* to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

To amend the *Commonwealth Authorities and Companies Act 1997* to, amongst other things:

- overhaul the process by which relevant Commonwealth bodies may be notified that they must comply with specified government policies
- introduce new, and revise existing, penalties relating to contraventions of various reporting and accountability obligations, and
- bring various provisions into line with equivalent provisions in the *Corporations Act 2001*.

### Background

The main financial reporting and related accountability obligations of Commonwealth government bodies are set out in either the *Financial Management and Accountability Act 1997* (FMA Act) or the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

Commonwealth Government bodies regulated under the FMA Act are financially and legally part of the Commonwealth, holding public money that can only be spent under the authority of an appropriation from the Australian Parliament. Such bodies are generally headed by a Chief Executive.

By comparison, bodies that are both legally and financially separate from the Commonwealth are regulated by the CAC Act. Such bodies usually have a governing board. Unlike bodies subject to the FMA Act, CAC Act bodies are generally not required

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to comply with general government policies unless specifically required to do so under either:

- a direction from the responsible Minister (where this is possible under the relevant enabling legislation or a company's constitution), or
- a notice provided about a 'general policy of the Australian Government' under existing sections 28 or 43 of the CAC Act.

The range of Commonwealth Government bodies governed by the CAC and FMA Acts can be accessed via a [list](#) held by the Department of Finance and Deregulation.

### Basis of policy commitment

According to the Bill's second reading speech:

The amendments in the bill are primarily intended to improve accountability and transparency arrangements for Commonwealth authorities and Commonwealth companies. The amendments in the bill also improve the alignment of the CAC Act with equivalent provisions in the Corporations Act and update the CAC Act based on experience from over 10 years of operation.<sup>1</sup>

The CAC Act was reviewed by the Parliament Joint Committee of Public Accounts and Audit (JCPAA) during 1999-2000. The terms of reference for that inquiry were wide-ranging, and included accountability issues. The Committee's report, [Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997](#), was released in March 2000.

Subsequently, the Government released an exposure draft of the Financial Framework Legislation Amendment Bill in 2003, which was the subject of a further JCPAA [report](#). However that Bill, which was passed by Parliament in 2005, mainly concerned the FMA Act rather than the CAC Act.<sup>2</sup> The amendments proposed by the current Bill do not appear to have derived from any formal review process.<sup>3</sup>

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1. The Hon Lindsay Tanner MP, House of Representatives, *Debates*, 13 February 2008, p. 200.
  2. See the relevant [Bills Digest](#), no.95, Parliamentary Library, Canberra, 2004-05.
  3. Note that in 2003 the then Coalition government released the findings of the [Review of the Corporate Governance of Statutory Authorities and Office Holders](#) (the Uhrig Review). However, the Uhrig review focussed more on the appropriate governance structure of Commonwealth bodies, and the interaction between the bodies, the responsible Minister and Secretary of the relevant Commonwealth Department. As such, the Bill does not appear to be directly related to the Uhrig Review process.

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## Committee consideration

The Senate Standing Committee for the Scrutiny of Bills (the Committee) reviewed the Bill in its [report](#) tabled on 12 March 2008.<sup>4</sup> However, it did not make any adverse comments on the Bill or request any advice from the relevant Minister.

## Position of significant interest groups/press commentary

The Bill does not appear to have attracted any significant public or political comment.

## Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact.<sup>5</sup>

## Main provisions

The CAC Act sets out various duties and obligations that officers of Commonwealth authorities and bodies must discharge. In some cases, a failure to do so may constitute an offence and carry significant criminal sanctions. **Items 8 and 9** change part of the existing definition of ‘officer’. They do so by replacing the current concept of an officer as including a ‘person who is concerned in, or takes part in, the management of the authority’ with the concept of ‘senior manager’. The term ‘senior manager’ is imported from the *Corporations Act 2001* (the Corporations Act). In least in some cases, this would appear to widen the range of persons who might be subject to officers duties and obligations to include not only persons directly involved in the management and decision-making process of the relevant body but also persons who have the ‘capacity to affect significantly the authority’s financial standing’.

Division 2 of Part 3 places various obligations on directors of a Commonwealth authority. Among them is the requirement to prepare an annual report for presentation to the relevant Minister. Existing section 11 provides that directors may be subject to civil penalties if they contravene their reporting obligations. **Item 18** amends section 11 to include a criminal offence where a contravention of any of the directors reporting obligations rules is ‘dishonest’.<sup>6</sup> The maximum penalty in such a case is a fine of 2,000 penalty units (\$220,000) or five years imprisonment, or both.

The concept of a dishonest contravention is also contained in **item 24**, which amends section 20. Section 20, which deals with an officer’s obligations with respect to the authority’s accounting records, currently contains a criminal offence containing a penalty of

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4. [Alert Digest No. 1 of 2008](#) at pp 32-36.

5. Explanatory Memorandum, p. 2.

6. As opposed to a contravention that is caused through negligence etc.

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six months imprisonment. **Item 24** reduces the ‘non-dishonest’ contravention to a civil penalty offence, but a dishonest contravention carries a maximum penalty of a fine of 2,000 penalty units or five years imprisonment, or both.

Existing section 27D deals with the circumstances under which a director of a Commonwealth authority may reasonably rely on information or advice provided by others in discharging their duties or obligations. One of the conditions that must be fulfilled is that the director must first make ‘proper inquiry’ about the information or advice ‘if the circumstances indicated the need for inquiry’: existing subparagraph 27D(b)(ii). That is, the director cannot necessarily accept the information or advice on face value. **Item 33** replaces existing subparagraph 27D(b)(ii) with the same language used in the Corporations Act. Thus the proposed condition is that the director can only place reliance ‘after making an independent assessment of the information or advice, having regard to the director’s knowledge of the authority and the complexity of the structure and operations of the authority’. So for example if the Director has only modest understanding of relevant aspects of the authority, they may need to seek substantial independent assessment of the information or advice.

Subject to some exceptions, existing subsection 27F(1) requires a director of a Commonwealth authority to disclose any material personal interests in a matter relevant to the authority’s affairs. However, the CAC Act does not contain any penalty for breach of this obligation<sup>7</sup> – in comparison the equivalent Corporations Act provision (section 191) carries a maximum penalty of 10 penalty units (\$1,100) or imprisonment for 3 months, or both. That provision is also a strict liability offence. **Items 34** and **35** make a breach of subsection 27F(1) a strict liability offence, carrying a maximum penalty of 10 penalty units, but does not add the penalty of imprisonment. The Explanatory Memorandum comments in relation to these items that:

If ultimately penalties for these provisions under the CAC Act differ from their Corporations Act equivalent, further consideration may be given to amending those penalty provisions.<sup>8</sup>

It is not clear whether such ‘further consideration’ means that the proposed CAC Act penalty be expanded to include possible prison time or whether this element might be dropped from the Corporations Act.

Existing subsection 27J(1) also contains restrictions on a director who has a material person interest in a matter from being present at a director’s meeting at which that matter is being discussed, or voted on. These restrictions can be waived in certain circumstances. **Items 37** and **38** introduce similar Corporations Act ‘consistency’ provisions as **items 34**

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7. Although normally a breach is grounds for termination under the relevant authority’s statute.

8. Op cit, p. 12.

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and **35** discussed above. In this case, the proposed penalty for contravention is 5 penalty units (\$550).

**Items 40, 50 and 53** contain some of the key amendments in the Bill – those introducing the concept of ‘General Policy Orders’ or GPOs. These GPOs are to replace the concept of ‘general policies of the Australian government’ currently in the CAC Act. The Explanatory Memorandum comments that:

A general policy of the Australian government is a policy that is made by the government, usually by Cabinet or senior ministers, that applies to all or most bodies subject to the FMA Act and CAC Act. A policy Minister oversees the development and administration of the policy.<sup>9</sup>

The CAC Act currently allows the particular Minister responsible for the authority or company to notify the directors of any general policies that are to apply to the body.<sup>10</sup> In relation to companies, the provisions only apply to companies that are ‘wholly-owned’ by the Commonwealth. The Minister must consult the directors before such notification. The directors must ensure that the authority or company complies with the policies, and to the extent practical, that subsidiaries of the authority or company likewise comply.

Under the proposed changes, GPOs are made only by the Finance Minister via legislative instrument and thus must be both tabled in Parliament and placed on the Federal Register of Legislative Instruments. However, **proposed subsection 48A(5) (item 53)** provides they are not disallowable, nor subject to standard sunset provisions under the *Legislative Instruments Act 2003*.

The GPOs may be expressed to apply to all authorities or companies, or only specified ones, or specified classes of authorities or companies. They may also provide that only particular parts of the GPOs apply to specified authorities, companies or classes of these. Before making a GPO, the Finance Minister must be satisfied that the Minister(s) responsible for the authorities and companies to which the GPO will apply have consulted the Chair and/or directors of those authorities and companies on the application of the policy. Once the GPO is made, the Directors have the same duty to ensure compliance as is presently the case under the CAC Act.

The Explanatory Memorandum comments:

These changes to the notification of general policies of the Australian government are aimed at improving efficiency and transparency in the way general policies are notified, through reducing the number of letters involved in the process and making it

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9. Op. cit., p. 5.

10. Sections 28 and 43.

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easier to identify what policies have been applied to Commonwealth authorities and wholly-owned Commonwealth companies. The amendments only change the notification process and would not affect the underlying general policies of government.<sup>11</sup>

**Item 41** inserts **proposed section 28A** to allow authorities to use credit cards and credit vouchers. This regularises and clarifies current practices and is consistent with similar provisions in the FMA Act. **Item 42** inserts **proposed section 28B**, which contains a criminal offence for misuse of credit cards and credit vouchers. Existing section 60 of the FMA Act contains a similar provision. The maximum penalty is seven years imprisonment.

Existing section 34 defines a Commonwealth company as one in which the Commonwealth has a ‘controlling interest’. **Item 44** amends this definition to a company which the Commonwealth ‘controls’, and defines what ‘control’ means. This brings it into line with the equivalent provision in the Corporations Act (section 46). The Commonwealth will be deemed to control a company if:

- it controls the composition of the company’s board; or
- it is in a position to cast, or control the casting of, the majority of votes that may be cast at a meeting of members; or
- it holds a majority of the share capital in the company (excluding any part of the issued share capital that carries no right to participate, beyond a specified amount, in a distribution of either profits or capital).

The change will widen the range of companies that fall within the meaning of Commonwealth company and thus be subject to the CAC Act.

Existing section 36 requires a Commonwealth company to give the responsible Minister an annual report. Failure to do so within the required timeframe renders the company liable to a penalty of 50 penalty units. **Item 46** amends this by providing that a company director, rather than the company, is liable for the offence if they either ‘cause’ the contravention of the reporting obligation or fail to take reasonable steps to secure compliance with it. The maximum penalty is 2,000 penalty units, or if the contravention is dishonest, five years imprisonment. Again the Explanatory Memorandum comments that this is to bring the CAC Act into line with the Corporations Act.<sup>12</sup>

Existing Schedule 2 of the CAC Act sets out how the penalties for contravening the Act’s civil penalty provisions are enforced. **Items 58-66** insert various references into Schedule 2 to cover the new civil penalty provisions inserted into the CAC Act by the Bill.

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11. Op. cit., p. 6.

12. Op Cit., p. 13.

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