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# Key issues: 1 July 2014 commencement

## Introduction

3.1 Chapter 3 focuses on key issues concerning the rules development for 1 July 2014 commencement of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). It considers the draft *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) and associated instruments.

3.2 Of interest, as set out in the Joint Committee of Public Accounts and Audit (JCPAA) inquiry terms of reference, is the impact of the draft rules and their purpose in the context of the broader Public Management Report Agenda (PMRA).

3.3 The chapter commences with a number of issues raised during the inquiry concerning the PGPA Act itself. It then discusses several specific issues regarding the draft rules. The chapter concludes with the Committee's comments and recommendations.

## General issues concerning PGPA Act 2013

3.4 As discussed in Chapter 1, the purpose of the Committee's previous inquiry was to investigate the *Public Governance, Performance and Accountability Bill 2013* (PGPA Bill). The purpose of this current inquiry was not to revisit the PGPA Act but rather to focus on the PGPA rules development in the context of the broader PMRA.

3.5 However, the Committee notes six issues regarding the PGPA Act raised during the course of the inquiry that are relevant to the development of the PGPA rules, guidance and the broader PMRA reform process, as follows:

- PGPA Act guiding principles

- Role and powers of the Australian National Audit Office (ANAO)
- Dual coverage PGPA Act and *Public Service Act 1999* (PS Act)
- s32B of the *Financial Management and Accountability Act 1997* (FMA Act) in the context of the PGPA Act
- s38 PGPA Act
- s59 PGPA Act

## PGPA Act guiding principles

3.6 The PGPA Act and broader PMRA have been established on the basis of four guiding principles:

- government should operate as a coherent whole;
- uniform set of duties should apply to all resources handled by Commonwealth entities;
- performance of the public sector is more than financial; and
- engaging with risk is a necessary step in improving performance.[1]

3.7 The ANAO proposed the following additional guiding principle be applied in developing the remaining elements of the PMRA and PGPA framework:

> The financial framework, including the rules and supporting policy and guidance, should support the legitimate requirements of the government and the parliament in discharging their respective responsibilities.[2]

3.8 The ANAO explained that its purpose in suggesting this additional guiding principle is to 'recognise that the executive government is accountable to the parliament for the use of public resources in a manner consistent with legislative requirements and conventions'.[3] Further, the resource management framework has 'traditionally played a significant part in assisting government to manage its responsibilities in relation to public resources efficiently and effectively, and to respond to the legitimate information needs of the parliament'.[4] While the PGPA Act and broader PMRA reflect a rigorous review of the existing resource management framework to eliminate constraints on the efficiency and effectiveness of public sector entities, 'it is also important as part of this

1 *Explanatory Memorandum*, Public Governance, Performance and Accountability Bill 2013 (PGPA Bill), Parliament of the Commonwealth of Australia, p. 2. See also Department of Finance (Finance), *Submission 1*, p. 2.

2 Australian National Audit Office (ANAO), *Submission 3*, p. 4.

3 ANAO, *Submission 3*, p. 4.

4 ANAO, *Submission 3*, p. 4.

process that appropriate recognition is given to the responsibilities of the executive government, including in discharging its responsibilities to the parliament'.[5]

3.9 As the Auditor-General, Mr Ian McPhee, further commented:

> … the ANAO have supported the benefits of conducting a review of the existing financial framework to eliminate constraints on the efficiency and effectiveness of public sector entities but have emphasised the importance of giving appropriate recognition to the responsibilities of an executive government in discharging its responsibilities to the parliament.[6]

3.10 The Department of Finance (Finance) responded to the ANAO's proposal by emphasising that the 'principle of supporting the parliament has been and is being implemented'.[7] It was pointed out that 'in the act itself, as passed, one of the objects in section 5(c) is: "to require the Commonwealth and Commonwealth entities: (ii) to provide meaningful information to the Parliament and the public"'.[8]

3.11 Finance further explained that:

> We have been animated in this process by a desire and a concern to enhance the relationship between the public sector and parliament and to enhance the role of parliament in a number of key ways. Three ways in which this in particular has happened in the PGPA process is the inclusion of an annual performance statement in annual reports, which will be tabled in parliament; parliamentary scrutiny of terminations of accountable authority appointments made under section 30; and also some roles in relation to the Auditor-General himself.
>
> From our perspective, these changes are being done with a view to enhancing the ability of parliament to operate, to scrutinise the public sector and to hold the public sector to account. As we progress in this process we see subsequent stages of the reform program overall being about making more accessible, more relevant and more useful to parliament a lot of the documentation that parliament currently receives.[9]

3.12 In summary, Finance concluded:

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5 ANAO, *Submission 3*, p. 6.

6 Mr Ian McPhee, Auditor-General, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 8.

7 Dr Stein Helgeby, Deputy Secretary, Department of Finance (Finance), *Committee Hansard*, Canberra, 7 April 2014, p. 14.

8 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 14.

9 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 14.

> The PGPA Act puts in place requirements for high standards of governance, performance and accountability and seeks to ensure that the Parliament is provided with meaningful information. The number of references to the Parliament has increased from 6 under the FMA and 4 under the CAC Acts to 14 under the PGPA Act.
>
> At the highest level, the PGPA Act has done a number of things to enhance the role of the Parliament. For example, it requires:
>
> - the inclusion of an annual performance statement in annual reports, that, of course, are tabled in Parliament;
> - Parliamentary scrutiny of terminations of accountable authorities' appointments made under section 30; and
> - expanded powers for the Auditor-General.
>
> These provisions have been to ensure that important role of the Parliament is effectively supported by the supported by the PGPA Act.[10]

## Role and powers of ANAO

3.13 The Committee sought to confirm that the new PGPA framework and rules would not impact on the role and powers of the ANAO. The Committee therefore asked the ANAO to confirm whether the consequential amendments to the *Auditor-General Act 1997*, being made through the PGPA (Consequential and Transitional Provisions) Bill 2014, would give the ANAO the full audit powers under the framework that Parliament would expect.

3.14 The ANAO confirmed that they were:

> … very nearly there with the amendments to the Auditor-General Act. There are a lot of them. A lot of them are relatively minor. They are just replacement wordings. There is only one substantive amendment, which we still have not quite got there on yet. That is not because it is difficult or contentious. There is just a lot of work involved here. That involves an amendment that the Prime Minister has agreed on to introduce the concept of interim reports to the Auditor-General Act and to protect the confidentiality of those reports. That has been agreed to at a policy level by the Prime Minister. We are just working through the details of that amendment … we are very close to getting agreement for the many amendments required to the act.[11]

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10 Finance, *Submission 1.3*, p. 12.

11 Mr Russell Coleman, Audit Principal, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 15.

## Dual coverage PGPA Act and PS Act

3.15 A significant issue arising during the Committee's inquiry was the dual coverage of the PGPA Act 2013 and the *Public Service Act 1999* (PS Act). This was highlighted by the Australian Public Service Commission (APSC), particularly with reference to s25-s29 concerning the 'General duties of officials'.

3.16 The APSC noted that:

> The Commission and the Department of Finance have examined carefully ways in which the PGPA Act works with … the PS Act, which sets out the role and powers of agency heads and a clear statement of the conduct expected of public servants. The Commission has been especially concerned that the legislation, taken together, should be clear, predictable and lack ambiguity for the employees who will be called on to implement it on a daily basis in the course of their duties. There has been good progress in this respect, particularly in relation to guidance on the general duties of officials.[12]

3.17 However, the APSC observed that the fact this guidance material had to be developed 'reinforces the view' that the 'dual coverage of the two Acts, with each of them setting out alternate statements seeking to regulate the behaviour and professional standards of public servants in the APS, adds complexity and the potential for confusion for APS employees'.[13]

3.18 The Australian Public Service Commissioner pointed to the difference in language between the two Acts as particularly contributing to this potential confusion—'although they are expressed very similarly in respect of financial management, these statements use slightly different language, which carries the potential for unnecessary confusion, inefficiency and cost'.[14] The Commissioner further explained the APSC had undertaken 'mapping of the obligations that were being imposed

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12 Australian Public Service Commission (APSC), *Submission 7*, p. 4.

13 APSC, *Submission 7*, p. 4. The draft Resource Management Guide on the 'General duties of officials' sets out the 'Complementary duties between the PGPA Act and the PS Act'. The guide states that '[a] significant portion of officials have obligations under the PS Act. The PS Act has a broader scope when it comes to the duties, but the PGPA Act is more specified in law regarding standards of governance, performance and accountability across all Commonwealth entities … For APS Employees, this guidance should be read in conjunction with the Australian Public Service Commissioner's guidance on the APS Code of Conduct', Finance, *Submission 1.2*, p. 16.

14 Mr Stephen Sedgwick, Australian Public Service Commissioner, APSC, *Committee Hansard*, Canberra, 7 April 2014, p. 9. For the purposes of this inquiry, the APSC also provided a reference table showing the differences in language between the two Acts, *Submission 7*, pp. 6-7.

under the two acts, and the point we are trying to make is that they are very, very similar. There is scope for confusion because they are so similar but they are in small respects different … It is not necessarily the same language but it is certainly the same set of principles and the same intent'.[15]

3.19 Noting this potential for confusion, the APSC therefore proposed that the PGPA Act be amended to specify that the provisions of the Act relating to 'General duties of officials' do not apply to those employed under the PS Act:

> The PGPA Act already contains provisions in relation to Commonwealth companies that recognises the Corporations Act as the primary regulatory framework that should apply. As a consequence, they are exempted from many of the provisions of the PGPA Act … it would be sensible to amend the PGPA Act to take a similar approach in relation to the duties of officials set out in sections 25 to 29, specifying that those provisions do not apply to people employed under the PS Act.

3.20 Under this proposal, as the APSC explained, the PS Act and, in particular, the APS Code of Conduct, would instead provide the regulatory framework in this area: '[a]n amendment of this character would recognise that, under the APS Code of Conduct, those employees already have a comprehensive framework for the regulation of their behaviour that has been developed over years of practice and through consultation across the APS, and has been shown to work well over a substantial period of time'.[16]

3.21 On the issue of whether the APS Code of Conduct provided an effective replacement for s25-s29 of the PGPA Act in terms of its scope encompassing the resource management aspect of the PGPA Act in this area, the APSC emphasised the comprehensive nature of the PS Act framework. The Commissioner acknowledged that 'colleagues in Finance have particular concerns about whether the APS Code of Conduct, in a very small number of cases, provides the degree of specificity that they are seeking to be an effective replacement for these sections'.[17] However, he noted that '[w]e are sympathetic to this concern and we are exploring with Finance the scope to amend the APS code so that it is more specific in the relevant areas'.[18]

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15 Mr Sedgwick, APSC, *Committee Hansard*, Canberra, 7 April 2014, p.14.

16 APSC, *Submission 7*, p. 4.

17 Mr Sedgwick, APSC, *Committee Hansard*, Canberra, 7 April 2014, p. 9.

18 Mr Sedgwick, APSC, *Committee Hansard*, Canberra, 7 April 2014, p. 9.

3.22 The Commissioner therefore observed that the PS Act might also need to be amended to assist in addressing this issue:

> As part of our attempt to resolve this issue, we have said: 'Okay. Fine. If needs be, we could always recommend to the government that they consider some minor changes to the way that the code is expressed in order to be able to eliminate that scope for confusion between the two acts.' We are working with Finance … The sense that we are getting, as the process is not over, is that there probably are technical solutions that would have the effect of ensuring that the two sets of obligations are consistent, that the intent of the act is clearly covered, that the PGPA would exclude the duties and obligations in sections 25 to 29 from … applying to APS employees but that the code of conduct has the same effect.[19]

3.23 The APSC concluded that its experience of the development of the PGPA rules and guidance 'reinforces the view' that it would be 'preferable to amend the PGPA Act, recognising that the behaviour of APS employees, as the single largest common group of officials under the PGPA Act, should be regulated and enforced by existing, well-established and well-understood mechanisms established by the PS Act'.[20] As the Commissioner commented:

> We have a once-in-a-decade opportunity to improve the quality of financial governance without imposing unnecessary costs and inefficiencies, a key to which is to ensure that the responsibilities under the total governance framework—which in this case is the PGPA Act and the Public Service Act—are clear, consistent, unambiguous and workable for everybody …
>
> If further discussions confirm it is workable, this approach would also be consistent with the government's desire to reduce unnecessary regulation while retaining prudent financial management arrangements. It would minimise scope for confusion among staff and reduce the costs of ensuring compliance with what would otherwise be two very similar but slightly different regulatory regimes under two different acts. Let's be clear: unnecessary cost can be reduced, if not avoided totally, by slightly amending the Public Service Act and the PGPA Act rather than continuing to separately apply duties and responsibilities of the PGPA Act to Public Service Act employees … over the last couple of years we have overhauled both the

19 Mr Sedgwick, APSC, *Committee Hansard*, Canberra, 7 April 2014, p.14.

20 APSC, *Submission 7*, p. 5.

> Public Service Act and the financial management framework within which the FMA and the CAC bodies operate … we have done two landmark revisions of the frameworks within which significant parts of the public sector have operated in recent times and at the end they appear to have been too disconnected, which is a big pity, I think.[21]

3.24 In response, Finance made a number of comments about the two frameworks. In particular, it emphasised that the general duties of officials in s25 to s29 of the PGPA Act seek to apply a 'single set of standards that apply to all officials who use public resources', to promote a 'coherent system of governance' and give the Parliament 'confidence that public resources will be managed consistently and to a high standard'.[22] This is based on the principle that 'public resources are public resources no matter in whose hand they are', and that there:

> … ought to be common standards of accountability and responsibility in relation to the management of those public resources. Public resources in the Commonwealth are managed by upwards of 300,000 officials and about half of those fall under the Public Service Act. So to ensure that there are common standards across the whole of the Commonwealth in relation to the management of public resources, we need consistent duties …
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> this scheme will fall down if there are not common duties in relation to the management of public resources. If parliament cannot hold officials accountable on a consistent basis, then ministers cannot hold officials accountable on a consistent basis and the notion of the Commonwealth as a coherent whole falls down. So for us, it is a fundamental issue.[23]

3.25 As Finance explained:

> The PGPA Act creates a complete scheme around the management of public resources. The duties of officials complement the framework of controls and processes established by the accountable authority as required by sections 15 to 19 of the PGPA Act. The direct link between these controls and processes and the duties placed on all officials through sections 25 to 29 is designed to drive the cultural changes needed within entities to, amongst other things, promote effective risk management and performance

21 Mr Sedgwick, APSC, *Committee Hansard*, Canberra, 7 April 2014, pp. 9-10, p. 17.

22 Finance, *Submission 1.3*, p. 6.

23 Mr Lembit Suur, First Assistant Secretary, Governance and Public Management, Finance, *Committee Hansard*, Canberra, 27 March 2014, p. 14.

> cultures. The need for precise and unambiguous standards would disrupt the scheme if APS employees were subject to a broader set of duties that are described differently …
>
> Decisions of the current and future governments to reshape government administration are best supported by a framework that applies the same set of duties and rules to all officials in their management of public resources. A single set of standards will allow the government to be more efficient and agile in times of administrative reorganisation and structural change. It will also give comfort to the Parliament that all officials, irrespective of whether an APS employee or a non-APS employee or of a corporate or non-corporate Commonwealth entity, will be subject to a complete scheme.[24]

3.26 Finance further pointed to differences in scope between the two frameworks, emphasising that 'in the PGPA Act there is a focus on precision and there is a focus on a couple of key concepts … important in financial management and governance, which are not currently reflected in the Public Service Act'.[25] Finance added that:

> The APS code of conduct, which is prescribed by section 13 of the Public Service Act 1999 (PS Act) and applies to around half of Commonwealth officials, has broader scope and relates to the employment of APS employees. The APS code of conduct is highly valued, and gives confidence about the high professional standards of an apolitical Australian Public Service, but the PGPA Act applies more precision when it comes to standards of governance, performance and accountability, particularly in relation to the management of resources. Good governance demands precise and unambiguous standards to promote effective management of public resources by officials.[26]

3.27 In terms of potential confusion between the two frameworks, Finance emphasised that there are 'sufficient similarities between the duties in the PGPA Act and the Public Service Code of Conduct to allow the two duties to work side by side',[27] and that a number of agencies had successfully operated under multiple regulatory regimes—'entities and officials already operate under multiple regulatory regimes, including sets of duties, without difficulty'.[28] Further, concerning the CAC Act, Finance

24 Finance, *Submission 1.3*, pp. 6-7.

25 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 15.

26 Finance, *Submission 1.3*, p. 6.

27 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 2.

28 Finance, *Submission 1.3*, p. 7.

noted that there is 'no evidence' that the two sets of similar duties has 'created confusion over the past 14 years for the 17 CAC Act bodies that are also subject to the PS Act. In fact there is an argument that having consistent duties across multiple operating environments can help reinforce expectations on officials and help implement a consistent change in organisational culture'.[29]

3.28 Finance confirmed that it had worked with the APSC on the draft guidance on the general duties of officials, to remove any potential confusion on this matter:

> There are some differences between a particular duty under the PGPA Act and the corresponding duty under the Public Service Act. We believe that the management and use of public resources demands consistent and explicit standards applied unequivocally in legislation. To this end we acknowledge the work we have done and the assistance we have been provided by the Public Service Commission in helping to refine the draft guidelines on duties of officials where there has been a concern about potential confusion. We have worked to remove any confusion between the PGPA Act and the Public Service Act. In doing this we have sought to retain the precision of the PGPA Act …
>
> Our view is that areas for confusion have been addressed and removed. We have done that in consultation with the APSC throughout the process.[30]

3.29 As a possible 'way forward', Finance concluded that it 'appreciates the assistance provided to date' by the APSC in developing guidance and 'will continue to work collaboratively with the APSC to ensure clarity around the way that the PGPA Act and PS Act interact. It will be important to monitor this issue both in the short term and as part of the independent review of the PGPA Act in three years' time'.[31]

3.30 In this context, Finance confirmed that, in the interim, it would 'continue to work collaboratively with the APSC on this issue to see whether or not solutions can be found in a much faster time frame than that'.[32]

## Section 32B FMA Act

3.31 Section 32B was included in the FMA Act to 'establish a supplementary power for the Commonwealth to make commitments to spend public

29 Finance, *Submission 1.3*, p. 8.

30 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 27 March 2014, p. 2.

31 Finance, *Submission 1.3*, p. 8.

32 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 2.

money where there is not currently legislative authority'.[33] This was in response to the High Court's judgement of 20 June 2012 in *Williams v Commonwealth* (2012) 288 ALR 410 (Williams). The FMA regulations list arrangements, grants and programs to which s32B applies.

3.32 Finance noted that, to continue providing this legislative authority for the arrangements, grants and programs listed in the regulations, it is proposed to retain s32B of the FMA Act and the related regulations after 1 July 2014. The 'necessary amendments to allow these arrangements to continue to operate will be included in the PGPA (Consequential and Transitional Provisions) Bill 2014'.[34]

3.33 The ANAO commented that it was 'unclear from the information provided to date, why appropriate provisions have not been included in the PGPA Act to provide this support'.[35]

3.34 Finance explained that, as there is a second Williams case before the High Court, the preferred approach is to:

> … respect the processes of the High Court and to leave the arrangement … in response to the first Williams decision in place for the duration of the High Court's consideration of the Williams matter … it would be inappropriate to take section 32B and to simply transfer that scheme into a new piece of legislation when the High Court is considering section 323B in the context of the second Williams case.[36]

3.35 According to Finance the prudent course of action was therefore to 'leave the scheme where it is, to understand what the High Court believes about a scheme of that nature, and then to make judgements about what to do with that scheme'.[37]

## Section 38 PGPA Act

3.36 Section 38 of the PGPA Act concerns 'measuring and assessing performance'. Section 38(1) states that the accountable authority of a Commonwealth entity must 'measure and assess the performance of the entity in achieving its purposes'. The ANAO commented that this phrase could be 'interpreted narrowly', explaining that 'this is why Australian Accounting Standards separately require government agencies to account for income, expenses, assets and liabilities that they control, as well as

33 ANAO, *Submission 3*, pp. 5-6.

34 Finance, *Submission 1.3*, pp. 13-14.

35 ANAO, *Submission 3*, p. 5.

36 Mr Suur, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 5.

37 Mr Suur, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 6.

separately account for administered income, expenses, assets and liabilities'.[38]

3.37 As the ANAO emphasised, it is 'obviously critically important that the performance of an agency not only encompass information on the delivery of programs but also information on the effectiveness of programs, even though policy responsibility rests with government'.[39]

3.38 The ANAO therefore proposed an amendment to s38 of the PGPA Act to clarify this matter. However, it also noted that:

> Clarification of this issue could be pursued in conjunction with the development of the revised performance framework to give greater confidence that assessment of performance relates to the impact or effectiveness of government programs or activities for which an entity carries administrative responsibility, including those that involve multiple entities and other jurisdictions.[40]

## Section 59 PGPA Act

3.39 Indigenous Business Australia (IBA) were concerned that s59(1) of the PGPA Act, 'Investment by corporate Commonwealth entities', might operate to 'restrict investment activity entirely except where the funds are surplus to requirement'.[41] There was concern that IBA might be found 'in breach' of s59 by continuing to pursue investment activity with IBA's funds, even though IBA is expressly authorised by its act to invest money.[42] IBA therefore proposed s59 be redrafted to clarify this issue.

3.40 IBA acknowledged, however, that:

> The Department of Finance, in fairness, say that the amendments to the provision are the same in intent [as the CAC Act] and there is no material change and that, specifically around the argument that a specific power such as IBA has will override the general provision on the PGPA.[43]

3.41 In response to these concerns, Finance clarified that:

> The investment powers for corporate and non-corporate entities under the PGPA Act have not changed from those currently in place under the CAC Act … Where corporate Commonwealth

38 ANAO, *Submission 3*, p. 5.

39 ANAO, *Submission 3*, p. 5.

40 ANAO, *Submission 3*, p. 5.

41 Indigenous Business Australia (IBA), *Submission 12*, p. 3.

42 IBA, *Submission 12*, p. 5.

43 Mr Chris Fry, Chief Executive Officer, IBA, *Committee Hansard*, Canberra, 7 April 2014, p. 20.

> entities have specific investment powers in their enabling legislation (such as the IBA), these powers will not change.
>
> Corporate entities will have no diminution of investment powers under the new framework.[44]

## Draft PGPA Rule 2014 and associated instruments

3.42 The Committee's focus in this inquiry is the draft rules required for 1 July 2014 commencement. The Committee's core reference documents were:

- *Exposure Draft of the PGPA Rule 2014*[45]
- draft *Explanatory Statement* to the Exposure Draft of the PGPA Rule[46]
- draft *Commonwealth Procurement Rules* (CPRs)[47]
- draft *Commonwealth Grants Rules and Guidelines* (CGRGs)[48]

3.43 As non-disallowable instruments, the Commonwealth Procurement Rules and Commonwealth Grants Rules and Guidelines are not consolidated in the PGPA Rule.

3.44 Finance provided the Committee with working drafts of a range of other instruments also planned to be in place for 1 July 2014 to support these draft rules:

- Guidance—supporting a number of the draft rules (working drafts with various dates)[49]
- Model Resource Management Instructions (working draft dated 13 March 2014).[50]

3.45 These documents have informed the Committee's deliberations. As the ANAO commented:

> It is … encouraging that Finance has now prepared draft guidance for each of the rules to be in place on 1 July 2014 and has also developed draft model Resource Management Instructions; this allows for a more informed assessment to be made about the

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44 Finance, *Submission 1.3*, p. 28.

45 Finance, *Submission 1*, Attachment 3, pp. 1-31.

46 Finance, *Submission 1*, Attachment 4, pp. 1-26.

47 Finance, *Submission 1.1*, pp. 21-56.

48 Finance, *Submission 1.1*, pp. 57-93.

49 Finance, *Submission 1*, Attachment 10, pp. 1-19; Finance, *Submission 1.1*, pp. 94-206; and Finance, *Submission 1.2*, pp. 1-17.

50 Finance, *Submission 1.1*, pp. 207-337.

> totality of the financial framework in relation to those matters on which rules have been prepared.[51]

3.46 However, it is noted that, at the time of the Committee reporting, the guidance and other materials reflected work in progress, not final drafts, and were still undergoing consultation.[52] Where the Committee has made recommendations in this chapter concerning specific draft rules, it has also recommended the relevant draft guidance and other materials supporting that particular rule be reviewed and amended accordingly, in consultation with stakeholders.

3.47 Finance further provided the Committee with a draft Commonwealth Risk Management Policy.[53] This policy is discussed in Chapter 4 as it relates to broader issues related to the implementation of the PGPA Act and the broader Public Management Reform Agenda (PMRA), post 1 July 2014.

## Design principles for draft rules

3.48 The draft PGPA rules have been developed according to six agreed design principles—see Table 3.1. These design principles have been of interest in considering the impact and purposes of the draft rules. As Finance noted, the design principles have been developed 'to ensure a consistent consideration of issues in the development of the proposed rules and to ensure that where a rule was to be included, the requirements and intent of the rule was clear'.[54]

51 ANAO, *Submission 3*, p. 7.

52 As part of its submissions, Finance also provided the Committee with a working draft of a PGPA Act *Compendium*, describing the legislative and other arrangements supporting the introduction of the PGPA Act, Finance, *Submission 1*, Attachment 7, pp. 1-163. The draft *Compendium* provided useful background information for the Committee.

53 Finance, *Submission 1.1*, pp. 338-344.

54 Finance, *Submission 1*, p. 5.

Table 3.1 PGPA rule design principles

| Design principle | Key aspects of principle |
|---|---|
| **Threshold justification** | A rule is to be made only where the Act specifies the making of a rule, or where it is necessary or convenient for administrative reasons to have a rule.<br>A rule should not be created if the provision(s) within the Act already provide sufficient direction.<br>In all cases where a rule is not mandatory one should only be introduced where the subject matter cannot be dealt with (or is inappropriate to deal with) through guidance or better practice for legal, accountability, or policy reasons.<br>Rules should set principles and, as a general proposition, should be outcome focussed and not prescribe detailed requirements that are better addressed by an entity's internal controls.<br>Entities should have the flexibility to adopt appropriate systems and practices to achieve diverse policy and statutory objectives. |
| **Make clear the intent of a rule** | The purpose of a rule needs to be explained in non-technical language through a statement of objective in the explanatory statement and/or an introductory guide, as per the construct of the Act. |
| **Minimises regulation and red tape** | All rules should be drafted with the objective of keeping to a minimum the level of regulation and red tape, including through a regular review mechanism – the emphasis of the new system is on encouraging prudent behaviour through the duties of accountable authorities and officials, not on overly prescriptive regulatory and compliance requirements.<br>Compliance for compliance's sake is to be avoided and should only be required where it is necessary to promote the objectives of the PGPA Act.<br>Where prescriptive provisions are included, they should be clear, easy to understand and be able to be applied consistently. |
| **Recognises and manages risk** | The content of each rule will be dependent on the risk and consequences of non-compliance, and the nature and complexity of the subject matter.<br>The rules will focus on ensuring an entity's response to any non-compliance is appropriate and balanced, taking into account all the circumstances, including associated risks. |
| **Avoids repetition and ambiguity** | A rule should avoid repeating features already included in the Act or best dealt with in entity-level policy and/or guidance/instructions. |
| **Supports the coherence of the Commonwealth framework** | Rules will have general application unless there is a clear case for them to apply to one group or type of entity ("Commonwealth as a whole").<br>Some rules may need to be expressed in a form that meets particular legal requirements and circumstances that relate to particular entities.<br>The approach reflected in one rule should not be in conflict with or overlap with another rule or the provisions of the Act |

*Sources* *Submission 1, Department of Finance, p. 17.*

## Overview of draft rules

3.49 Some 19 PGPA rules, as set out in the draft PGPA Rule 2013, and CPRs and CGRGs, are required for 1 July 2014 commencement of the PGPA Act, as follows:

- defining government business enterprises
- listed entities
- listed law enforcement agencies
- accountable authorities
- preventing, detecting and dealing with fraud
- recovery of debts
- officials' duty to disclose interests
- audit committees for Commonwealth entities and for wholly owned Commonwealth companies
- approving commitments of relevant money
- banking
- investment by the Commonwealth
- insurance obtained by corporate Commonwealth entities
- authorisations of amounts by the Finance Minister
- payment of amount owed to person at time of death
- minister to inform Parliament of certain events
- receipts of amounts by non-corporate Commonwealth entities
- other CRF money
- grants
- procurement[55]

3.50 As was discussed in Chapter 2, the draft PGPA rules provided to the Committee by Finance were developed following an extensive consultation process on an initial set of proposed rules.

3.51 Issues were raised with the following four draft rules as part of the Committee's inquiry—see Table 3.2. These issues are discussed below.

55 Finance, Draft *Explanatory Statement* to the Exposure Draft of the PGPA Rule 2014, *Submission 1*, Attachment 4, p. 2; Finance, Draft *CPRs 2014*, *Submission 1.1*, pp. 21-57; and Finance, Draft *CGRGs 2014*, *Submission 1.1*, pp. 58-94.

Table 3.2 Draft rules where issues raised during inquiry

| Title of rule provision | Draft section for rule provision in draft PGPA Rule 2014 | Section in PGPA Act 2013 |
|---|---|---|
| Officials' duty to disclose interests | 12-16 | 29 |
| Audit committees for Commonwealth entities and for wholly owned Commonwealth companies | 17, 28 | 45, 92 |
| Approving commitments of relevant money | 18 | 52 |
| Banking | 19-21 | 55 |

3.52 There was support for the majority of draft rules required for 1 July 2014 commencement, with several inquiry participants remarking on their satisfaction with these rules.

3.53 The ANAO commented that, except for the rule on 'Approving commitments of relevant money the rules provided to the Committee will provide a reasonable basis for the substantive commencement of the Act on 1 July 2014, noting that rules on a number of key matters are still under development'.[56]

3.54 Other participants confirmed that:

> … the Memorial is satisfied that generally, the draft rules are principles based, and provide agencies with the flexibility to adopt the requirements of the Act, or in accordance with their accountable authority's written instructions or delegations.[57]
>
> CSIRO considers the Rules should serve to promote consistency and define minimum standards or requirements across the Commonwealth and, as proposed, be supported by guidance material and education and training programs. Draft Rules developed to date have for the most part met that objective ... The combination of the PGPA Act, Rules as legislative instruments, General Policy Orders, and Resource Management Guides will provide certainty for entities, whilst allowing the Government the necessary flexibility to modify the Financial Management and Accountability Framework in an efficient and timely manner.[58]

3.55 On this point, Finance reflected that submissions were 'generally supportive of the proposed rules and complimentary of Finance's consultation process as providing genuine opportunity for organisations

56 ANAO, *Submission 3*, p. 7. See also ANAO, *Submission 3.1*, p. 1.

57 Australian War Memorial (AWM), *Submission 6*, p. 3.

58 Commonwealth Scientific and Industrial Research Organisation (CSIRO), *Submission 13*, p. 4.

to contribute to the development of the rules'.[59] Finance further confirmed that:

> In terms of policy principle, there might be a difference of views about, let us say, the audit committee rule, to give an example, but that would be the only rule where there is a difference of view about policy. The other rules are all settled and they are settled with a high degree of satisfaction. So we have been getting email traffic and having conversations with people over the last couple of weeks about where we are up to, and across the full diversity of the Commonwealth, from corporate independent entities like the ABC down to departments of state and agencies in Canberra, people are happy with the rules and where they have taken the rules.[60]

3.56 A number of inquiry participants also remarked that they regarded many of the rules required for 1 July 2014 commencement as non-contentious and representing relatively minor change:

> … the majority of the rules developed to date are technical in nature and a number, in large part, reflect existing requirements that apply to Commonwealth agencies that are subject to the FMA Act.[61]
>
> … the majority of the 17 draft Rules issued to date do not present significant departures from the current practice.[62]

3.57 On the grants and procurement rules, Finance explained that:

> There is no intention to make material changes to either grants or procurement requirements at this time, with the current Commonwealth Procurement Rules (CPRs) and Commonwealth Grants Guidelines (CGGs) being brought into the PGPA rule framework largely in their current form. This allows for a smooth transition to the new framework without disrupting the routine activities of Commonwealth entities … While this approach is proposed for 1 July 2014, over time Finance will work to review and simplify the requirements of both the CGGs and the CPRs.[63]

3.58 By way of explanation for this approach, Finance noted that

> The content of the CPRs are strongly influenced by requirements established in free trade agreements entered into by Australia …

59 Finance, *Submission 1.3*, p. 3.

60 Mr Suur, Finance, *Committee Hansard*, Canberra, 27 March 2014, p. 8.

61 ANAO, *Submission 3*, p. 6.

62 AWM, *Submission 6*, p. 2.

63 Finance, *Submission 1*, p. 7.

> The Senate Finance and Public Administration Committee is currently conducting an inquiry into Commonwealth procurement procedures and there are a number of new free trade agreements being negotiated. Given the potential for these processes to impact on the current scope and content of the CPRs, Finance prefers to bring these together with any PGPA related changes into a single process at a later date …
>
> The current CGGs … reflect the outcomes of a significant review, which sought to address issues raised by the not-for-profit (NFP) sector, recommendations of the Australian National Audit Office and the JCPAA itself.[64]

3.59 Finance further commented that, as part of the update to the CPRs for PGPA Act compliance, it had 'taken the opportunity to reflect recent changes to the procurement framework', including decreasing the construction threshold and increasing the procurement reporting threshold.[65] It was also noted that there were a few other changes that Finance wanted to 'take an opportunity to make, in terms of the Commonwealth procurement rules, so as to pick up areas where ANAO advice has largely suggested to us that we need to do more to help agencies to help Commonwealth procurement officers'.[66] Similarly, the drafting of the updated CGRGs had sought to make the document clearer, 'with those elements that are mandatory clearly identified, while guidance is identified as non-mandatory better practice'.[67]

3.60 As no significant concerns were raised about the other draft rules in the evidence provided to the Committee, these rules are not further discussed in this report.

## Specific issues concerning draft rules

### Draft rule on Officials' duty to disclose interests (s13, s14 and s16)

3.61 The APSC noted that it was exploring with Finance a 'minor revision' to the draft rule on 'Officials' duty to disclose interests':

> … to ensure that it is clear in the rules that section 13(7) of the PS Act, which concerns disclosure of real or apparent conflicts of interest, applies to members of accountable authorities (section

64 Finance, *Submission 1*, p. 7.

65 Finance, *Submission 1.1*, p. 4.

66 Mr John Sheridan, Australian Government Chief Technology and Procurement Officer, Finance, *Committee Hansard*, Canberra, 27 March 2014, p. 9.

67 Finance, *Submission 1.1*, p. 4.

> [13] of the draft Rule) where the member is also head of an APS agency.[68]

3.62 During the inquiry, the Commissioner confirmed that, since the draft rule was submitted to the Committee, 'we have agreed a small amendment to section 13 to underscore that APS agency heads are bound by the code of conduct as well as this rule. I understand that the Department of Finance will include this amendment in the next iteration of the rule following the inquiry'.[69]

3.63 Finance similarly observed that:

> The guide to section 16 of the PGPA Rule (which applies to officials who are not an accountable authority or a member of an accountable authority) specifically references the duty in subsection 13(7) of the PS Act. Finance is amenable to including a similar reference in the guide to section 13 of the PGPA Rule (which applies to officials who are the accountable authority).[70]

3.64 The Statutory Research and Development Corporations (RDCs) also raised concerns with the draft rule on 'Officials' duty to disclose interests'—in particular, ss14(4) of the draft Rule:

> Exposure Draft Rule 14(4) states "The official must ensure that the disclosure is recorded in the minutes of the meeting". This differs from the previous draft of this rule, which stated "(5) The disclosure must be recorded in the minutes of the meeting". As no official other than the chair is in a position to record minutes, the Statutory RDCs submit that the wording of the previous draft should replace the wording of Exposure Draft Rule 14(4).[71]

3.65 Finance clarified that it had developed this subsection 'in consultation with the Office of Parliamentary Counsel who has advised that the obligation needs to be attributed to a particular person'.[72]

3.66 The Statutory RDCs further raised concerns with s16 of the draft Rule:

> Exposure Draft Rule 16 states that "An official of a Commonwealth entity … must disclose that interest in accordance with any instructions given by the accountable authority of the

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68 APSC, *Submission 7*, p. 5.

69 Mr Sedgwick, APSC, *Committee Hansard*, Canberra, 7 April 2014, p. 9.

70 Finance, *Submission 1.3*, p. 25.

71 Cotton Research and Development Corporation, Fisheries Research and Development Corporation, Grains Research and Development Corporation, Grape and Wine Research and Development Corporation, and Rural Industries Research and Development Corporation (the Statutory Research and Development Corporations [RDCs]), *Submission 5*, p. 2.

72 Finance, *Submission 1.3*, p. 20.

> entity". This differs from the previous draft of this rule, which stated "The official must disclose the interest in writing consistent with requirements established by the accountable authority." The Statutory RDCs seek confirmation that an internal policy constitutes "instructions" within the meaning of Exposure Draft Rule 16, as the Statutory RDCs would generally record such requirements in internal policy documentation.[73]

3.67 Finance clarified that the 'instructions given by an accountable authority will become internal policies of their Commonwealth entity and binding on the officials of that entity'.[74]

## Draft rule on Audit committees (s17 and s28)

3.68 A number of inquiry participants raised issues about the draft PGPA rule on 'Audit committee for Commonwealth entities' (s17) and 'Audit committee for wholly-owned Commonwealth companies' (s28)—in particular, paragraph 17(5)(a), concerning the exclusion of an organisation's Chair from being a member of its audit committee.

3.69 In terms of membership of the audit committee for Commonwealth entities, s17 states:

> (3) The audit committee must consist of at least 3 persons who have appropriate qualifications, knowledge, skills or experience to assist the committee to perform its functions.
>
> (4) On and after 1 July 2015, the majority of the members of the audit committee must:
>
> (a) for a non-corporate Commonwealth entity—be persons who are not officials of the entity; or
>
> (b) for a corporate Commonwealth entity—be persons who are not employees of the entity.
>
> (5) Despite subsections (3) and (4), the following persons must not be a member of the audit committee:
>
> (a) the accountable authority or, if the accountable authority has more than one member, the head (however described) of the accountable authority;
>
> (b) the Chief Financial Officer (however described) of the entity;
>
> (c) the Chief Executive Officer (however described) of the entity.

73 Statutory RDCs, *Submission 5*, p. 2.

74 Finance, *Submission 1.3*, p. 20.

3.70 In terms of membership of the audit committee for wholly-owned Commonwealth companies, s28 states:

> (1) Section 17 of this rule (which is about audit committees for Commonwealth entities) applies to a wholly-owned Commonwealth company in the same way as it applies to a corporate Commonwealth entity.
>
> (2) For the purposes of subsection (1), a reference in section 17 to the accountable authority of the entity is taken to be a reference to the governing body of the company

3.71 Section 28 therefore specifies that the requirements in s17 also apply to wholly-owned Commonwealth companies.

### Audit committee for wholly-owned Commonwealth companies (s28)

3.72 As Commonwealth companies, defined as government business enterprises (GBEs) under s5 of the draft PGPA Rule, Medibank Private Ltd, Australian Rail Track Corporation Ltd (ARTC), ASC Pty Ltd and Moorebank Intermodal Company Ltd (MIC) were concerned that s28 would prevent the Chair of a wholly-owned Commonwealth company from being a member of its audit committee. They raised a number of issues with this proposed rule, including that:

- it is inconsistent with widely adopted corporate governance standards for non-Commonwealth companies
  - The *Corporations Act 2001* (Cth) imposes no requirements in relation to the composition of audit committees ... The *Corporate Governance Principles and Recommendations with 2010 Amendments* (2nd edition) of the Australian Securities Exchange (ASX) Corporate Governance Council ... does not prohibit the Chair of the board of directors of the company from being a member of the company's audit committee ... We believe that ... the corporate governance standards applicable to the audit committee should generally be consistent with corresponding standards that apply to private enterprises conducting similar commercial activities.[75]
- there is no justification for the higher standard
  - We have not been apprised of any justifications for imposing a higher standard on wholly-owned Commonwealth companies in respect of their audit committee composition ... The Draft Explanatory Statement to the Exposure Draft PGPA Rule 2014 included with the submission made to the Committee by the

75 Medibank Private Ltd, Australian Rail Track Corporation Ltd (ARTC) and ASC Pty Ltd, *Submission 4*, p. 2, p. 4. See also on Moorebank Intermodal Company Ltd (MIC) on this point, *Submission 16*, p. 1.

> Department of Finance ... does not clearly explain why it is necessary ... In referencing and stating that it replaces regulation 6B Commonwealth Authorities and Companies Regulations 1997, the Draft Explanatory Statement overlooks the fact that there is no equivalent to proposed paragraph 17(5)(a) in regulation 6B ... there is no adequate case for Commonwealth companies to be subjected to this higher standard in terms of audit committee composition than comparable privately owned companies are.[76]

- it is unnecessarily restrictive
  - It is our view that regulation should not exceed the minimum that is reasonably required in order to achieve the particular policy effect (or adequately to counter a demonstrated mischief) desired.[77]
- it creates a competitive disadvantage
  - The prohibition on the Chair of the board sitting on the audit committee would place Medibank, ARTC and ASC company at a competitive disadvantage to their private sector counterparts and other similar commercial enterprises ... no Commonwealth company that is a GBE should be subject to the standard in proposed section 17(5)(a) of the PGPA Rule given that companies in the industries in which they compete as suppliers or purchasers are not subject to a similar prohibition.[78]

3.73 Medibank Private, ARTC and ASC further pointed out that the regulatory context 'allows differentiation in the application of the rules that would permit s28 of the PGPA Rule to be modified':

> The CAC Act recognises differences between Commonwealth authorities and Commonwealth companies. The PGPA Act does the same, recognising corporate and non-corporate Commonwealth entities as well as Commonwealth companies. The 'design principles' for the PGPA Rule contemplate the possibility of differentiated application of rules if there is a clear case for them to apply to one group or type of entity. Those same design principles state that such rules should be "necessary or convenient", minimise regulation and "red tape" and only apply where necessary to promote the objectives of the PGPA Act. Moreover, paragraph 101(2)(b) of the PGPA Act contemplates

76 Medibank Private, ARTC and ASC Pty Ltd, *Submission 4*, p. 3. See also MIC, *Submission 16*, p. 1, p. 4.

77 Medibank Private, ARTC and ASC Pty Ltd, *Submission 4*, p. 3.

78 Medibank Private, ARTC and ASC Pty Ltd, *Submission 4*, p. 3, p. 4.

> different provisions under such rules for different Commonwealth entities or companies or classes thereof.[79]

3.74 Accordingly, Medibank Private, ARTC, ASC and MIC proposed that there be a differentiated application of the PGPA rules to enable s28 to be amended so that paragraph 17(5)(a) does not apply to wholly-owned Commonwealth companies that are GBEs.[80]

3.75 Finance responded to these concerns by highlighting that:

> The distinguishing feature of an audit committee of an entity is its independence from the day-to-day operations and management of an entity. The ASX Principles make this point explicitly, noting that "the existence of an independent audit committee is recognised internationally as an important feature of good corporate governance" … The ASX Principles also acknowledge this implicitly by requiring that chairs of boards should not be chairs of Audit Committees …[81]

3.76 However, Finance acknowledged that the draft PGPA rules do 'go a step further' in excluding an organisation's Chair as a member of its audit committee 'for reasons that go to the scope or responsibility of an audit committee under the PGPA Act'.[82] On this point, Finance explained that:

> Under the ASX Principles, the responsibilities of an audit committee are to "review the integrity of the company's financial reporting and oversee the independence of the external auditors" … Under the section 17(2) of the draft PGPA Rule, the functions assigned of an audit committee are broader, and "must include reviewing the appropriateness of the accountable authority's: (a) financial reporting; and (b) performance reporting; and (c) system of risk oversight and management; and (d) system of internal control; for the entity".[83]

3.77 Finance concluded that the 'role of an audit committee under the PGPA Act is therefore wider than under the ASX Principles':

> The exclusion of the chairs of boards and councils from the audit committee reflects the fact that a chair, like a chief executive officer and chief financial officer of an entity, both of whom are also excluded from the membership of an entity's audit committee, is responsible for leading the accountable authority in acting on and

79 Medibank Private, ARTC and ASC, *Submission 4*, p. 5.

80 Medibank Private, ARTC and ASC, *Submission 4*, p. 5; and MIC, *Submission 16*, p. 5.

81 Finance, *Submission 1.3*, p. 9.

82 Finance, *Submission 1.3*, p. 9.

83 Finance, *Submission 1.3*, p. 9.

> giving effect to advice provided by the audit committee. In relation to these three positions a separation of roles is highly desirable.[84]

3.78 As Finance further commented:

> We acknowledge that this rule would create a high standard for Commonwealth entities and companies than for publicly listed companies. We believe this is appropriate. There is precedent for holding Commonwealth companies to a higher and different standard than their listed competitors. For example, in relation to audit committees for Commonwealth companies, the current Commonwealth authorities and companies regulations in the proposed rule provide that membership may include people who are not directors of the company to promote an independent perspective beyond the board.
>
> The role of an audit committee in the Commonwealth is to provide independent advice and assurance to the entity's accountable authority. That includes reviewing the appropriateness of the accountable authority's performance reporting, risk oversight and systems of internal control. This goes beyond verifying and safeguarding the integrity of the financial reporting of an entity, which is a focus of ASX principles. For this reason we believe it is appropriate that senior leaders and managers responsible for day-to-day operations of an entity leave the giving of advice to others in this particular area.[85]

### Audit committee for Commonwealth entities (s17)

3.79 As a corporate Commonwealth entity, the Australian War Memorial (AWM) was also concerned about paragraph 17(5)(a) of the draft rule on audit committees preventing the Chair of its governing council from being a member of its audit committee:

> ... in the Memorial's view, retaining the option to allow the Chairman of Council to be a general member does not compromise the independence of the Audit Committee. It provides the opportunity for the Chairman of Council to tender well-informed strategic input, noting that this position is independently elected by Council members.[86]

3.80 Finance's response to this matter was discussed above.

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84 Finance, *Submission 1.3*, p. 9.

85 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 1.

86 AWM, *Submission 6*, p. 2.

3.81 Morison Consulting raised concerns with this draft rule for both corporate and non-corporate Commonwealth entities, suggesting either removal of the rule altogether or, if not, modification of the rule:

> I do not believe that Commonwealth audit committees require a specific PGPA Rule. A rule will only minimise flexibility which is not consistent with the broader Public Management Reform Agenda. The requirement to have an audit committee within the PGPA is sufficient ... Too much specificity in a rule reduces this flexibility and does not take account of the different size, complexity or maturity of organisations.[87]

3.82 If an audit committee rule is to be implemented, Morison Consulting noted particular concern with ss7(4), which requires a majority of independent members—for a non-corporate Commonwealth entity, that a majority of the members of the audit committee entity be persons who are not employees of the entity and, for a corporate Commonwealth entity, that a majority of the committee members be persons who are not officials of the entity. In terms of the requirement applying to non-corporate Commonwealth entities, Morison Consulting commented that:

> … this is too prescriptive and not in the spirit of the PGPA. I am not sure what problem we are trying to resolve with this approach, except to cause more expense to government agencies. Comment has been made that the extra members could be sourced from other government agencies on a 'free basis'. I do not believe that open and frank discussion may necessarily take place at an audit committee under such a scenario. There is also a cost at the whole of government level in the use of these resources ... There is an incorrect assumption that by having a majority of members as independent, the audit committee will necessarily provide independent assurance.[88]

3.83 In terms of the requirement applying to corporate Commonwealth entities, Morison Consulting commented that:

> This part of the Audit Committee rule is not well constructed. Section 17(4) allows in effect, for the audit committee of corporate Commonwealth entities to be comprised entirely of board members. This ignores the inherent conflict that boards are the ultimate decision makers and have overall responsibility for performance of the organisation. To address this conflict audit committees of corporate Commonwealth entities should also have

87 Morison Consulting, *Submission 9*, p. 3.

88 Morison Consulting, *Submission 9*, p. 4

> a member/(s) who are truly separate from the board and management ... section 17(4)(b) should read:
>
> The majority of the members of the audit committee must for a corporate Commonwealth entity be persons who are not employees of the entity and include at least one member who is external of the corporate accountable authority.[89]

3.84 Finance responded by noting that:

> … the distinguishing feature of an audit committee of an entity is its independence from the day-to-day operations and management of an entity. The ASX principles make this point explicitly, noting that "the existence of an independent audit committee is recognised internationally as an important feature of good corporate governance" … The draft PGPA Act audit committee rules mandate majority independent membership for the same reason.[90]

3.85 Related to this concern, the Statutory RDCs, as corporate Commonwealth entities, requested further clarification of the definition of 'employees' in paragraph 17(4):

> Exposure Draft Rule 17(4) states "On or after 1 July 2015, the majority of the members of the audit committee must … (b) for a corporate Commonwealth entity—be persons who are not employees of the entity." The Statutory RDCs request express clarification in the rule that members of an accountable authority of a corporate Commonwealth entity are not "employees" within the meaning of this rule (and therefore do count towards the relevant majority).[91]

3.86 Finance clarified that employees 'can include members of the accountable authority where they are executives of the entity'—however, 'non-executive members of the accountable authority are not employees for the purpose of the rule, that is, they meet the independence test (excluding the head of the accountable authority under subsection 17(5) of the PGPA Rule)'.[92]

### Observer status option

3.87 At the 7 April 2014 public hearing for the Committee's inquiry, an alternative way of approaching the PGPA audit committee rule—the

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89 Morison Consulting, *Submission 9*, p. 5.

90 Finance, *Submission 1.3*, p. 19.

91 Statutory RDCs, *Submission 5*, p. 3.

92 Finance, *Submission 1.3*, p. 20.

observer status option— was discussed as a possible means of addressing the concerns set out above.

3.88 As the Auditor-General highlighted, 'there is no prohibition on them [chairs] attending as observers if they wish':

> … we quickly did a bit of intelligence gathering within the office late last week about what happens with the CAC bodies, and certainly there are circumstances where the chairs of CAC bodies do attend audit committee meetings as members. There are equally a significant number of chairs who attend the audit committee meetings as observers—which is quite interesting. That is, they are not formal members of the committee but they attend anyway—and, under the Finance approach, arguably could still attend as observers.[93]

3.89 Finance confirmed that nothing in the draft rule precluded persons in the three positions—chair, chief executive officer and chief financial officer of an entity (all of whom are excluded from the membership of an entity's audit committee)—from attending any meeting of an entity's audit committee as an observer.[94] Importantly, as Finance further noted:

> … in discussions that we had with some Commonwealth corporations in Adelaide last week we confirmed that there was nothing to preclude. Two of the entities we spoke to are two of the entities that signed one of the submissions to this committee—the Australian Submarine Corporation and the Australian Rail Track Corporation. We indicated to them that there was no reason why a chair of a board could not attend an audit committee meeting. In fact, it is common practice … not only in corporate Commonwealth entities but also non-corporate Commonwealth entities for people like chief operating officers or chief financial officers to sit in on audit committee meetings as observers to answer questions that might arise from the audit committee as those questions arise.[95]

3.90 In terms of this option, a number of corporate Commonwealth entities present at the April 2014 public hearing were asked if they thought having a chair with observer status at an audit committee was sufficient.

3.91 The AWM confirmed a remaining 'very strong preference that we retain the option to invite the chair of our council to be a member of the audit committee', but conceded that 'appearing as an observer would be better

93 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 12.

94 Finance, *Submission 1.3*, p. 10.

95 Mr Suur, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 12.

than not being able to appear at all'.[96] The RDCs reaffirmed that 'there should be the option for the board to choose its committee members', but conceded that having observer status for the chair 'should allow' for important matters for RDCs such as 'transfer of corporate memory'.[97]

3.92 CSIRO commented that it was 'comfortable with the rules written':

> Our convention is that the chair is not a member. He is invited to attend by the chair of the audit committee as is the chief executive and other officials, and we are comfortable with that observer or participation status, which is effective for our operations.[98]

3.93 Similarly, IBA noted that it also had 'an independent audit and chair. Chair of the audit and risk is independent, and that is something we believe in quite strongly'.[99]

## Draft rule on Approving commitments of relevant money (s18)

3.94 The draft PGPA rule on 'Approving commitments of relevant money' (s18) is intended to replace a number of existing FMA regulations governing the approval and commitment of public money. Section 18 states that:

> (1) If an official of a Commonwealth entity is approving the commitment of relevant money for which the accountable authority of a Commonwealth entity is responsible, the official must record the approval in writing as soon as practicable after giving it.
>
> (2) To avoid doubt, the official must also approve the commitment consistently with any written requirements, including spending limits, specified by the accountable authority in:
>
> (a) instructions given by the accountable authority; or
>
> (b) the instrument that delegates to the official, or otherwise authorises the official to exercise, the accountable authority's power to approve the commitment of relevant money; or
>
> (c) a direction to the official in relation to the exercise of that power.

3.95 The explanatory guide to s18 in the draft PGPA Rule 2014 states that:

> The accountable authority responsible for relevant money has a duty to promote the proper use of the money (see section 15 of the

96 Ms Leanne Patterson, Chief Finance Officer, AWM, *Committee Hansard*, Canberra, 7 April 2014, p. 19.

97 Mr Tolson, Cotton RDC, *Committee Hansard*, Canberra, 7 April 2014, p. 19.

98 Mr Michael Whelan, Deputy Chief Executive, Operations, CSIRO, *Committee Hansard*, Canberra, 7 April 2014, p. 19.

99 Mr Fry, IBA, *Committee Hansard*, Canberra, 7 April 2014, p. 19.

> Act). This duty applies when approving commitments of the money. If the accountable authority delegates its power to approve commitments of the money to an official, or otherwise authorises an official to exercise that power, the accountable authority will be able to ensure the proper use of the money through the delegation or authorisation. It can also ensure that through its instructions.

3.96 Section 15 of the PGPA Act states that:

> (1) The accountable authority of a Commonwealth entity must govern the entity in a way that:
>
> (a) promotes the proper use and management of public resources for which the authority is responsible; and
>
> (b) promotes the achievement of the purposes of the entity; and
>
> (c) promotes the financial sustainability of the entity.
>
> (2) In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions on public resources generally.

3.97 While noting that the FMA regulations were 'quite prescriptive' and acknowledging 'benefits in streamlining existing requirements',[100] the ANAO raised a number of concerns with the draft rule, including:

- 'Proper use' and recording the basis for expenditure decisions
- Commitment of expenditure in future years
- Approval of expenditure in aggregate

### 'Proper use' and recording basis for expenditure decisions

3.98 The ANAO commented that the draft rule regarding 'Approving commitments of relevant money' was a 'substantive departure from existing obligations that explicitly require an approver to be satisfied, after making reasonable inquiries, that giving effect to the spending proposal would be a proper use of Commonwealth resources'.[101] This was a requirement under Regulation 9 of the FMA Act. As the ANAO explained:

> The proposed rule imposes no direct obligation on an official to be satisfied that the proposed commitment of relevant money represents the 'proper use' of the money and relies instead on: the general duty of the accountable authority to promote the proper use of relevant money (the duty is included in section 15 of the PGPA Act); and on the accountable authority issuing instructions,

100 ANAO, *Submission 3*, p. 7.

101 ANAO, *Submission 3*, p. 7. Capital Training Pty Ltd also raised concern about this rule, *Submission 8*, p. 5.

> delegations or directions to officials that must be complied with in approving the commitment.[102]

3.99 As the ANAO further noted, while it may be 'expected that an accountable authority would take the necessary steps to require an official to be satisfied that the proposed commitment of relevant money would represent the "proper use" of such money', there is 'no obligation on the accountable authority to do so'.[103]

3.100 It was acknowledged that there is high level alignment between the FMA Act and PGPA Act in promoting proper use, but the key point being made here is that, while it is expected under the PGPA Act and relevant rule that an accountable authority will establish internal systems to promote proper use, there is no obligation on them to do so:

> … promotion does not mean application and that is the fundamental issue here … What we observe in the current proposal is that there is no similar mechanism to operationalise, to go from promotion to application … What we observe in the rule is very simply that the obligation is that you must comply, if you are an approver, with 'any written requirement that may exist'. The issue is and the question is: will the requirement exist? The current schema relies in essence on the accountable authority to bring home the bacon by producing an internal rule set which requires its people to observe the proper use test. It may do so … it would be an imprudent chief executive or board that would not do so. However, the option remains. It could be introduced in whole or in part or not at all.[104]

3.101 As the Auditor-General commented on this point:

> Nothing focuses the mind more than a direct and personal obligation applied by the financial framework when you sign off and approve expenditure of public monies to be satisfied it is the proper use of public monies. It has been with us for a long time. It is not an onerous requirement but it is a requirement that has protected the interests of government and the parliament for a long period of time. We are suggesting it needs close consideration before it is removed.[105]

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102 ANAO, *Submission 3*, p. 8.

103 ANAO, *Submission 3*, p. 8.

104 Dr Tom Ioannou, Group Executive Director, Performance Audit Services Group, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 11.

105 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 11.

3.102 The Auditor-General further emphasised the importance of this issue from the perspective of executive government and the Parliament:

> It has always been my understanding that the financial framework should look after the interests of the government and also the parliament. That is driving our views around the views about officials being required to say that the proposed commitment of relevant moneys represents the proper use, because we believe—and I believe—that that is important from the government's point of view and from the parliament's point of view.[106]

3.103 Accordingly, the ANAO concluded that:

> … [it] does not consider that the proposed rule will provide the government and parliament with sufficient confidence that officials, in approving the commitment of relevant money, will be required in all cases to form a judgment that it represents the proper use of such money. Because the need to explicitly consider 'proper use' has historically been a fundamental principle of public administration when committing public funds, and has served a beneficial purpose without being a compliance burden, we do not see a valid basis to vary this in the context of the implementation of the PGPA Act.[107]

3.104 In response, Finance made a number of comments. It highlighted that, '[f]undamentally the PGPA reforms take a more holistic approach to the prudent control over public resources':

> In creating a single framework for all Commonwealth entities, the PGPA Act and Rules move away from the transactional, process and legislative prescription currently contained in the FMA Act; for example, which deal with 'persons entering arrangements' and 'approvers recording the terms of approvals' …
>
> The PGPA Act seeks to establish a coherent system of governance and accountability across all Commonwealth entities. A prudent control system is not solely about the final consideration or approval steps in a process—it is holistic, starting with the level of control exercised by an accountable authority, and the structures, checks and balances that the accountable authority deploys to provide confidence to Ministers, the auditor and the Parliament that it is meeting its obligations in relation to the proper use of public resources. It is about how those controls are supported by

106 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 13.

107 ANAO, *Submission 3*, p. 8.

> legislative controls on officials to exercise care and diligence, good faith and for proper purpose.[108]

3.105 As Finance explained:

> Proper use under the PGPA Act is a matter that is dealt with again through accountable authorities [under s15 of the Act], so we have elevated a responsibility to accountable authorities to ensure proper use and to put in place internal systems of control that ensure proper use. Under our scheme, it is [up to] a fully accountable authority to ensure that it has an appropriate system in place across the whole of the entity to ensure proper use. Individuals work within that scheme, within that system. It is not necessary in our view for individuals then to make decisions in isolation about whether or not a particular transaction constitutes a proper use.[109]

3.106 Accountability in this area is 'further reinforced' by the requirement in s16 of the PGPA Act that the accountable authority 'must also establish an appropriate system of internal control which includes requirements on officials approving commitments'.[110] Accordingly:

> An official who is approving a proposed commitment of relevant money would be doing so in accordance with directions from his or her accountable authority who is required to promote the proper use and management of public resources for which the authority is responsible (section 15 of the PGPA Act).
>
> It is for the accountable authority to ensure internal controls of the entity support the proper use and management of public resources.
>
> Officials must also comply with the general duties of officials to act in good faith and for a proper purpose (section 26 of the PGPA Act).[111]

3.107 As Finance noted, in the proposed system of controls, obligations and duties under the PGPA Act, there is 'flexibility for accountable authorities to apply processes for committing relevant money that are appropriate to their entities and the environments that they operate in':

> The proposed framework introduces a system of control at the whole-of-government level which gives the Executive and the Parliament confidence that the commitment of relevant money

108 Finance, *Submission 1.3*, p. 5.

109 Mr Suur, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 10.

110 Finance, *Submission 1.3*, p. 6.

111 Finance, *Submission 1.3*, p. 27.

across the whole Commonwealth system and by each Commonwealth entity is:

- undertaken according to consistent principles,
- subject to processes and controls that are proportionate to the risks involved, and
- being recorded in a way that is auditable.[112]

3.108 In terms of controls being proportionate to the risks involved, Finance noted that 'the PGPA rules move away from the level of process prescription currently embodied in the FMA Act' and instead provide 'core governance principles for all accountable authorities and then gives them the flexibility to design processes for the management of their entity to meet those standards—taking into account the nature of the entity, its operations and, significantly, the risks the entity faces and engages with in its operations'.[113]

3.109 In terms of an audit trail, Finance commented that one thing that is 'mandatory' is the 'requirement for an approval to be recorded in writing as soon as practicable after it is given', ensuring there is an 'auditable record of an official's approval, in writing, that will form a part of the evidentiary trail against which the official can be held to account for their proper use of relevant money'.[114]

3.110 Finance further observed that, while the FMA Regulation 9 approach provided 'a degree of assurance about process-compliance, these processes are prone to over-prescription, inefficiency and red-tape when broadly applied to all instances'.[115]

3.111 Finance also pointed out that there was no requirement under the CAC Act to explicitly require an approver to be satisfied, after making reasonable inquiries, that giving effect to the spending proposal would be a proper use of Commonwealth resources—'[n]o such process, for example, is prescribed in the CAC Act, and there is no evidence that CAC Act entities are poorer in their handling of public moneys'.[116]

3.112 Finally, Finance observed that, for the first time, the new PGPA framework now extended the FMA Act concept of 'proper use' to the previous CAC Act bodies (now called corporate Commonwealth entities)—the obligation for proper use is being applied to entities to which it did not previously apply. A central part of the new PGPA

112 Finance, *Submission 1.3*, pp. 5-6.

113 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 2.

114 Finance, *Submission 1.3*, p. 6.

115 Finance, *Submission 1.3*, p. 5.

116 Finance, *Submission 1.3*, p. 5.

framework, building on the current FMA Act requirement, is that all accountable authorities are now responsible, under s15 of the PGPA Act, for promoting the proper use and management of public resources for which they are responsible. The new framework therefore extends the current FMA Act concept to 'all Commonwealth entities, corporate and non-corporate alike'.[117]

3.113 In conclusion, Finance noted that the approach to this area in the PGPA Act:

> … encourages accountable authorities and officials to engage effectively with risk and implement controls around spending that are efficient and proportionate to the risks involved, but always within the context of the discretion and powers provided to them by the Parliament.
>
> In moving away from the rigid prescription currently applied to FMA Act agencies, the new framework gives accountable authorities the responsibility to develop controls that are appropriate to their entities, rather than a 'one size fits all' approach.[118]

3.114 Finance further stated that:

> The current arrangements [under the FMA Act] require people to act in certain ways … The [PGPA] framework … is one that relies upon internal processes and mechanisms and relies upon the requirements and the obligations that are set out in the act itself to drive the right level of disclosure, the right level of process and the right level of accountability inside particular organisations, recognising that not only are there different types of transactions that people conduct but organisations have different levels of risk attached to them … We have put before you a set of proposals that rely on a sequence of or series of internal controls starting with the act itself working through the rules and then going down to obligations for accountable authorities to put certain processes in place. That is the approach we have taken compared to the current arrangement, which is to require, which does not differentiate at those levels …
>
> we would expect that, as a matter of good practice, people would be undertaking proper activities here. To the extent that they do not, to the extent that their processes are inadequate, they are exposed to audit processes, they are exposed to committee

117 Finance, *Submission 1.3*, p. 6.

118 Finance, *Submission 1.3*, p. 5.

> processes of parliament and they are exposed for the lack of robustness in their processes. But in essence what we are saying is: 'We expect you to obey and follow the requirements your accountable authority has set for you.' The difference is that we are saying that those processes will need to be put in place in an appropriate manner, and the ANAO is saying: 'We would like to see that requirement specifically written in at this level rather than at the level of the individual entity'.[119]

3.115 Of significance here is ensuring that the linkages are made clear between:

- s15 and s16 of the PGPA Act
- s25-s29 (Duties of officials) of the PGPA Act
- s18 of the draft PGPA Rule on 'Approving commitments of relevant money' (s18), and
- ensuring that the following supporting material also makes these linkages clear:
  - ⇒ the section guides in the draft PGPA Rule
  - ⇒ the draft Explanatory Statement to the draft PGPA Rule
  - ⇒ the guidance material supporting these matters

3.116 As Finance commented:

> The link to officials goes to duties in section 25 to 29, so officials work within the framework of controls established by the accountable authority. The rule requires them to observe the requirements of that framework but, if you like, the other compulsion on them to do so properly is the duties in the PGPA Act under section 25 which is to show care and diligence and the duty in section 26 to act in good faith and for a proper purpose. So, if you like, the scheme comes together not only through the common duty that all accountable authorities have, corporate and non-corporate, for ensuring proper use and ensuring the proper processes are in place in their entity for proper use but the duties that all officials have across corporate and non-corporate entities to behave in a way that shows care and diligence and demonstrates that they are acting in good faith for a proper purpose. So that is where the scheme connects.[120]

3.117 There would need to be consultation if this draft PGPA rule were proposed to be amended to incorporate the previous requirement in Regulation 9 of the FMA Act. In this context, there was interest in whether

119 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 10, p. 13.

120 Mr Suur, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 10.

this approach would in fact be onerous for the previous CAC Act bodies (the new corporate Commonwealth entities under the PGPA Act). Finance commented:

> There is nothing in the CAC act at the moment that talks about proper use … If we were to take the route that the ANAO is suggesting, it would visit a new compliance burden on all corporate Commonwealth entities. We have got them over the line on the proper use concept and we have got them over the line in recording when a commitment is being spent. But what is being suggested by the ANAO here is: (1) something that has not been tested with corporate Commonwealth entities; (2) some corporate Commonwealth entities in their submissions to this committee have already made some comment on, indicating that they would not support movement down this track; and (3) would represent the imposition of red tape and new regulation on corporate Commonwealth entities' operations.[121]

3.118 However, as the IBA commented, perhaps the issue here is not so much proposing such a change as ensuring there is consultation and stakeholders have sufficient time to understand what is being proposed:

> My concerns with [the proposal made by] the Auditor-General may not be in the actual detail that he proposes but are rather that we have not had time to fully understand the impact on day-to-day management, and that aspect may lead to some unintended consequences that take away flexibility in the commercial space without mitigating any additional risk that might be perceived … I think where I am coming from is that we may not have any concerns with what the Auditor-General has in mind but we have not had time to understand the detail.[122]

3.119 On a separate but related matter, the ANAO raised whether, 'as a matter of principle, the basis for decisions (that is the substantive reasons) to enter into commitments that may result in the expenditure of public moneys above a certain threshold (as determined by entities) should be recorded'.[123] As the ANAO explained:

> This is currently a requirement in relation to the proposed expenditure of grants and is generally accepted practice, at least for higher value expenditure. Given the special responsibilities that attach to the use of relevant moneys (essentially public

121 Mr Suur, Finance, *Committee Hansard*, Canberra, 7 April 2014, p. 3.

122 Mr Fry, IBA, *Committee Hansard*, Canberra, 7 April 2014, p. 24.

123 ANAO, *Submission 3*, pp. 8-9.

> moneys), it would not be unreasonable to require approvers to record the basis of their decisions for expenditure above an agreed threshold which may be determined by entities.[124]

3.120 In response, Finance commented that the PGPA Act:

> … provides core governance principles for accountable authorities and gives them the flexibility to design their processes for the management of their entity, according to the nature of the entity, its operations and, significantly, the risks that the entity faces and engages within its operations.
>
> The accountable authority responsible for relevant money has a duty to promote the proper use of the money (section 15 of the Act). The accountable authority is able to promote the proper use of the money through its delegations or instructions to officials, which may contain requirements around the recording of decisions based on the factors such as the nature and size of the commitment, and the risk profile of the entity.
>
> Finance guidance material will support accountable authorities in determining where this might be appropriate.[125]

### Commitment of expenditure in future years

3.121 The ANAO noted that the draft rule on approving commitments of relevant money 'does not incorporate any specific requirements in relation to the commitment of expenditure beyond available appropriations, currently governed by FMA Regulation 10'.[126]

3.122 By way of background, an important control in a public resource management framework concerns the commitment of future moneys that have yet to be appropriated by the Parliament:

> While appropriations are frequently on an annual basis, entities' operations, their interactions and transactions with the public and with business do not lapse annually, but are ongoing. Contractual arrangements, partnerships and accommodation leases span many years, potentially twenty-five years or longer. Services are provided for which there may be a public or professional liability that runs on for many years.
>
> In delegating power over future spending to accountable authorities, an appropriate balance needs to be struck that allows the accountable authority to operate in an efficient and financially

124 ANAO, *Submission 3*, pp. 8-9.

125 Finance, *Submission 1.3*, pp. 16-17.

126 ANAO, *Submission 3*, p. 9.

> sustainable manner with suitable controls over Budget 'lock-in' and oversight by the Executive and Parliament.[127]

3.123 While acknowledging that the PGPA Act included requirements 'designed to control these commitments' that would 'go some way towards a system that provides some control over commitments that rely on future appropriations', the ANAO observed that they are 'less than the requirements traditionally relied on by Finance Ministers in this area'.[128]

3.124 Instead, the ANAO proposed that '[a]ny control would be most effective as part of the resource management framework, rather than as a budgetary control because it is transactions entered into by entities that commit expenditure over the forward estimates that are the focus of current arrangements'.[129]

3.125 However, the Auditor-General acknowledged that '[w]e accept it is ultimately a matter for those in government responsible for budget preparation to determine the extent to which explicit requirements need to be in place to control these commitments, as the issues go to the extent of lock-in of future budgets'—however, '[h]istorically, this is an area where explicit controls have existed and have been valued by finance ministers'.[130]

3.126 As the Auditor-General added:

> … it is a matter for the finance minister as to how much control he would like in the regime. But my experience says that historically finance ministers have actually enjoyed and appreciated the ability to keep the lid on the level of forward commitments … I am just saying that a little bit of strength in the hand of the finance minister should keep a lid on this. And by 'keeping a lid on it' I mean agencies or entities entering into transactions that can obligate the government in future years. In my view that is desirable.[131]

3.127 In response, Finance commented that, through FMA Regulation 10, 'the current framework takes a purely prescriptive path to control the commitment of future spending', with Regulation 10 having a 'limited impact' because it applies to a small proportion of total government

127 Finance, *Submission 1.3*, p. 3.

128 ANAO, *Submission 3*, p. 9.

129 ANAO, *Submission 3*, p. 9.

130 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 8.

131 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 16.

spending—'in practical terms, less than 8 per cent of total government expenditure is subject to FMA Regulation 10'.[132]

3.128 Finance further noted that the 'effectiveness of FMA Regulation 10 has diminished over time as better controls have been introduced', with two-thirds of Regulation 10 requests to the Finance Minister now relating to indemnities (these will now be subject to the Finance Minister's approval under a requirement in the PGPA Act).[133]

3.129 As Finance also emphasised:

> … the PGPA Act places principles-based requirements for financial management on all accountable authorities. This includes the duty to govern the entity (PGPA Act section 15), which includes promoting the financial sustainability of the entity and considering the effect of decisions on public resources generally. The draft guidance material issued by Finance for section 15 points out that in meeting these obligations, an accountable authority should consider whether proposed commitments can be met from known appropriations, and whether, by entering into long-term commitments, they are locking away future flexibility to accommodate new policy and program priorities.[134]

3.130 Finance concluded that, taken together, 'the systems of controls, obligations and duties under the PGPA framework, and controls contained in other frameworks provide a rigorous control over future Budget lock-in and protect the ability of Government to respond to emerging priorities'.[135]

### Approval of expenditure in aggregate

3.131 The ANAO noted that the draft rule on approving commitments of relevant money 'allows for the approval of the commitment of expenditure in aggregate'. While recognising the 'benefits of allowing the approval of aggregate expenditure in some circumstances', the ANAO commented that the 'supporting guidance should discuss the reasonable use of, and the risks involved in, officials approving aggregate expenditure proposals'.[136]

132 Finance, *Submission 1.3*, p. 3.
133 Finance, *Submission 1.3*, p. 4.
134 Finance, *Submission 1.3*, p. 4.
135 Finance, *Submission 1.3*, p. 4.
136 ANAO, *Submission 3*, p. 9.

### Other issues

3.132 The Statutory RDCs raised a different issue about the draft rule on 'Approving commitments of relevant money', concerning the wording of s18(1), which states:

> If an official of a Commonwealth entity is approving the commitment of relevant money for which the accountable authority of a Commonwealth entity is responsible, the official must record the approval in writing as soon as practicable after giving it.

3.133 The Statutory RDCs pointed to 'various circumstances' where they 'may not grant approval prior to making a commitment for a specific item or for a specific amount in writing'—for example, the engagement of a supplier 'may be approved in writing but the specific amount is not necessarily approved, except by payment of the invoice'.[137] They concluded that the rule therefore 'lacks clarity on the level at which the approval must occur'.[138] In particular, the Statutory RDCs were concerned that the draft rule might 'force the introduction of formal purchase order systems, which is likely to involve significant implementation and administration cost and a reduction in flexibility of operation'.[139]

3.134 Accordingly, the Statutory RDCs proposed the draft rule be amended by inserting a new sub-rule—that 'Rule 18(1) does not apply to corporate Commonwealth entities'.[140] Alternatively, they sought further clarification about the wording of the rule itself—that 'general approvals of commitments made in accordance with any written requirements specified by the accountable authority will constitute compliance with the rule'.[141]

3.135 In response, Finance observed that officials currently approving commitments of relevant money must have obtained the authority to approve the proposed commitment through a delegation or authorisation from their accountable authority, and that a 'proposal for the commitment of relevant money can be general in nature (such as, a proposal relating to a group or class of proposed arrangements)'.[142] Finance confirmed that it

137 Statutory RDCs, *Submission 5*, p. 3.
138 Statutory RDCs, *Submission 5*, p. 3.
139 Statutory RDCs, *Submission 5*, p. 3.
140 Statutory RDCs, *Submission 5*, p. 4.
141 Statutory RDCs, *Submission 5*, p. 3.
142 Finance, *Submission 1.3*, pp. 20-21.

would 'continue to consult with stakeholders on the guidance offered to ensure that entities understand how to apply the Rule'.[143]

### Draft rule on Banking (s19-s21)

3.136 The Statutory RDCs raised concerns with the draft rule on 'Banking' (s19-s21):

> The previous draft of these rules stated that "A Minister or an official of a Commonwealth entity who receives relevant money is not required to bank the money, when: … (b) the banking of the money, in the opinion of the relevant accountable authority, is uneconomical". This exception to the general requirement to bank relevant money does not appear in the Exposure Draft Rule and the Statutory RDCs submit that it should be reinserted to provide flexibility in appropriate circumstances.[144]

3.137 Finance clarified that, under paragraph 19(1)(b) of the draft PGPA Rule, an accountable authority may 'prescribe a period by which bankable money received by an official must be deposited', and that '[t]this discretion may be exercised by an accountable authority for a broad range of reasons, including the situation where individual amounts collected over a certain period is likely to be uneconomical to bank'.[145]

## Committee comments and recommendations

3.138 The Committee concludes that stage one of the PMRA, comprising the PGPA Act and the implementation of the first set of rules, establishes a solid foundation for efficiencies and the framework for cultural change in Commonwealth resource management over future years.

3.139 The willingness to encourage entities and officials to appropriately engage with risk is a welcome and necessary maturation of public sector management. More specifically, allowing accountable authorities increased autonomy to determine fit-for-purpose internal controls, within a clearly defined and principles based framework, is commendable.

3.140 The Committee's specific comments and recommendations on the matters outlined in this chapter are set out below.

143 Finance, *Submission 1.3*, p. 21.

144 Statutory RDCs, *Submission 5*, p. 4.

145 Finance, *Submission 1.3*, p. 21.

# General issues concerning PGPA Act 2013

## PGPA Act guiding principles

3.141 The Committee notes the ANAO's proposal that the following additional guiding principle be applied in developing the remaining elements of the PMRA and PGPA framework:

> The financial framework, including the rules and supporting policy and guidance, should support the legitimate requirements of the government and the parliament in discharging their respective responsibilities.[146]

3.142 The Committee also notes Finance's position that the PMRA and PGPA framework are effectively supporting this principle, despite it not being explicitly stated.

3.143 The Committee acknowledges and commends efforts to increase the prominence of the Parliament in the finance law and increase the quality of information provided to the Parliament and the public.

3.144 However, the Committee concludes on balance that there would be benefit in explicitly stating the prominence of the Parliament through adopting an additional guiding principle along the lines of that proposed by the Auditor-General.

3.145 In coming to this conclusion, the Committee points to the significance of the four existing guiding principles—they are critical to understanding the PGPA Act and rules, and broader PMRA. As Finance confirmed, '[t]he rules … have been drafted to reinforce the importance of these principles'.[147] These guiding principles are also frequently referred to in key material supporting the draft rules, the PGPA framework and PMRA.[148]

3.146 Adoption of this additional principle would therefore help focus and support the development of the remaining stages of the PMRA framework.

146 ANAO, *Submission 3*, p. 4.

147 Dr Helgeby, Finance, *Committee Hansard*, Canberra, 27 March 2014, p. 1.

148 The guiding principles were referred to in the *Explanatory Memorandum* for the PGPA Bill 2013 (Parliament of the Commonwealth of Australia, p. 2) and are referred to in guidance produced to support some of the draft rules—see, for example, Resource Management Guide on 'General duties of accountable authorities' (Working draft), Finance, *Submission 1.2*, p. 5.

**Recommendation 2**

3.147 **The Committee recommends that the following additional guiding principle be included as one of the guiding principles for the Public Management Reform Agenda:**

- **The financial framework, including the rules and supporting policy and guidance, should support the legitimate requirements of the Government and the Parliament in discharging their respective responsibilities.**

## Role and powers of ANAO

3.148 The Committee notes that the new PGPA Act and rules are not intended to impact on the role and powers of the ANAO. However, the Committee suggests that further consequential amendments to the Auditor-General's Act may be required to ensure the ANAO retains the full audit powers under the new framework that Parliament would expect. For example, it will be necessary to ensure that the ANAO can audit the full scope of the planning, performance and accountability framework under the PGPA Act, not just 'performance indicators'.

**Recommendation 3**

3.149 **The Committee recommends that the Department of Finance work to ensure that any necessary amendments are made to the *Auditor-General's Act 1997* such that the Australian National Audit Office has the power to audit the full planning, performance and accountability framework under the *Public Governance, Performance and Accountability Act 2013*.**

## Dual coverage PGPA Act and PS Act

3.150 The Committee acknowledges the range of concerns raised by the APSC about dual coverage of the PGPA Act and the PS Act and Code of Conduct. The Committee also notes the points raised by Finance in response.

3.151 The Committee was deeply disappointed to hear that the two largest public sector legislative reforms that have occurred in recent years have not been developed in tandem, and that the result may lead to confusion for officials trying to work under both pieces of legislation.

3.152 The two Acts should have been developed to be consistent and complementary—taking the opportunity to simplify, rather than complicate, the operating environment for officials at the day-to-day level.

3.153 However, given that this did not occur, the Committee supports the principle of consistency in coverage of the PGPA Act, rather than allowing differential application for different entity types (acknowledging the necessary distinction made for Commonwealth companies operating under the *Corporations Act 2001*).

3.154 The Committee is also confident that the professionalism of public sector officials will enable them to operate effectively under the two Acts and fulfil their associated duties.

3.155 The Committee does not therefore recommend amendment to the PGPA Act at this time to exclude officials employed under the PS Act from the general duties of officials' within s25 to s29 of the PGPA Act.

3.156 The Committee does however strongly recommend continued work on the supporting guidance for both the PGPA Act and PS Act—with the aim of minimising potential confusion for officials. This work is crucial and should be prioritised. Of course, once finalised this explanatory material should be widely communicated.

3.157 Furthermore, the Committee encourages Finance and the APSC to be mindful that the issue of dual legislative coverage may impact the development of future rules; and that they should work together pre-emptively as necessary to minimise such instances.

3.158 Despite the guidance attempting to minimise confusion, the situation of dual coverage is far from ideal. The Committee proposes that Finance and the APSC work together to draft the necessary amendments to the PGPA Act and/or the PS Act to remove any overlap. This may result in amending the terminology within the two Acts to ensure consistency, or may result in one Act referring to the other on certain matters.

3.159 The situation of dual legislative coverage should be rectified as soon as practicable. The Committee is conscious that the PS Act and Code of Conduct have just undergone major revisions, with associated communication and education initiatives to make relevant officials aware of the updates. It may therefore take some time to make amendments. However, it is not acceptable to the Committee that this issue only be revisited in the independent review of the PGPA Act in three years' time. Work should be done and proposals put to the Parliament in the interim if at all possible.

### Recommendation 4

3.160 **The Committee does not recommend a change to the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) at this time, to address the potential confusion from dual coverage with the *Public Service Act 1999* (PS 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 PS Act to remove overlaps and reduce potential confusion from dual coverage, and that amendment proposals be put to the Parliament.**

## Section 32B FMA Act

3.161 The Committee acknowledges the ANAO's comments concerning provisions reflecting s32B of the FMA Act not having been included in the PGPA Act. However, the Committee notes Finance's explanation concerning the current High Court action relating to this matter. The Committee therefore agrees that, although the present arrangement may not be ideal, it is a practical and prudent approach to a matter currently before the courts.

## Section 38 PGPA Act

3.162 The Committee notes the ANAO's acknowledgment that, rather than amending s38 of the PGPA Act to clarify matters relating to the measurement and assessment of entity performance, this might instead be addressed in the future development of the revised performance framework. The Committee therefore encourages Finance and the ANAO to work together to clarify this issue as part of the future consultation process on a revised performance framework. On this point, the Committee notes Finance's commitment that it will:

> … consult extensively both within and outside of the Commonwealth on the development of the new performance framework to ensure it is coherent, flexible and sufficiently detailed to enable an improved system of performance management and governance, and it provides meaningful information to Parliament.[149]

149 Finance, *Submission 1.3*, p. 13.

### Section 59 PGPA Act

3.163 The Committee appreciates the concerns raised by IBA about possible restrictions on its investment activity under s59 of the PGPA Act. However, the Committee notes Finance's clarification of s59 seeking to address IBA's concerns about this matter. In particular, the Committee notes Finance's clear direction that, '[w]here corporate Commonwealth entities have specific investment powers in their enabling legislation (such as the IBA), these powers will not change. Corporate entities will have no diminution of investment powers under the new framework'.[150]

## Specific issues concerning draft rules

3.164 The Committee notes that there was support for the majority of draft PGPA rules required for 1 July 2014 commencement, with several inquiry participants remarking that the rules will largely provide an adequate basis for commencement on 1 July. The Committee also notes that this level of support reflects the extensive consultation process conducted by Finance on the initial set of proposed rules, as discussed in Chapter 2.

3.165 Specific issues raised with four draft rules are discussed below.

### Draft rule on Officials' duty to disclose interests (s13, 14 and s16)

3.166 The Committee notes the APSC's concerns with s13 of the draft PGPA Rule relating to 'Officials' duty to disclose interests' and the agreement reached between the APSC and Finance, over the course of the inquiry, to amend the guide to s13 of the draft Rule to specifically reference the duty set out in subsection 13(7) of the PS Act.

3.167 The Committee also notes the concerns raised by the RDCs regarding s14 and s16 of the draft rule on 'Officials' duty to disclose interests'. The Committee is satisfied with the clarifications provided by Finance on these matters. To further address the RDCs' concerns, the Committee encourages Finance to work with the RDCs to ensure that the relevant draft guidance and other materials supporting this draft rule are revised to better clarify these issues.

### Draft rule on Audit committees

3.168 The Committee notes the concerns raised by a number of inquiry participants about the draft PGPA rule on 'Audit committee for Commonwealth entities' (s17) and 'Audit committee for wholly-owned Commonwealth companies' (s28)—in particular, paragraph 17(5)(a),

150 Finance, *Submission 1.3*, p. 28.

concerning the exclusion of an organisation's Chair from being a member of its audit committee.

3.169 The Committee agrees with the principle that a distinguishing feature of an audit committee of an entity should be its independence from the day-to-day operations and management of an entity. The Committee also appreciates Finance's point that the draft PGPA rules 'go a step further' in excluding an organisation's Chair as a member of its audit committee 'for reasons that go to the scope or responsibility of an audit committee under the PGPA Act', with the functions of an audit committee under the Act being 'broader'.[151]

3.170 The Committee considers that an increased emphasis on the observer status option in the guidance and other materials supporting the draft rule may address some of the concerns raised about this matter. Finance has confirmed that nothing in the draft rule precludes the chair, chief executive officer and chief financial officer of a Commonwealth body (all of whom are currently excluded from the membership of an audit committee under s17 and s28 of the draft rule) from attending audit committee meetings as an observer.[152] On balance, the Committee does not therefore support a change to the draft rule at this time.

**Recommendation 5**

3.171 **The Committee recommends that the Department of Finance (Finance) amend the draft guidance to s17 and s28 of the draft *Public Governance, Performance and Accountability Rule 2014* to emphasise that nothing in the draft rule precludes the chair, chief executive officer and chief financial officer of a Commonwealth body from attending audit committee meetings as an observer. Finance should also widely communicate this point.**

## Draft rule on Approving commitments of relevant money (s18)

3.172 The Committee notes the evidence and strongly held views expressed during the inquiry on the wording of the draft rule on 'Approving commitments of relevant money'.

3.173 The Committee recognises the importance of extending the concept of 'proper use' to accountable authorities of Commonwealth corporate entities for the first time. This is a commendable advancement in accountability.

151 Finance, *Submission 1.3*, p. 9.

152 Finance, *Submission 1.3*, p. 10.

3.174 However, the issues raised by the Auditor-General regarding the controls around commitments of relevant money are concerning.

3.175 The Auditor-General commented that the proposed approach is a 'substantive departure from existing obligations' for non-corporate Commonwealth entities. He continued that the requirement to explicitly consider proper use is 'not an onerous requirement but it is a requirement that has protected the interests of government and the parliament for a long period of time'.[153] The ANAO's submission further notes that the rule before the Committee has substantially changed from that consulted upon previously, and cites s71 of the PGPA Act placing obligations on Ministers that aligns with the previous 'Regulation 9' provisions.

3.176 On balance and due to the significance of this issue, the Committee is therefore of the opinion that the draft rule should be amended to explicitly place an obligation on all individual officials to consider 'proper use' before approving a commitment of relevant money, while allowing an accountable authority the freedom to establish internal controls appropriate to its operating environment—such as spending limits and associated documentation requirements. In connection with amending the draft rule, the associated guidance materials should also be amended. The Committee is aware that this amendment will apply obligations to officials of both Commonwealth corporate and non-corporate entities. At a minimum, the draft rule, rather than the 'guide to this section' of the rule, should be amended to state that an official must also comply with his or her duties under s25 to s29 of the PGPA Act.

3.177 In coming to this conclusion, the Committee notes Finance's evidence and the draft guidance that draws the connection between s25 and s26 of the PGPA Act and the rule in question.

3.178 Section 8 of the PGPA Act explicitly defines 'proper' as 'when used in relation to the use or management of public resources, [to] mean efficient, effective, economical and ethical'. Section 26 of the Act states that 'an official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties in good faith and for a proper purpose'.

3.179 The Committee is of the opinion that the general duties of officials also relate to the use or management of public resources. In other words, the broader duties of officials also apply to the specific duties of officials when approving commitments of relevant money. Section 26 should therefore be read as placing an explicit and direct obligation on all officials to form a

153 Mr McPhee, ANAO, *Committee Hansard*, Canberra, 7 April 2014, p. 11.

judgement about whether a commitment of relevant money is efficient, effective, economical and ethical in all instances.

3.180 As, in the Committee's opinion, this obligation is already enshrined in the PGPA Act—and its promotion is also expected by accountable authorities—making this obligation explicit at the level of the rule should be at little cost. Rather, it should serve to clarify and re-enforce the obligations in the Act and a key principle around the use of public sector resources.

3.181 Furthermore, it is a reasonable expectation that all officials should already be considering proper use concepts every time they commit taxpayer dollars—whether they are within Commonwealth corporate or non-corporate entities and whether or not this a current legislative obligation. The Committee is therefore not convinced by arguments that an explicit statement to this effect in the rule would unreasonably reduce an entity's autonomy or impose an unreasonable burden. This point is reinforced by the statement that 'public resources are public resources', implying that the rules around the use of public resources should be equal, no matter the entity type.

3.182 Within this context, the Committee is supportive of allowing an accountable authority the freedom to establish internal controls appropriate to its operating environment—such as spending limits and associated documentation requirements. This will allow the entity to appropriately engage with risk and balance the issues of efficiency and accountability. The Committee notes that this approach is supported by the Auditor-General.

3.183 The Committee acknowledges that this change may take time to implement, including undertaking necessary consultations, as this is technically a new obligation for Commonwealth corporate entities. It therefore may not be prudent to implement this change for Commonwealth corporate entities for 1 July 2014. However, retaining this obligation for non-corporate Commonwealth entities should be straightforward as it will be a continuation of current practice.

3.184 Finally, the Committee believes these issues should be included as key elements in first independent review of the PGPA Act.

### Recommendation 6

3.185 **The Committee recommends that draft rule s18 (Approving commitments of relevant money) of the *Public Governance, Performance and Accountability Rule 2014* be amended to explicitly place an obligation on all individual officials to consider proper use and management of public resources before approving commitments of relevant money.**

### Recommendation 7

3.186 **The Committee recommends that the issue of commitments of relevant money, and the appropriateness of spending limits and associated documentation requirements set by accountable authorities, be included by the Department of Finance in the first independent review of the *Public Governance, Performance and Accountability Act 2013*.**

3.187 Regarding the commitment of future money, the Committee appreciates the ANAO's concern that the draft rule does not incorporate specific requirements in relation to the commitment of expenditure beyond available appropriations, currently governed by FMA Regulation 10. However, the Committee notes the Auditor-General's acknowledgment that this may primarily be a matter for executive government.

3.188 The Committee requests that the Department of Finance advise the Committee of the thresholds set for expenditure beyond available appropriations as soon as these are established.

3.189 The Committee further notes the ANAO's comments concerning the draft rule allowing for the approval of the commitment of expenditure in aggregate. It supports the ANAO's suggestions that the supporting guidance on this rule should discuss the reasonable use of, and the risks involved in, officials approving aggregate expenditure proposals.

### Recommendation 8

3.190 **The Committee recommends that the draft guidance material supporting s18 (Approving commitments of relevant money) of the *Public Governance, Performance and Accountability Rule 2014* be amended to include discussion of the reasonable use of, and the risks involved in, officials approving aggregate expenditure proposals.**

## Draft rule on Banking (s19-s21)

3.191 The Committee notes the concern raised by the RDCs regarding s19-s21 of the draft PGPA rule on 'Banking'. The Committee considers that the clarifications provided by Finance on this matter should be sufficient. To further address the RDCs' concern, the Committee encourages Finance to work with the RDCs to ensure that the relevant draft guidance and other materials supporting this draft rule are revised to better clarify this issue.