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HOUSE OF REPRESENTATIVES

PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY BILL 2013

EXPLANATORY MEMORANDUM

(Circulated with the authority of the
Minister for Finance and Deregulation,
Senator the Hon Penny Wong)

TABLE OF CONTENTS

Table of abbreviations and common terms ... iv
GENERAL OUTLINE ... 1
Financial Impact Statement ... 1
Statement of Compatibility with Human Rights ... 2
The PGPA Bill in a context of reform ... 2
Issues to Address in the Existing Commonwealth Financial Framework ... 3
Consultation ... 5
Key elements of the PGPA Bill ... 5
Government as a whole ... 5
Independence of entities ... 6
Uniform duties ... 7
Public resources ... 7
Planning and evaluation ... 7
Risk management and earned autonomy ... 8
Cooperation and partnering ... 9
Accountability ... 9
Penalties and sanctions ... 9
Simplification ... 9
Rules ... 10
Consequential amendments ... 10
NOTES ON CLAUSES ... 11
Chapter 1 Introduction ... 11
Part 1-1 Introduction ... 11
Division 1 Preliminary ... 11
Division 2—Objects of this Act ... 12
Division 3—Guide to this Act ... 14
Part 1-2—Definitions ... 14
Division 1—Guide to this Part ... 14
Division 2—The Dictionary ... 14
Chapter 2—Commonwealth entities and the Commonwealth ... 17
Part 2-1—Core provisions for this Chapter ... 17
Division 1—Guide to this Part ... 17
Division 2—Core provisions for this Chapter ... 17

Part 2-2—Accountable authorities and officials 19
Division 1—Guide to this Part 19
Division 2—Accountable authorities 19
Subdivision A—General duties of accountable authorities 19
Subdivision B—Rules about general duties of accountable authorities 23
Subdivision C—Application of government policy 23
Subdivision D—Special provisions applying to accountable authorities of non-corporate Commonwealth entities 24
Division 3—Officials 25
Subdivision A—General duties of officials 25
Subdivision B—Provisions relating to general duties of officials 28
Subdivision C—Officials to whom the Public Service Act applies 30
Part 2-3—Planning, performance and accountability 30
Division 1—Guide to this Part 30
Division 2—Planning and budgeting 31
Division 3—Performance of Commonwealth entities 33
Division 4—Financial reporting and auditing for Commonwealth entities 34
Division 5—Audit committees for Commonwealth entities 36
Division 6—Annual report for Commonwealth entities 36
Division 7—Whole-of-government financial reporting 37
Part 2-4—Use and management of public resources 38
Division 1—Guide to this Part 38
Division 2—Funding and expenditure 38
Division 3—Banking 39
Division 4—Borrowing 40
Division 5—Investment 41
Division 6—Indemnities, guarantees, warranties and insurance 42
Division 7—Waivers, set-offs and act of grace payments 43
Division 8—Special provisions applying to Ministers and certain officials 45
Subdivision A—Gifts of relevant property 45
Subdivision B—Liability of Ministers and certain officials 45
Division 9—Special provisions applying to Ministers only 46
Part 2-5—Appropriations 48
Division 1—Guide to this Part 48
Division 2—Appropriations relating to non-corporate Commonwealth entities and the Commonwealth 48
Division 3—Special accounts 52
Part 2-6—Cooperating with other jurisdictions 55
Division 1—Guide to this Part 55
Division 2—Cooperating with other jurisdictions 55
Part 2-7—Companies, subsidiaries and new corporate Commonwealth entities 56
Division 1—Guide to this Part 56

Division 2—Companies and subsidiaries ... 56
Subdivision A—The Commonwealth's involvement in companies ... 56
Subdivision B—Subsidiaries of corporate Commonwealth entities ... 57
Division 3—New corporate Commonwealth entities ... 57
Chapter 3—Commonwealth companies ... 58
Part 3-1—General ... 58
Division 1—Guide to this Part ... 58
Division 2—Core provisions for this Chapter ... 59
Division 3—Special requirements for wholly-owned Commonwealth companies ... 59
Part 3-2—Planning and accountability ... 61
Division 1—Guide to this Part ... 61
Division 2—Planning and budgeting ... 61
Division 3—Reporting and accountability ... 63
Chapter 4—Rules and delegations ... 64
Part 4-1—The rules ... 64
Division 1—Guide to this Part ... 64
Division 2—The rules ... 64
Part 4-2—Delegations ... 68
Division 1—Guide to this Part ... 68
Division 2—Delegations ... 68

Table of abbreviations and common terms

Abbreviation or common term	Full term or description
ABC	Australian Broadcasting Corporation
ABC Act	*Australian Broadcasting Corporation Act 1983*
AI Act	*Acts Interpretation Act 1901*
ANAO	Australian National Audit Office
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
Audit Act	*Audit Act 1901* (repealed following the introduction of the FMA Act, the CAC Act and the Auditor-General Act)
Auditor-General Act	*Auditor-General Act 1997*
CAC Act	*Commonwealth Authorities and Companies Act 1997*
CAC Regulations	*Commonwealth Authorities and Companies Regulations 1997*
CFAR	Commonwealth Financial Accountability Review
Commonwealth entity	An entity as defined under clause 10 of the PGPA Bill
Corporations Act	*Corporations Act 2001*
CRF	The Consolidated Revenue Fund established by section 81 of the Constitution.
Criminal Code	*Criminal Code Act 1995*
FFLA Bill	Financial Framework Legislation Amendment Bill
Finance Minister	The Minister who will administer the *Public Governance, Performance and Accountability Act 2013*
FMA Act	*Financial Management and Accountability Act 1997*
FMA Regulations	*Financial Management and Accountability Regulations 1997*
FMO	Finance Minister's Orders
GBE	Government Business Enterprise

Abbreviation or common term	Full term or description
GGS	General Government Sector
GST	Goods and Services Tax
JCPAA	Joint Committee of Public Accounts and Audit
LI Act	*Legislative Instruments Act 2003*
OPA	Official Public Account
PBS	Portfolio Budget Statement
PGPA Bill or ‘the Bill’	Public Governance, Performance and Accountability Bill 2013
PS Act	*Public Service Act 1999*
RBA	Reserve Bank of Australia
RB Act	*Reserve Bank Act 1959*
rules	The rules made under clause 101 of the PGPA Bill
SBS	Special Broadcasting Service Corporation
SBS Act	*Special Broadcasting Service Act 1991*

Public Governance, Performance and Accountability Bill 2013

GENERAL OUTLINE

1. The ***Public Governance, Performance and Accountability Bill 2013*** (PGPA Bill) provides strong foundations for a modern, streamlined and adaptable Commonwealth public sector that is able to meet Australia's changing needs. If enacted, it will put in place the legislative underpinnings of an integrated system that promotes high standards of governance, performance and public accountability.

2. The PGPA Bill proposes to replace the current bifurcated model for Commonwealth financial management established through the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act). It will consolidate under one piece of legislation the governance, performance and accountability requirements for the Commonwealth and relevant entities, which can broadly be characterised as 'Commonwealth entities'. These include Departments of State, executive agencies and statutory authorities established by Parliament. In relation to Commonwealth companies, the Bill is drafted in light of the fact that the primary regulatory framework that applies is the *Corporations Act 2001* (Corporations Act).

3. Rather than prescribing detailed requirements, the PGPA Bill will create a financial framework where entities have the flexibility and incentives to adopt appropriate systems and processes that help them to achieve diverse policy and statutory objectives efficiently and effectively. Entities will also be held to high standards of accountability for their performance through a more explicit framework for monitoring and evaluating performance.

4. The PGPA Bill is a fundamental part of broader reforms to be introduced through the comprehensive Commonwealth Financial Accountability Review (CFAR), which commenced formally in December 2010.

Financial Impact Statement

5. While difficult to quantify, the premise that simplifying regulatory requirements can contribute to improved efficiency and productivity in government operations has been supported by most contributors to the CFAR process.

6. During consultations leading to the development of the PGPA Bill, considerable feedback was given about the transactional and compliance-focused nature of the FMA Act. The adverse impact this can have on the cost profile and performance of an entity was unfavourable compared to the principles-based approach in the CAC Act.

7. Several entities have been transferred from the CAC Act to the FMA Act over the last few years. A common theme from their feedback is that there is no discernible benefit in terms of performance from the additional burden of operating under the FMA Act. For example, the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission have commented on the time and resources involved in changing financial processes and systems as a result of the migration between the two Acts, with no gains in terms of transparency or performance.

8. Commonwealth entities have provided positive feedback about the direction of the reforms to the Commonwealth's financial framework that are contained in the Bill.

9. The PGPA Bill contains a number of provisions in relation to special or standing appropriations. These provisions continue special appropriations that are currently in the FMA Act (and the Audit Act before that), for example, for refunds of money. Continuing these special appropriations from the FMA Act has no additional financial impact.

Statement of Compatibility with Human Rights

10. The Bill, if enacted, will not engage any of the applicable rights or freedoms outlined in the *Human Rights (Parliamentary Scrutiny) Act 2011*, such as those encompassed in the *International Covenant on Civil and Political Rights.*

11. The Bill does not propose any offences or penalties that limit any human rights.

12. The Bill is therefore compatible with the human rights and freedoms recognised or declared in the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The PGPA Bill in a context of reform

13. To meet fiscal and service challenges into the future, all governments will need to consider, often fundamentally, the ways in which public services are delivered and outcomes are measured. The financial framework should support a productive and innovative public sector that is able to adapt to increasing community demands and changing circumstances, while retaining robust systems of management and accountability.

14. The objective of CFAR is to improve performance, accountability, risk management and service delivery across government. This recognises that a more effective financial framework will help support a modern and forward-looking public sector that can respond to the changing circumstances of the twenty-first century.

15. With broad input from across all levels of government, the private and not-for-profit sectors and academe, the CFAR process identified opportunities for reform to remove red tape in the public sector; enhance the public sector's potential for innovation; improve the performance of the public sector in meeting the government's goals; gain the best value for money spent on any particular purpose; promote high standards of stewardship and accountability; and enhance transparency.

16. The proposed reforms are based on four guiding principles, that:

- 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.

17. While the CFAR reforms lay an emphasis on improving strategic coherence and coordination in the Commonwealth, there is an accompanying theme of allowing individual entities to have an appropriate level of operational independence.

18. The PGPA Bill is the cornerstone of a broad, integrated package of reforms to the Commonwealth's financial framework being proposed by CFAR. Taken together, the reforms will seek to deliver long lasting benefits, including:

- improved quality of information to Parliament to support its constitutional role in relation to Commonwealth expenditure;
- a more mature approach to risk across the Commonwealth;

- improved productivity and performance of the Commonwealth public sector with concomitant benefits for a broad range of stakeholders; and
- reduced red tape within the Commonwealth and for partners who contribute to the delivery of Australian Government programs and services, including grant recipients.

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

Issues to Address in the Existing Commonwealth Financial Framework

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

21. The current framework is primarily based on two Acts, the FMA Act and the CAC Act. These Acts outline the roles and responsibilities of people who make decisions about the management and use of public resources.

22. The CAC and FMA Acts were a significant improvement on the highly prescriptive, rules-bound and controls-focused financial management framework provided by the *Audit Act 1901*. They contain many sound provisions, and have provided a strong basis for the financial aspects of government operations since they commenced on 1 January 1998.

23. Despite this strength, regular amendments have been made to both pieces of legislation, since their introduction, in order to maintain their serviceability and to respond to emerging issues. While this incremental approach to legislative reform has been effective in addressing isolated issues as they have emerged, it has added complexity to the financial framework's administration and may also have contributed to its fragmentation.

24. The current financial framework is not broken, but it does creak at times, and can be improved in order to reduce unnecessary complexity, to enhance the operations and efficiency of the Commonwealth and to clarify the accountabilities of the entities and individuals who operate within the Commonwealth.

25. Under the current framework, the classification of Commonwealth entities as either FMA Act or CAC Act entities turns on the notion of 'ownership' of funds. According to the Explanatory Memorandum accompanying the FMA Bill in 1996:

> *This [FMA] Bill is concerned with the regulatory/accounting/accountability framework for dealing with and managing the money and property of the Commonwealth. Its scope covers the underlying principles that are to govern the activities of persons in organisations that, financially, are agents of the Commonwealth - that is, Departments; those Statutory Authorities whose enabling legislation does not give them legal ownership of money or property separately from the Commonwealth; and anybody, organisation or group of persons prescribed as an Agency on the basis of its dealing with and managing public money or public property on behalf of the Commonwealth.*

26. In comparison, the original intent of the CAC Bill was to provide financial reporting and ethical and auditing provisions for corporate public authorities whose enabling legislation gives them 'ownership' of their operating funds and assets.

27. The distinction between entities under the FMA Act and entities under the CAC Act is overstated, and confuses operational independence with ownership. The money and property held by CAC Act entities are still public resources, in the sense that they should properly be regarded as being managed for the Australian people. The public interest in these resources is further underlined by the fact that the Auditor-General audits these entities on behalf of the Parliament.

28. The bifurcated model has offered a governance choice between a single chief executive (FMA Act) or a governing board of directors (CAC Act). A choice between the two basic governance models does not fit neatly with the administrative and legal diversity that now exists among Commonwealth entities.

29. To demonstrate the complexity which has become commonplace under current arrangements 13 bodies corporate are classified as, or are contained within, FMA Act agencies, although they have legal powers (including financial powers which are not exercised) distinct from the Commonwealth.

30. Other issues with the current legislative structure include:

- The FMA Act does not have a logical flow and has a largely transactional focus.
- Some provisions are complicated to implement and have led to processes with significant regulatory costs. These costs may have become disproportional to the materiality of the issues they seek to address. This is likely to have become the case in relation to drawing rights and FMA Regulation 9.
- The CAC Act fails to recognise that many CAC Act bodies:
  - receive all or most of their funding from the Parliament through the appropriations process, as do all FMA Act agencies; and
  - are classified in the General Government Sector (GGS), which is the same statistical classification for all FMA Act agencies.
- While the independence of CAC Act bodies is frequently mentioned as a justification for establishing a body under that Act, some FMA Act agencies are very independent from government. For example, the Australian Federal Police (AFP), the Australian Security and Intelligence Organisation (ASIO) and the Australian National Audit Office (ANAO) are all FMA Act agencies with significant statutory independence.
- There could be greater clarity in the way that employment arrangements interact with governance arrangements, in particular in relation to the duties of employees.
- There is a strong focus on financial accountability but this is not matched by a corresponding focus on the achievement of objectives and purposes or the quality of performance monitoring and evaluation.
- There is a strong focus on entities in their own right, but less of a whole of Australian Government perspective.
  - For example, the duty of a director to act in good faith in the best interests of their Commonwealth authority (paragraph 23(1)(a) of the CAC Act) means that they may not always consider the impact of their decision on the wider Commonwealth.

Consultation

31. CFAR was announced by the Minister for Finance and Deregulation on 8 December 2010, as part of the Government's Better Government agenda. The review undertook extensive consultation on potential areas of reform. This included the public release of a Discussion Paper on 29 March 2012 and a Position Paper on 23 November 2012.

32. Over 60 submissions were received on the Position Paper from within government and from interested stakeholders, including other jurisdictions and the private and not-for-profit sectors. Consultations were held across Australia, including with business, the third sector, state and territory governments and academe. There has also been consultation with the Joint Committee of Public Accounts and Audit (JCPAA), the Senate Standing Committee on Finance and Public Administration and the ANAO.

33. The PGPA Bill has been developed with strong involvement and input from a range of Commonwealth entities and companies. The Bill reflects a balanced and considered approach to the issues raised by entities including explicit reference to required consequential amendments to preserve the statutory independence of certain entities. Commonwealth entities have provided positive feedback that the Bill will reduce unnecessary compliance burden with the primary legislation. The rules that will be made under the Bill will also be developed in close consultation with Commonwealth entities and companies, a number of which have flagged their interest in being involved in working groups to develop draft provisions.

Key elements of the PGPA Bill

Government as a whole

34. The PGPA Bill provides a coherent approach to the governance, performance and accountability of the Commonwealth, at the level of primary law. It also provides the opportunity to regularise the interaction of the financial framework with the enabling legislation of many Commonwealth entities. This second goal will be continued through consequential amendments to be made once the Bill has been passed.

35. A number of Commonwealth entities are established under enabling legislation that specifies that the entity and/or its office holders have functions or roles that are to be exercised with a high degree of independence from the executive government. The *Auditor-General Act 1997*, the *Reserve Bank Act 1959* (RB Act), the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Act 1991* (SBS Act) contain such provisions. The PGPA Bill seeks to give proper recognition to these arrangements.

36. There are instances, however, where exceptions will have to be made to accommodate special needs or particular mandates contained in enabling legislation. Following consultation, it is proposed that the Bill will explicitly exempt the High Court of Australia and the Future Fund Board of Guardians (though not the Future Fund Management Agency) from its ambit, noting their enabling legislation and particular roles.

37. The primary logic for the categorisation of Commonwealth entities under the PGPA Bill, in contrast to the FMA and the CAC Acts, is their legal character determined by the provisions of their enabling legislation. How they hold their funds is a function of these considerations, but it is not the determining factor in how they are treated for the purposes of accountability, reporting and control.

38. The PGPA Bill creates two primary categories of Commonwealth body. These are, on the one hand, ‘Commonwealth entities’, and on the other hand, ‘Commonwealth companies’. Within the category of Commonwealth entities are two sub-categories, namely ‘non-corporate Commonwealth entities’ (that are not bodies corporate and are therefore part of the Commonwealth) and ‘corporate Commonwealth entities’ (that are legally separate from the Commonwealth) but are not Commonwealth companies. Non-corporate Commonwealth entities are subject to greater financial controls than corporate Commonwealth entities, as they are legally part of the Commonwealth.

39. There are a number of themes and requirements in the Bill that will apply to all Commonwealth entities. One is a responsibility on entities to keep Ministers and the Parliament informed of their activities through regular and ad-hoc reporting, including through the provision of corporate plans and annual reports. Another is the positioning of the Commonwealth Auditor-General as the auditor of all Commonwealth entities, which is a continuation of the existing legislative arrangements. A third is a uniform set of duties on all accountable authorities and officials (which does not apply to Commonwealth companies) in relation to how they perform their roles, especially when they manage and handle public resources.

40. The roles and responsibilities of the Finance Minister in relation to oversight of the financial framework, governance and the use and management of public resources, as outlined in the PGPA Bill, also help to bring together the single scheme. These were previously sprinkled through the FMA Act, the CAC Act, and the Regulations and Orders made under those two pieces of legislation. The Bill makes explicit the areas in which, and in some parts the extent to which, the Finance Minister can make rules. This is a significant advance in terms of clarity and transparency, compared to the FMA and CAC Acts.

41. The Bill also outlines the responsibilities of all Ministers when they approve proposed expenditure proposals, which is currently specified under the FMA Act.

Independence of entities

42. The Bill will not seek to alter the operational independence of entities as set out in their enabling legislation. It is for the Parliament to set out the relationship between an entity and the Government; and not for general resource management legislation to do this. For example, there are a number of entities that have decision-making powers that have been purposely quarantined from executive government influence. The Bill will not impinge on these arrangements.

43. To give an example, the ABC has a number of current exemptions from the CAC Act and, with limited exceptions, is not subject to direction by the Government (subsection 8(1) of the ABC Act). Various provisions in the SBS Act (sections 11, 12 and 13) maintain the independence and integrity of Special Broadcasting Service (SBS) in relation to the content and scheduling of programs. Other arrangements go to the independence of their respective Boards of the ABC and SBS and appointment of their Managing Directors. For example, the ABC has its own Charter (section 6 of the ABC Act) and its Board has a statutory obligation to maintain the independence and integrity of the ABC (subsection 8(1) of the ABC Act). Similar provisions are found in paragraph 10(1)(a) of the SBS Act. It is not intended that the ABC’s or SBS’s independence will be compromised by the PGPA Bill.

44. Amendments to the ABC Act and the SBS Act, and other relevant Acts, will be put to the Parliament before the commencement of the relevant provisions of the Bill, to preserve existing arrangements under enabling legislation.

Uniform duties

45. Whether resources are provided by the Parliament, generated by commercial operations or cost recovered activities, or provided through donations and bequests, those resources have been entrusted to the custody of a Commonwealth entity. The governance and funding arrangements of a Commonwealth entity do not change the inherently public nature of the resources entrusted to their care.

46. The PGPA Bill will introduce a uniform set of duties in relation to Commonwealth entities. Some of the duties are designed to apply to accountable authorities because they govern and set the overall strategic direction of their entity. The remainder of the duties apply to all officials of a Commonwealth entity, reflecting the obligations of all to act responsibly in the discharge of their duties, including in relation to public resources.

47. The duties of officials are based on the fiduciary duties contained in the Corporations Act. Alignment of duties in this way may help in creating consistency across the public, private and not-for-profit sectors and may help directors who serve in multiple sectors to have better clarity of their responsibilities and obligations.

48. A number of the duties imposed on officials also align with requirements under the PS Act Code of Conduct. The duties in the PGPA Bill sit alongside these PS Act duties, and a breach of the general duties contained in the Bill can be the basis of action being taken under the PS Act, including termination of employment.

Public resources

49. The PGPA Bill seeks to clarify the concept of public resources through the introduction of a single definition that applies to all money and all property held by Commonwealth entities. This will eliminate any perceived advantage or disadvantage in terms of public accountability arising from the different classification of entities that occurs under the existing framework.

Planning and evaluation

50. The key dimensions of resource management (the cycle of planning, budgeting, implementing, evaluating and being held accountable) have not been well reflected in the FMA and CAC Acts. The PGPA Bill, and future elements of the CFAR reforms, will seek to link the key elements of resource management so that there is a clear cycle of planning, measuring, evaluating and reporting of results to the Parliament, Ministers and the public.

51. The PGPA Bill does this by:

- explicitly recognising the high-level stages of the resource management cycle;
- recognising the value of clearly articulating key priorities and objectives;
- requiring every Commonwealth entity to develop corporate plans;
- introducing a framework for measuring and assessing performance, including requiring effective monitoring and evaluation; and
- maintaining the rigorous audit arrangements currently in place.

52. Under the current framework, the information that is most readily available from Commonwealth entities is financial in nature, which, of itself, does not provide insights into whether publicly funded programs and activities are achieving their objectives and outcomes. Measuring performance in the public sector also requires adequate and relevant non-financial information.

53. The PGPA Bill seeks to address the current imbalance between financial and non-financial performance information by placing explicit obligations on officials for the quality and reliability of performance information. Benefits of this approach include:

- fostering a strong focus on performance management and reporting. To support such change, the Department of Finance and Deregulation will play a stronger role in encouraging a more systematic approach to performance monitoring and evaluation; and
- providing incentives for achieving a clear line of sight between the information contained in appropriations, corporate plans, Portfolio Budget Statements and annual reports. Entities will need to define, structure and explain their purposes and achievements clearly to achieve a clear read through these documents. It is hoped that as performance information improves, then so too does the value it can bring to strategic policy deliberations.

Risk management and earned autonomy

54. Risk management is a fundamental feature of modern management. An appetite for prudent risk-taking is crucial for improving productivity and innovation in the public sector.

55. Public sector managers deal with risk every day. However, there is no explicit reference to risk management in the FMA Act or the CAC Act and the Commonwealth does not have an overarching risk management framework. In this, the Commonwealth public sector lags behind other sectors.

56. The PGPA Bill improves the Commonwealth's focus on risk. First, there is an express duty on an accountable authority to ensure that the entity for which it is responsible has appropriate systems of risk oversight and management.

57. Second, the Bill puts in place the underpinnings for a system of earned autonomy which can be applied to Commonwealth entities. This is done by giving the Finance Minister a power to prescribe matters or make different provisions in relation to particular Commonwealth entities or classes of entities. This model will see a targeted and risk-based approach taken to financial framework regulation. The nature and extent of oversight and regulatory intervention exercised will depend on an entity's risk profile and performance.

58. Broad principles for the earned autonomy model will draw on the better practice principles for regulators identified by the Productivity Commission, which include:

- streamlining reporting requirements;
- risk-based monitoring and enforcement;
- a graduated response to regulatory and compliance breaches and performance deficiencies; and
- clear and timely communication.[1]

59. This system will, in its full development, allow regulatory approaches to be tailored to individual entities and be based on clear risk metrics. It will be put in place through the rules to the Bill, which will be developed in close consultation with Commonwealth entities.

60. As with the increased emphasis on planning and evaluation, legislation is only a first step towards greater cultural change to embrace risk management as a way to foster improved productivity and innovation in the Commonwealth public sector.

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[1] Productivity Commission, *Identifying and Evaluating Regulatory Reforms*, Research Report, Canberra, 2011, p. xv.

Cooperation and partnering

61. The PGPA Bill seeks to encourage greater cooperation between Commonwealth entities themselves, and between Commonwealth entities and their partners, including states and territories and bodies in the private and not-for-profit sectors.

62. Parties consulted in the CFAR process have consistently raised the issue of unnecessary compliance burdens that government places on outsiders. This is at a time when the public policy problems faced by governments often require solutions that span different jurisdictions or sectors of the economy. The FMA and CAC Acts were not necessarily set up to effectively deal with such arrangements.

63. The PGPA Bill places explicit obligations on accountable authorities to encourage officials within their entities to cooperate with partners, and to consider the effect of compliance burdens being placed on partners when dealing with them. These positive duties are not designed to force entities to cooperate with others, but they do send a message that cooperation needs to be seriously considered, and the financial framework will not impede effective partnering.

Accountability

64. The PGPA Bill seeks to strengthen and simplify accountability through: a greater emphasis on performance monitoring, evaluation and reporting; and greater clarification in relation to annual reporting, which can be subject to inconsistent requirements across different pieces of legislation. The JCPAA will have an enhanced role in approving the proposed annual report requirements for all Commonwealth entities, not just those whose annual report is provided under the PS Act.

Penalties and sanctions

65. Apart from one exception, the PGPA Bill does not contain specific penalties and sanctions. This is to avoid duplication of provisions already existing under other legislation or legal arrangements. For example, employment arrangements (including for public servants) are likely to include a range of sanctions, while criminal conduct is covered by the Criminal Code Act or other criminal laws. This approach stands in contrast to the FMA Act, which contains criminal penalties, and the CAC Act, which contains both civil and criminal penalties.

66. The one exception is a provision allowing for the removal of a member of an accountable authority of a Commonwealth corporate entity for failing to comply with his or her duties as an official under this legislation. This provision is intended to operate only in cases where the scope of a corporate entity's enabling legislation is inadequate to address a breach of the duties outlined in the Bill.

67. For the sake of clarity, the PGPA Bill makes clear that the finance law that is put in place under the Bill is an applicable Australian law for the purposes of the PS Act. This means that if an official employed under the PS Act contravenes the finance law, sanctions such as termination of employment may be imposed on the official under the PS Act.

Simplification

68. The PGPA Bill seeks to remove or appropriately modify undue and unnecessary regulation or administrative requirements. Under the broader CFAR reforms, of which the PGPA Bill is part, compliance requirements will focus on areas of high risk, without prescribing procedures that are better addressed through targeted internal controls. This will

mean that some current detailed requirements, especially prescriptive process-related requirements under the FMA Act, will not form part of the core set of obligations imposed on entities.

69. The framework will require reporting obligations to be periodically reviewed to ensure they continue to meet their intended objectives efficiently and effectively. The broader CFAR reforms will also provide an opportunity to explore options to streamline financial reporting requirements for Commonwealth entities, including through the introduction of tiered or differential financial reporting arrangements that are appropriately calibrated to relevant entities. Again, significant consultation will need to occur with stakeholders, including the Auditor-General and the Parliament, to ensure that transparency and accountability is not compromised by such arrangements.

Rules

70. The PGPA Bill sets out the fundamental elements of a coherent financial framework for all Commonwealth entities. It will be underpinned by more detailed rules to be issued by the Finance Minister. This is no different to the current FMA Act and CAC Act, under which Regulations have been made and Finance Minister's Orders issued to clarify the requirements of, or give detail to, the primary legislation. The modification of framework requirements for a limited number of identified entities (for example, intelligence, security and law enforcement agencies) will be dealt with in these rules.

71. The rules, which will be disallowable instruments, will be developed in consultation with Commonwealth entities. A number of entities have indicated an interest in participating in working groups to develop the rules. The JCPAA will also play an important role in the development and approval of the rules.

Consequential amendments

72. Importantly, the enabling legislation of all statutory authorities, like the RBA, the ABC and SBS, will be updated through consequential amendments to allow for a continuation of existing exemptions from specific financial framework requirements that relate to them.

NOTES ON CLAUSES

Chapter 1 - Introduction

Part 1-1 - Introduction

Division 1 - Preliminary

Clause 1: Short title

73. Once enacted, the short title of the Bill will be the *Public Governance, Performance and Accountability Act 2013*.

Clause 2: Commencement

74. Clause 2 sets out when the Bill's provisions commence.

75. Clauses 1 to 5 would commence on 1 July 2013.

76. The remainder of the provisions (the substantive provisions of the Bill) will commence on a date to be fixed by Proclamation. In the absence of proclamation before 1 July 2014, the substantive provisions will commence on 1 July 2014. This extended period for Proclamation has been included for a number of reasons:

- The Bill would introduce a new financial framework for the Commonwealth impacting on some 195 entities and approximately 300,000 individuals, who will need to understand the implications of the new framework. Experience from the reforms in 1997, when the FMA and CAC Acts were introduced, showed that such change requires a structured and disciplined approach to implementation, including sufficient support and training. The delayed implementation will assist to mitigate implementation risks.

- The Bill is principles-based, with detail to be included in rules where appropriate. This is consistent with the FMA and CAC Acts, where much of the detail is contained in subsidiary legislation including Regulations and Finance Minister's Orders. The delayed commencement date will ensure that the rules supporting the Bill will be developed in collaboration with entities across the Commonwealth to ensure their effectiveness and avoid the imposition of an unnecessary regulatory burden on entities.

- A separate Bill with transitional and consequential amendments is being developed. Both Bills will need to commence on the same date to avoid unexpected consequences or create governance and accountability gaps between the old and new financial frameworks.

Clause 3: This Act binds the Crown

77. Clause 3 provides that the Bill binds the Crown in right of the Commonwealth.

Clause 4: This Act extends to things outside Australia

78. Clause 4 provides that the Bill applies to things both inside and outside Australia. This recognises that the Commonwealth and its entities often operate beyond Australia.

Division 2 Objects of this Act

Clause 5: Objects of this Act

79. Clause 5 sets out the objects of the Bill. The objects articulate the goals of the Bill, including the overarching imperative that government should act as a coherent whole.

80. The first object is to establish a coherent system of governance and accountability across Commonwealth entities. The existing system under the FMA Act and CAC Act has been seen to lack coherence:

- Entities can be placed under the FMA Act or the CAC Act for reasons that are unconnected to ensuring the most appropriate governance structure. This has resulted in entities not being under the most effective legal and financial framework for the kind of activity or role they are to perform; rather, they are wedged into a system that generates points of friction. This can lead to inefficiency and unclear lines of accountability.
- The obligations currently placed on the leaders of Commonwealth entities are significantly different between the FMA Act (where a single Chief Executive governs) and the CAC Act (where generally a board governs). An FMA Act Chief Executive generally has one key duty – to promote the proper use of Commonwealth resources for which the Chief Executive is responsible. Chief Executives who are the heads of Departments or PS Act agencies are also bound by the Code of Conduct in the PS Act. In addition, the *Public Service Amendment Act 2013* clarified the roles and responsibilities of Secretaries of Departments.

81. On the other hand, directors under the CAC Act (and officers and employees in particular circumstances) have a range of duties, including to act in good faith and with care and diligence. These duties are consistent with the duties imposed under the Corporations Act. This difference in duties between the leaders of FMA Act agencies and CAC Act entities goes against the view that there is one Australian Government, which is providing services for Australian citizens through a variety of means and institutions.

82. The Bill aims to address these issues by:

- establishing a uniform set of duties for accountable authorities;
- establishing a uniform set of duties for all officials;
- establishing a comprehensive and uniform reporting framework for all Commonwealth entities; and
- clarifying the Finance Minister's role in relation to the financial framework.

83. The second object is to establish a performance framework for all Commonwealth entities. This is the first time that the importance of performance has been explicitly recognised in Commonwealth legislation. While legislation, of itself, will not guarantee effective performance, it can help create momentum for change and translate strategic direction into action. The rules regarding performance will outline the appropriate standards that are to be met especially in relation to the quality of performance information, and performance monitoring, evaluation and reporting.

84. To date, the predominant focus in the Commonwealth's financial framework legislation has been on financial reporting and accountability. However, performance of the public sector is more than financial. Having a structure for measuring and evaluating performance is necessary to understand whether performance is improving within an entity and across the Commonwealth more broadly.

85. The third object is to require Commonwealth entities to:

- meet high standards of governance − good governance provides the foundation for high performance and community confidence in the public sector. In the public sector, good governance is grounded in accountability, transparency, leadership, integrity and stewardship and in responsiveness to the needs and aspirations of citizens. Effective governance arrangements within entities would clearly articulate the roles, responsibilities and accountabilities of leaders and officials to provide for effective decision-making, strategic direction, risk management and service delivery;

- meet high standards of performance – a focus on performance and a good performance management framework helps government prioritise policies and programs and allocate resources accordingly. A strong performance reporting system will show the Parliament and the public whether resources are being used effectively and efficiently. Accountable authorities play an important role in developing performance criteria for their entities and ensuring the adequacy of performance information;

- meet high standards of accountability – ensuring responsible decision-making and having effective accountability arrangements are essential for managing public resources. All Commonwealth entities must account for their activities and performance;

- provide meaningful information to the Parliament − performance information is crucial to assessing whether policy goals have been achieved and how effectively the public sector has performed. This does not mean that providing more information is an end in itself. The information provided to the Parliament should assist it to understand how Commonwealth entities are performing and how they are using the resources that have been entrusted to them;

- ensure that public resources are used and managed properly − the notion of 'taxpayer funds' cuts a broad sweep. The money and property used and managed by Commonwealth entities is entrusted to them by the Parliament on behalf of the Australian people to provide desired public goods and services, to an appropriate standard; and

- cooperate with others to achieve common objectives – Commonwealth entities do not operate in a vacuum. Some of their objectives can only be achieved successfully by cooperating and partnering with others. Explicit legislative acknowledgement of the need to cooperate to achieve wider government objectives, where practicable, is designed to encourage a culture of building relationships, not just managing contracts.

86. The fourth object is to require Commonwealth companies to meet high standards of accountability. While the Corporations Act is the principal regulatory framework for Commonwealth companies, these organisations are still public and are expected to meet

higher standards of accountability than a private company. The provisions for Commonwealth companies give effect to this.

Division 3 - Guide to this Act

Clause 6: Guide to this Act

87. Clause 6 provides a plain-English guide to the Bill's structure and explains where major issues are covered.

Part 1-2 Definitions

Division 1 - Guide to this Part

Clause 7: Guide to this Part

88. Clause 7 explains that Part 1-2 is the Dictionary for the Bill.

Division 2 - The Dictionary

Clause 8: The Dictionary

89. Clause 8 is the Dictionary that contains a list of every term that is defined in the Bill. Key definitions are explained below in alphabetical order.

bank

90. Defining a bank as an Authorised Deposit-taking Institution (ADI) or the RBA clarifies exactly what is a bank for the purposes of domestic banking. Restricting 'bank' to ADIs and the RBA within Australia, will ensure that the public can have confidence that there is a proper regulatory framework applying to those banks which will be used by the Commonwealth and corporate Commonwealth entities. The RBA is specifically included because it is not an ADI within the meaning of the *Banking Act 1959*.

91. It is also necessary to define what is a bank outside Australia to give coverage to Commonwealth entities that operate beyond Australia as part of their normal operations, such as the Department of Foreign Affairs and Trade. Whether or not a person is engaged in 'the business of banking' will require a consideration of the general law meaning of that expression.

Department of State

92. Department of State is generally taken to have the same meaning as in section 64 of the Constitution. However, this ordinary meaning is modified in the Bill so that a Department of State can include other bodies, organisations or groups of persons that are prescribed in relation to a specific department. This mechanism may be used to clarify if a certain body, organisation or group of persons forms part of a department where this would otherwise be unclear.

93. The definition would exclude any part of a department that is itself a listed body. This reflects the intention that a listed body is to be regarded, for the purposes of the Bill, as a separate entity from the Department of State within the same portfolio.

enabling legislation

94. The enabling legislation for a Commonwealth entity is the legislation that sets up the body, including its governance structure, its powers, its functions and its relationship with its Minister. Under the definition, enabling legislation may be primary or subsidiary legislation. Not all Commonwealth entities have enabling legislation.

governing body

95. A governing body is the principal decision-making structure of a corporate Commonwealth entity. Ordinarily this is the board of directors (however described) established in an entity's enabling legislation. However, some corporate Commonwealth entities are not established with a traditional board structure. For example, a commission may have members undertaking day-to-day management as well as setting the strategic direction of the entity. In these cases, where the members of the body corporate act collectively to govern the entity, they will constitute the governing body of the entity. In other cases, there may be a single member who has management responsibilities and is best described as the governing body for a corporate Commonwealth entity.

government business enterprise

96. A government business enterprise (GBE) is any Commonwealth entity or Commonwealth company prescribed by the rules. This definition is the same as the definition under the CAC Act. Commonwealth entities or companies that exhibit commercial behaviours with strong entrepreneurial expertise in their governance are candidates for GBE status.

97. This pragmatic approach reflects a view that being a GBE is not only about the goods or services being provided by the Commonwealth entity or Commonwealth company or the sector the organisation operates in, but a broader approach to how business-like operations are best managed. It is possible that, over time, some additional organisations may be classified as GBEs.

proper

98. 'Proper' is defined in relation to the use and management of public resources and means efficient, effective, economical and ethical. This definition is similar to the definition used in section 44 of the FMA Act except in one important aspect; it does not encompass the notion of 'not inconsistent with the policies of the Commonwealth'.

99. 'Proper use and management' recognises that the public resources used and managed by Commonwealth entities are, in a broad sense, not theirs, but rather belong to the people of Australia and are provided to entities so that they can do things for the people of Australia.

100. The term 'use' is related to the expenditure of relevant money, the commitment of appropriations, and the application of public resources generally to achieve a public purpose. The term 'management' is broader and encompasses the decisions, systems and controls around the custody and use of, and accountability for, public resources.

relevant money

101. The term 'relevant money' appears in several provisions of the Bill. It is an important concept given that millions of Commonwealth transactions involve the payment and receipt of relevant money. Relevant money is money standing to the credit of a bank account of the Commonwealth or corporate Commonwealth entity, together with money held by the Commonwealth or corporate Commonwealth entity.

102. This single definition covers money that was classified as public money under the FMA Act and money that CAC entities held in their own account (subsection 7(3) of the CAC Act). An all-embracing definition of relevant money that covers all Commonwealth entities will assist with:

- developing a philosophy that government acts as a coherent whole, rather than a group of distinct entities; and
- clarifying that all money held by Commonwealth entities is relevant money, and subject to the same obligations, regardless of who holds it and how it is held, or other technical distinctions.

103. The definition is designed to clearly define what counts as relevant money. Money will be relevant money if it is either:

- in a bank account of the Commonwealth or a corporate Commonwealth entity; or
- held by the Commonwealth or a corporate Commonwealth entity (this is intended to refer to cash in the custody of the Commonwealth or corporate Commonwealth entity or an official in the entity).

104. The definition is intended to provide clarity around what is or is not relevant money, and avoids the uncertainty, and technical issues associated with the definition of 'public money' in the FMA Act.

relevant property

105. 'Relevant property' is property owned or held by the Commonwealth or a corporate Commonwealth entity. This definition is designed to parallel the definition of relevant money in that it is designed to capture property in the possession of the Commonwealth or a Commonwealth entity. The intent is for the Bill to cover physical, real and personal property, like buildings, vehicles and equipment. The term relevant property will also cover intellectual property, and choses in action such as bonds, debentures and securities, except as covered by other legislation.

106. The Bill will operate concurrently with other legislation dealing with property, such as for real property under the *Lands Acquisition Act 1989*. It is also intended to operate consistently with existing guidance in relation to intellectual property under the Australian Government's *Intellectual Property Manual*. In the event that the application of the Bill, or certain parts of the Bill, to certain types of property needs to be clarified, the rules will be used to prescribe such types of property.

responsible Minister

107. The responsible Minister is the Minister to whom the Commonwealth entity reports. This will be determined by reference to the Administrative Arrangements Order. Where it is unclear who the responsible Minister is, such as where two Ministers may hold equal

numbers of shares in a Commonwealth company, the rules can prescribe the responsible Minister.

subsidiary

108. Only corporate Commonwealth entities and Commonwealth companies can have subsidiaries.

Chapter 2 Commonwealth entities and the Commonwealth

Part 2-1 Core provisions for this Chapter

Division 1 - Guide to this Part

Clause 9: Guide to this Part

109. Clause 9 explains Part 2-1 of the Bill.

Division 2 - Core provisions for this Chapter

Clause 10: Commonwealth entities

110. Clause 10 defines the term ‘Commonwealth entity’. Departments of State, Parliamentary Departments and listed entities (which will encompass most prescribed agencies under the FMA Act) formerly subject to the FMA Act. Bodies corporate encompass ‘Commonwealth authorities’ under the CAC Act as well as those bodies corporate that were formally.

111. Importantly, Commonwealth companies are not Commonwealth entities for the purposes of the Bill. Commonwealth companies are governed by Chapter 3 of the Bill. This means, for example, that the duties imposed on accountable authorities and officials in Part 2-2 do not apply to Commonwealth companies. Rather directors and officers of Commonwealth companies are subject to the duties in the Corporations Act.

112. The expression ‘listed entity’ is defined in clause 8. That definition provides that a listed entity could include a body, person, group of persons or organisation (or any combination of these) that is prescribed by the rules, but does not include a body corporate. So whether something is a ‘listed entity’ will depend on whether it is prescribed. A listed entity might be something that, if it were not listed, would form part of another non-corporate Commonwealth entity. For example, the Australian Office of Financial Management, would be part of the Department of the Treasury if it were not a listed entity.

113. Two entities are not Commonwealth entities for the purposes of the Bill and will be exempt from the Bill’s operation. The exemption of the High Court of Australia, which is explicitly referred to in the Constitution and covered by the *High Court of Australia Act 1979*, recognises the Court’s constitutional position. The Future Fund Board of Guardians, established by section 34 of the *Future Fund Act 2006*, is excluded as that Act imposes comprehensive duties on the board members and sanctions for breaches of those duties.

114. The statutory independence of other entities will also be recognised. Consistent with the existing approach, relevant exemptions from provisions of the Bill will be reflected in an entity’s enabling legislation. Existing exemptions to the FMA and CAC Acts will be

continued through consequential amendments that will be presented to the Parliament prior to 30 June 2014.

Clause 11: Types of Commonwealth entities

115. Commonwealth entities are divided into those that are bodies corporate and those that are not. A corporate Commonwealth entity has a separate legal personality and can act on its own behalf in exercising certain legal rights such as entering contracts and owning property. Non-corporate Commonwealth entities have no separate legal existence from the Commonwealth.

116. Some provisions of the Bill treat the two types of Commonwealth entities differently, particularly in relation to appropriations, banking, investments and the use of indemnities because of this different legal status.

Clause 12: Accountable authorities

117. An accountable authority for a Commonwealth entity is generally the person or group of persons that has responsibility for, and control over, the entity's operations. The Bill confers responsibilities and powers on these people in relation to financial management and reporting matters.

118. The term 'accountable authority' encompasses both Chief Executives under teh FMA Act and governing boodles under the CAC Act.

119. There can only be one accountable authority for each Commonwealth entity, unless the enabling legislation of the Commonwealth entity provides to the contrary and sets out how the PGPA Bill will apply in that case.

120. Importantly, there is scope for listed entities and bodies corporate to have either a single person or a group of persons as its accountable authority. This is more flexible than existing arrangements, where the determining factor is whether the entity is governed by the FMA Acts or the CAC Act.

121. In the case of the Departments of State and the parliamentary departments, the accountable authority will be the Secretary of the Department. For listed entities, the rules will prescribe the person who is, or group of persons who are, the accountable authority. Generally, the identification of the accountable authority of a corporate Commonwealth entity will be straightforward. However, in cases where it is unclear, the rules can prescribe the accountable authority.

Clause 13: Officials

122. Officials are the individuals who are in, or who form part of, a Commonwealth entity. This definition is intended to be expansive to capture officers, directors, members (such as members of a commission), employees and statutory office holders. This would also include members of a governing board. Subparagraph 13(3)(a)(i) clarifies that a member of an accountable authority is an official.

123. The definition is sufficiently broad to recognise certain unique arrangements across the Commonwealth. For example, members of the Payments Systems Board in the RBA will be officials for the purposes of the Bill, even though they will not be members of the accountable authority.

124. Certain individuals are excluded from the definition. Ministers are not officials for the purposes of the Bill. Nevertheless, some provisions in the Bill apply to Ministers where they

are performing certain functions, such as approving proposed expenditure of public resources (refer to clause 71).

125. Judges are excluded and will not be subject to the requirements in the Bill. It is also intended that the Bill will not apply to Registrars performing judicial functions . This will be facilitated through the rules in accordance with paragraphs 13(b) (iv). Similarly, it is intended that certain requirements, for example in relation to keeping Ministers informed on the activities of the entity, and preparing corporate plans will be moderated through the rules to ensure that they do not impinge on judicial and similar activities of courts and tribunals to maintain appropriate independence. Such modifications will also apply yo other statutory entities as appropriate.

126. Consultants and independent contractors are generally excluded from being officials and will not, therefore, be subject to the duties imposed on officials by the Bill.

127. The general exclusion of contractors from the definition will mean that accountable authorities will need to effectively manage contractual requirements. The rules provide a mechanism to include contractors nad officials as officials. This is intended to occur in limited circumstances, such as where these is evidence that an entity is not effectively managing contracts. This is consistent with the concept of earned automony described at clause 101.

128. The rules can both include and exclude, an individual (or a class of individuals) may from the definition

Part 2-2 Accountable authorities and officials

Division 1 - Guide to this Part

Clause 14: Guide to this Part

129. Clause 14 explains Part 2-2 of the Bill.

Division 2 - Accountable authorities

Subdivision A - General duties of accountable authorities

Clause 15: Duty to govern the Commonwealth entity

130. Clause 15 places requirements on an accountable authority about how the authority governs the entity. Under subclause 15(1), the accountable authority must:

- promote the proper use and management of public resources for which the accountable authority is responsible;
- promote the achievement of the purposes of the entity; and
- promote the financial sustainability of the entity.

131. Promoting the proper use and proper management of public resources is a fundamental duty of accountable authorities. Fulfilling this duty may require an accountable authority, among other things, to establish decision-making processes for the use of resources (for example a process of approvals for the expenditure of relevant money), to oversee line areas

responsible for projects and programs and to address the inappropriate use of resources by individuals in the entity.

132. For the purposes of paragraph 15(1)(b), the 'purposes' of a Commonwealth entity can be determined, for entities established by statute, by reference to the entity's statutory objectives and functions (refer to the definition of 'purpose' in clause 8). For a non-statutory Commonwealth entity, such as a Department of State, the accountable authority would be seeking to fulfil the objectives identified in the corporate plan, which would be expected to align with any Government statement of key priorities and objectives (refer to clause 35). The Administrative Arrangements Order would also be a relevant consideration.

133. Effective governance also necessarily involves taking medium and long-term considerations into account, which includes planning for the future and managing risk, obligations and opportunities. Consultations throughout the CFAR processes indicated that the existing financial framework offers few incentives for entities to demonstrate good financial management or take extra steps to achieve more efficient and effective use of public resources over the longer term. In addition, long-term planning does not easily reconcile with the annual budget process.

134. The use of the term 'financial sustainability' in paragraph 15(1)(c) seeks to recognise the importance of medium to longer term planning and budgeting and underpin broader reforms in the framework. A clear general duty will help clarify the expectation that accountable authorities manage their entities in a manner that promotes the financial sustainability of the entity. Other strategies in this Bill such as an emphasis on corporate planning, which is designated to enhance financial and strategic planning, will help to operationalise this duty to promote financial sustainability.

135. Subclause 15(2) requires an accountable authority, when making decisions for the purposes of subclause 15(1), to take into account the effect of those decisions on public resources generally. This requirement emphasises the theme of government acting as a coherent whole. The accountable authority for a Commonwealth entity must consider how its actions and policies will affect other entities individually and collectively. This could include partnering effectively and sharing better ways of working with other Commonwealth entities. This requirement is consistent with recent changes to the PS Act concerning the role of Secretaries in providing stewardship across the APS (s57(1)(d)).

136. For non-corporate Commonwealth entities, the duty in clause 15 is affected by clause 21, which provides that the accountable authority of a non-corporate Commonwealth entity must govern the entity in accordance with paragraph 15(1)(a) in a way that is not inconsistent with the policies of the Australian Government. This recognises obligations of Chief Executives of FMA agencies under section 44 for the FMA Act.

Clause 16: Duty to establish and maintain systems relating to risk and control

137. A more productive, innovative and efficient public sector will require a different approach to managing risks. Appropriate risk-taking and innovation are consistent with careful and proper use and management of public resources.

138. Clause 16 places an explicit responsibility on an accountable authority to establish and maintain an appropriate system of risk oversight and management. As a minimum, this would require entities to establish policies and business processes for identifying, measuring, managing and reporting material risks.

139. Complementing sound risk management practices is an effective system of internal control. Control systems should be commensurate with the risk involved. Among other

things, this would include ensuring that there are internal processes to deal with issues such as approving the use of public resources, recording the commitment of public resources and ensuring compliance with the finance law.

140. For indicative purposes note 1 to clause 16 provides an example of a measure directed at ensuring that officials of the entity comply with the finance law: the creation of employment arrangements that recognise the importance of complying with the finance law.

141. Note 2 to clause 16 recognises that, even where a consultant or independent contractor is not an official of an entity, an accountable authority has a duty to implement measures aimed at ensuring compliance with the finance law, such as through applying the finance law through the arrangement governing the relationship.

Clause 17: Duty to encourage cooperation with others

142. Effective collaboration between Commonwealth entities, with other levels of government, and with the private and not-for-profit sectors, is critical to the achievement of the government's priorities and national goals. A diversity of views and expertise is essential for developing policies and plans to deal with the complex challenges of government.

143. Clause 17 places a positive duty on an accountable authority to cooperate with others to achieve common objectives, where practicable. This duty recognises that Commonwealth entities do not operate in isolation. They often cannot achieve their objectives without working with other stakeholders.

144. Others should be interpreted broadly. It includes other Commonwealth entities, other jurisdictions, and other public and private bodies and organisations including in the not-for-profit sector.

145. The phrase 'achieve common objectives' establishes the scope of cooperation expected. The clause aims to encourage cooperation, where practicable it would be counter-productive to require cooperation where two or more organisations are working towards completely different goals. However, there are likely to be circumstances where one organisation places a greater priority on an objective than the other.

146. It is also clear that some entities' statutory functions may make cooperation difficult or even unlawful in particular circumstances. Examples include the RBA when setting monetary policy and the ABC and SBS when determining editorial content. Clearly the duty on an accountable authority must be read in light of specific limitations in enabling legislation. Limitations on cooperation should also be considered in light of requirements in legislation such as the *Privacy Act 1988* and in arrangements that involve commercial confidentiality.

Clause 18: Duty in relation to requirements imposed on others

147. Clause 18 places a positive duty on an accountable authority to ensure that the compliance, reporting and other obligations imposed on others in relation to the use or management of public resources must take into account the risks associated with that use or management. This clause aims to encourage accountable authorities to think carefully about unnecessary administrative requirements that their entity imposes in its individual relationships with other parties.

148. The scope of the term 'others' is the same as under clause 17.

149. Commonwealth entities provide significant resources to others through the procurement of goods and services and through the provision of grants. The duty places the onus on accountable authorities to assess the risks in relation to the resources and then place proportionate obligations on recipients. For example, a grantee with a proven record for delivery may not need to report as often.

150. Compliance and reporting requirements should focus on areas of high risk. It is also important that compliance requirements are appropriately placed. Shifting the compliance burden onto others, especially external service providers, may shift responsibilities away from where they are most effectively assessed and managed. Simplifying regulatory requirements can contribute to improved productivity.

151. Over time it is expected that fulfilling this duty will make Commonwealth entities more responsive when dealing with third parties and reduce the compliance burden for third parties. However, it needs to be recognised that some Commonwealth entities play a regulatory role, and this duty must be read subject to the enabling legislation of those entities.

Clause 19: Duty to keep responsible Minister and Finance Minister informed

152. Clause 19 generally reflects the effect of section 44A of the FMA Act and sections 15 and 16 of the CAC Act.

153. The clause places a series of continuous disclosure requirements on the accountable authority of a Commonwealth entity to:

- Keep the responsible Minister informed about the activities of the entity and its subsidiaries (if any exist) (paragraph 19(1)(a)). Activities would include the performance of statutory functions and powers and interactions with third parties. However, in relation to a court, it should be interpreted to be restricted to the administrative affairs of the court, and not to apply in relation to the judicial functions performed by judges or authorised registrars. The responsible Minister and Finance Minister are entitles to any reports, documents and information in relation to the activities of an entity or subsidiary (s19(1)(b)). The terms ‘reports’, ‘documents’ and ‘information’ are intended to be given wide interpretation. This reflects notions of responsible government as a Minister must be able to know what is occurring in his or her portfolio given he or she will be held accountable in Parliament (paragraph 19(1)(b)).
- In relation to providing reports, documents and information to the Finance Minister, this is intended to encompass the underlying information, data and assumptions that a Commonwealth entity uses to produce final reports, such as estimates numbers. The Finance Minister, as the Minister responsible for managing and reporting Commonwealth spending at a whole-of-government level, requires all relevant information to perform this role.
- Notify the responsible Minister of any significant decisions or significant issues that have affected the entity or its subsidiaries (paragraphs 19(1)(c) and (d)) and give the responsible Minister reasonable notice of a significant issue that may affect the entity or its subsidiaries (paragraph 19(1)(e)). Reasonable notice is a question of judgment on a case-by-case basis, given some issues may arise quickly.

154. For the purposes of paragraphs 19(1)(c) to (e), in deciding whether a decision or issue is significant, it is intended that the rules provide further context. As a guide, the interpretation of this term will not be dissimilar to that applied to the term ‘significant’ in the

context of sections 15 and 40 of the CAC Act. That is, whether a decision or issue is ‘significant’ will depend on:

- the materiality of the event – the importance of the event relative to the entity’s size and functions;
- the risks involved with the decision – is the decision or issue likely to be politically sensitive, would there be contingent liabilities that could affect the Commonwealth’s balance sheet, could the decision or issue have a financial impact in the future that could affect the entity’s financial sustainability; and
- the novelty of the event in the context of the Commonwealth entity’s previous experience, that is, does the Commonwealth entity have experience with the event.

155. Forming, or participating in forming of a business, including a company, trust, partnership, unincorporated joint venture, incorporated association or similar arrangement are all likely to be significant events, as would changing the nature of the entity’s involvement with such businesses, bodies or relationships or the acquisition or disposal of a business unit.

156. Subclause 19(2) confirms that for a court or tribunal, the activities, reports, documents or information required to be provided relates to administrative matters and does not relate information of a judicial nature.

157. Subclause 19(3) allows the relevant Minister to determine the timeframe for receiving reports requested under subclause 19(1). Where a timeframe is unlikely to be met, the accountable authority should seek an extension.

Subdivision B - Rules about general duties of accountable authorities

Clause 20: Rules about general duties of accountable authorities

158. This clause allows the rules to prescribe matters on how an accountable authority is to fulfil its duties under clauses 15 to 19. For example, in relation to paragraph 15(a) the rules may prescribe thresholds in relation to forward commitments. Consistent with earned autonomy, well governed entities may have capacity to commit a greater percentage of forward budget relative to another entity where there is scope to improve governance.

Subdivision C - Application of government policy

Clause 21: Non-corporate Commonwealth entities

159. Clause 21 operates in conjunction with paragraph 15(1)(a) to place a duty on the accountable authority of a non-corporate Commonwealth entity to promote the proper use and management of public resources in a way that is not inconsistent with the policies of the Australian Government. This clause is similar in effect to section 44 of the FMA Act, when read with paragraph 15(1)(a).

Clause 22: Corporate Commonwealth entities

160. Clause 22 would allow the Finance Minister to issue a legislative instrument in the form of a government policy order that would specify a policy of the Australian Government that is to apply to one or more corporate Commonwealth entities.

161. The proposed approach under clause 22 is similar to the approach taken under section 48A of the CAC Act. The instrument would specify the policy and the entities to which it applies, given that some policies may not apply universally.

162. However, the approach differs from that in the CAC Act in one aspect. Instead of consultation being conducted by each portfolio Minister with entities in their portfolio, the Minister responsible for the particular policy will conduct the necessary consultation with all relevant corporate entities.

163. The Finance Minister will need to be satisfied that the responsible Minister for a policy has consulted with each corporate Commonwealth entity to which a policy will apply before the Finance Minister makes the government policy order. This recognises the separate legal status that corporate Commonwealth entities have.

164. Some Commonwealth entities have specific exemptions from complying with government policies (these include the ABC, the Australian National University and SBS). These exemptions will continue under the Bill.

165. Subclause 22(3) places an obligation on an accountable authority to ensure that its Commonwealth entity and the entity's subsidiaries comply with a government policy order that applies to the entity. This clause is similar to section 28 of the CAC Act. An accountable authority would only have to ensure compliance to the extent that a government policy order applies to its Commonwealth entity. If, for example, an entity has been given an exemption from certain parts of a government policy order, the accountable authority would not need to ensure compliance with those parts.

166. An order made under clause 22 would not be subject to disallowance.

Subdivision D - Special provisions applying to accountable authorities of non-corporate Commonwealth entities

Clause 23: Power in relation to arrangements

167. Clause 23 makes it clear that the accountable authority of a Commonwealth entity that is not a body corporate can enter, vary and administer arrangements relating to the affairs of the entity on behalf of the Commonwealth. Non-corporate Commonwealth entities are part of the Commonwealth for legal purposes. The actions that they take are legally taken by the Commonwealth. This clause confers on the accountable authorities of these entities authority to enter into contracts and other arrangements on behalf of the Commonwealth. This provision in no way seeks to limit any other source of power to enter into contracts or other arrangements.

168. 'Arrangement' is given an expansive definition to cover contracts and other instruments between private parties that create rights and obligations. 'Administer' includes to make payments pursuant to the arrangement. Clause 23 replicates the effect of subsection 44(1A) of the FMA Act.

169. The notion that an accountable authority can enter into arrangements 'in relation to the affairs of the entity' is intended to be interpreted broadly.

170. For Commonwealth entities that are bodies corporate, their power to enter into contracts will normally be articulated in the law establishing the entity, or would otherwise be implied from the separate legal nature of the entity.

Clause 24: Power to establish advisory boards

171. Clause 24 provides that an accountable authority of a non-corporate Commonwealth entity may establish an advisory board to assist in governing the entity. Non-corporate Commonwealth entities ordinarily have a single person as their accountable authority. However, some of these entities, particularly Departments of State, can be amongst the most operationally and functionally diverse in the Commonwealth public sector.

172. An advisory board could provide a diverse range of skills and experience that accountable authorities could leverage. The board could include members from outside the entity and even the public sector to support the work of an accountable authority and provide strategic advice to the accountable authority.

173. An advisory board could be established in a temporary or permanent capacity and would not dilute the capacity of the accountable authority to direct the operations of the entity or the accountable authority's ultimate accountability for the performance of the entity.

Division 3 – Officials

Subdivision A - General duties of officials

174. Clauses 25 to 29 impose duties on officials.

175. These duties are modelled (with some modification) on the duties imposed on officers by the CAC Act, which themselves are modelled on the provisions in the Corporations Act.

176. A major difference between the Bill and the CAC and Corporations Acts is that there is no distinction in the Bill between duties imposed on 'officers' (that is, directors and senior managers) and those imposed on officials and employees. The duties in the Bill apply to all officials.

177. Under both the FMA Act and the CAC Act, duties are typically placed on leaders, such as chief executives and directors, or on senior management. Only a couple of the obligations are placed directly on employees under the CAC Act. Generally, employees are subject to the duties imposed on leaders through a trickle down of delegations and authorisations, through internal controls, or through employment frameworks. These links were not always apparent to people, particularly those unfamiliar with the financial framework. Placing duties directly on all officials aims to overcome this issue.

178. The duties in the Bill are similar to some of the requirements of the PS Act (APS Code of Conduct).

179. This Bill provides a complementary framework of duties for persons who are bound by the PS Act. The responsibilities on chief executives (including secretaries), officials and employees under the current financial management framework (detailed in the FMA and CAC Acts of 1997) and the APS Code of Conduct have existed side by side since the passage of the PS Act in 1999.

180. However, the PS Act only covers around half of the officials in the Commonwealth public sector that use and manage public resources. For example, the PS Act does not cover approximately 57,000 members of the Australian Defence Force and nearly 80 per cent of statutory authorities under the CAC Act. Providing duties on all officials who are in, or form part of, Commonwealth entities is a key guiding principle underpinning the Bill.

181. For persons not covered by the PS Act, there may be other complementary duties in other legislation, such as the Corporations Act or a statutory body's enabling legislation. For example officers and employees of Aboriginal Hostels Limited (AHL), are subject to duties under the Corporations Act and the PS Act.

182. As a general principle, officials in the public sector should not be held to a lower standard of account than employees of publically listed companies. If anything, they should be held to a higher standard, given that taxpayers do not have a choice as to whether they are to be 'shareholders' of public sector entities.

183. Basing duties on concepts understood across the public and other sectors will help the cause of government joining with other sectors and in recruiting directors for government bodies. It will facilitate more efficient and effective corporate governance in public sector entities if those directors can confidently draw on their knowledge and experience gained in the private sector and apply it to their government role. It can also create an overarching culture and environment of best practice corporate governance.

184. Failure to comply with duties in Division 3 Subdivision A in relation to the entity may give rise to sanctions under an official's employment arrangement (including where relevant the PS Act). Clause 32 seeks to provide clarity on this issue in relation to public servants. Where the circumstances of the breach are particularly egregious, it is possible that a breach of the criminal law may also have occurred, and in that case, prosecution under relevant provisions of the *Criminal Code Act 1995*, or other relevant criminal law may be possible and appropriate.

185. Issues dealt with in the CAC Act that have not been included specifically in the Bill may be covered under the rules, including section 22(2) (business judgment), reliance on information provided by others (section 27D), responsibility for actions of delegate (section 27E), rules around dealing with material personal interests (section 27F to 27K), access to information rights (section 27L) and indemnity insurance (section 27N).

Clause 25: Duty of care and diligence

186. Clause 25 places a duty of care and diligence on officials when exercising powers or discharging duties. This duty is similar to both the APS Code of Conduct in section 13(2) of the PS Act and subsection 23(1) of the CAC Act. However, there are differences:

- the APS Code of Conduct implies, rather than specifies, a particular standard of care and diligence. Clause 25, on the other hand, specifies that an official must have a standard of care equivalent to that of a reasonable person in the official's position; and
- the CAC Act duty only applies to directors and senior managers of Commonwealth authorities, whereas clause 25 applies to all officials.

187. In deciding whether an officer has discharged his or her duty, the decision-maker must consider the Commonwealth entity's specific circumstances, the official's position and the individual responsibilities of the official.

188. It is intended that rules made under subclause 25(2) will deal with the exercise of business judgment and reliance on advice when making decisions.

Clause 26: Duty to act in good faith and for proper purpose

189. Clause 26 places a duty on an official to exercise his or her powers and functions and discharge his or her duties in good faith and for a proper purpose. This clause is similar to subsection 24(1) of the CAC Act.

190. Generally, an official will act in good faith when he or she acts honestly.

191. A power granted to, or duty imposed on, an official of a Commonwealth entity (either by the Bill or other legislation) must be used or discharged for a proper purpose. In relation to 'proper purpose' any powers that are granted to officials are generally required to be used in connection with the functions of the entity. It will be a factual question whether power was exercised for a proper purpose but if there is no relationship between the use of power, and the functions and objectives of the entity, establishing that the power was used properly would be difficult.

192. In considering whether a power has been used for an improper purpose, it would be appropriate to consider the subjective reasons of the responsible officials for their actions, taking into account all the materials which genuinely throw light upon the state of mind of the officials.

Clause 27: Duty in relation to use of position

193. Clause 27 places a duty on an official not to use his or her position improperly to gain an advantage or cause a detriment. The clause is similar to subsection 24(1) of the CAC Act and the APS Code of Conduct at paragraph 13(10)(b) of the PS Act (which uses the words 'the employee's duties, status, power or authority', instead of 'position'). 'Position' is used broadly and could include a permanent or temporary work assignment, the powers or functions that have been delegated to an individual, or the general status that is attached to an official in a senior management role.

194. The term 'advantage' has a wide meaning. It includes both financial advantages and non-financial advantages, such as providing favourable treatment to a person during a tender or during a recruitment process.

195. The concept of causing detriment to an entity, the Commonwealth or another person recognises that an official may misuse their position both positively or negatively. Like advantage, 'detriment' should be given a wide interpretation.

196. The scope of paragraph 27(b) is very wide. Detriment can be to any person (compare the equivalent duty in the Corporations Act (paragraph 182(1)(b)), which only prohibits detriment to the corporation). This duty recognises that a public official has a broad ethical responsibility and must look beyond their entity to the Commonwealth, or to any other person.

Clause 28: Duty in relation to use of information

197. Clause 28 places a duty on an official not to use information obtained improperly as an official to gain an advantage or cause a detriment. The clause is similar to subsection 26(1) of the CAC Act and the APS Code of Conduct at paragraph 13(10)(a) of the PS Act (which uses the words 'inside information', instead of 'information'). 'Improper use' is intended to include the unauthorised disclosure of information. 'Information' is used broadly and is intended to include written and oral material , data and advice communicated to, or acquired by, the official.

198. The term ‘advantage’ has a wide meaning. It includes both financial advantages and non-financial advantages, such as providing extra information to a person during a tender or a recruitment process.

199. The concept of causing detriment to an entity, the Commonwealth or another person recognises that an official may misuse information in different ways. Like advantage, ‘detriment’ should be given a wide interpretation.

Clause 29: Duty to disclose interests

200. Clause 29 places a duty on an official to disclose material personal interests relating to the affairs of the entity. This recognises that the public has entrusted public resources to the entity.

201. It is fundamental to good governance that material personal interests are raised and dealt with effectively because failure to do so can undermine confidence and trust in the Commonwealth entity concerned and potentially the whole Commonwealth depending on the significance of the matter. Where public resources are involved, the public can rightfully expect that decisions about how they are being used are made in the public interest, and not for other reasons, such as personal gain.

202. The duty is not absolute—it only applies to material personal interest. What constitutes a material personal interest relating to the affairs of the entity will depend on the particular facts, but is not confined to financial or similar interests.

203. The term ‘relates to the affairs of the entity’ should be read broadly, for example, to include activities of the entity that involve collaboration by the entity with other entities inside or outside government.

204. Subclause 29(2) allows the rules to define a number of procedual aspects concerning disclosure:

- the circumstances where the disclosure of a conflict is not required. This might include, for example, where a material personal interest has been previously disclosed;
- the manner of disclosure, including:
  - to whom disclosure must be made, for example, a member of a governing body may have to disclose the conflict to the responsible Minister and other members;
  - how disclosure must be made, for example, verbally or in writing; and
  - when disclosure must be made, for example, as soon as practicable after a material personal interest arises; and
- the consequences of disclosing a material personal interest. This could include the official excusing himself or herself from discussion of the matter that is the subject of the material personal interest, or requiring a different official to make a decision on the matter that is the subject of the interest.

Subdivision B - Provisions relating to general duties of officials

Clause 30: Termination of appointment for contravening general duties of officials

205. Clause 30 provides that the person who appoints a member of the accountable authority (an ‘appointer’) of a corporate Commonwealth entity can terminate the appointment if the member has contravened one of the general duties on officials (that is, clauses 25 to 29).

Effectively, this provision applies to directors, or equivalent officials, who are members of the governing body of a corporate Commonwealth entity.

206. As the civil penalties regime that applies to directors under the CAC Act has not been continued under this Bill, the power to terminate an appointment becomes the key sanction against members of accountable authorities who breach their duties under the Bill (recognising that the Criminal Code or other criminal laws may be relevant where there has been some criminal act).

207. The duty only applies to a member of the governing body of a corporate Commonwealth entity because the situation of a member is different to that of an employee of such an entity who might be subject to administrative sanctions under employment law if they breach a duty under the Bill.

208. The enabling legislation of corporate Commonwealth entities can also include termination provisions. For example, the *Future Fund Act 2006* allows the Finance Minister and Treasurer to terminate the appointment of a member of the Future Fund Board of Guardians if the member contravenes duties similar to those under the Bill. However, these provisions are not uniform. Clause 30 introduces a consistent termination provision for all corporate Commonwealth entities, and a consistent scheme where employment law can be used to deal with people who breach their duties

209. For members of accountable authorities appointed under other legislation, the termination clause will be available in addition to termination clauses in such legislation.

210. Subclause 30(6) will ensure the termination provision in clause 30 will continue to be available, even if legislation enabling the employment arrangement purports to exclude the operation of other termination arrangements.

211. The power of termination is not to be used lightly. There must be clear evidence establishing a contravention before an appointer can dismiss a member.

212. Safeguards to avoid a misuse of this provision include:

- requiring the termination power to be exercised by the person in the same position as that which appointed the member to the accountable authority. It would be inappropriate to separate appointment and removal powers, particularly when someone outside the Commonwealth appoints a member, and could lead to perceptions of interference if the power of termination were to be conferred on a Minister in the absence of a power of appointment;
- requiring a written notice setting out the reasons for the termination, which would include the information the appointer has relied upon. This recognises the need to give due regard to procedural fairness when exercising this power (subclause 30(3));
- requiring the notice to be tabled in Parliament – any use of this provision is likely to be of special interest to the Parliament (subclause 30(4));
- the ability for the rules to prescribe requirements about the power of termination, which could include when and how the power can be exercised (paragraph 30(1)(d)); and
- decisions to terminate will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*, including in relation to whether the rules of natural justice had been observed in relation to the decision to terminate.

213. The rules can prescribe certain appointments that cannot be terminated under clause 30. This could include appointments where there are heightened sensitivities towards the independence of members or for *ex officio* members, such as a managing director, whose removal from an accountable authority would conflict with enabling legislation that puts the member on the board.

214. The provisions of this clause do not apply in the circumstances where there is no appointer, for example in respect to members of Land Councils established under the *Aboriginal Land Rights (Northern Territory) Act 1976*. Members of Land Councils are elected by their community.

Clause 31: Interaction between Subdivision A and other laws

215. Clause 31 clarifies the relationships between the general law, statutory duties in enabling legislation and the general duties under the Bill. The duties imposed by the Bill apply in addition to:

- the general law regarding the duties and liabilities placed on a person because of their position or employment. For example under the general law, employees have duties to serve their employer in good faith and not to disclose confidential information, which would overlap with the duties in clauses 26 and 28 respectively;
- the general law regarding conflicts of interest. For example, directors have an equitable duty to avoid conflicts of interest; and
- other statutory duties restricting material personal interests and holding an office or property where there are conflicts of duties or interests.

216. The inclusion of clause 31 reflects the fact that legislation around the management of organisations, and in particular, how organisations deal with financial matters, does not exist in a vacuum.

Subdivision C - Officials to whom the Public Service Act applies

Clause 32: Officials to whom the Public Service Act applies

217. Clause 32 and note 1 to the clause makes clear that a breach of the finance law can be the basis for action under the PS Act against an official employed under that Act.

218. Note 2 to clause 32 recognises that the employment arrangements of officials employed under arrangements other than those provided by the PS Act may include requirements to comply with the finance law, including with the duties in the Bill.

Part 2-3 - Planning, performance and accountability

Division 1 - Guide to this Part

Clause 33: Guide to this Part

219. Clause 33 explains Part 2-3 of the Bill.

Division 2 - Planning and budgeting

Clause 34: Key priorities and objectives of the Australian Government

220. A key part of a government's ability to explain its priorities to the Parliament and public is through the periodic release of statements and strategies. A clear and shared understanding of the Government's priorities and strategic direction is fundamental to a high performing public sector.

221. Clause 34 refers to the Australian Government's ability to and practice of periodically releasing such statements. It does not seek to prescribe the manner, timing or form of such statements, which are properly a decision of the Government of the day.

222. The Government already releases a number of such statements, both at Budget time and at other key times in the parliamentary cycle. Statements under this provision will not necessarily be a detailed exposition of all of the Government's intentions. However, the provision is intended to refer to statements which provide a level of detail adequate to provide an understanding of the Government's intentions for the short to medium term.

223. Statements under this provision would provide a basis on which accountable authorities of Commonwealth entities could align their strategic and operational plans broader government objectives where this is appropriate, and not inconsistent with an entity's mandate as defined in its enabling legislation.

224. From a hierarchical point of view, statements under this provision will be at the planning apex. They will help shift the focus of performance management, generally, from the entity level to a focus on whole-of-government priorities and objectives. Achievement of the relevant priorities and objectives will, where appropriate and not inconsistent with the entity's enabling legislation, then be supported by the corporate plan of each Commonwealth entity and, beneath that corporate plan, an operational plan about how the corporate plan will be implemented. This helps to provide a coherent framework for planning in the Commonwealth.

Clause 35: Corporate plan for Commonwealth entities

225. Clause 35 requires all Commonwealth entities to prepare a corporate plan in accordance with the rules and provide it to the responsible Minister and Finance Minister.

226. The corporate plan is the primary planning document of an entity, setting out the objectives and strategies the organisation is to pursue and the outcomes it hopes to achieve in the coming year. The plan should also explain how the resources of the entity will be used to achieve the relevant priorities of government. As a statement of planned performance, an entity's corporate plan is closely linked to its Portfolio Budget Statement (PBS) and annual report. The rules will ensure that information already published in other planning documents, such as the PBS, will not be duplicated.

227. Many Commonwealth entities already produce some form of corporate plan. For example, GBEs are currently required under sections 17 and 42 of the CAC Act to produce a corporate plan and statutory authorities may also have a requirement to produce a corporate plan in their enabling legislation. Some Commonwealth entities already undertake corporate planning as part of better practice.

228. The Bill introduces a uniform requirement on Commonwealth entities to prepare a corporate plan as a key requirement for improving performance across the Commonwealth.

It will promote a rigorous and transparent level of strategic resource management planning across the Commonwealth. The requirements of a corporate plan may differ depending on the type of Commonwealth entity. However, most plans are likely to include the following components:

- the objectives to be pursued by the entity;
- the strategies of the entity to achieve its purposes;
- forecast revenue and expenses;
- assumptions about the entity's business environment, including risks; and
- non-financial performance targets.

229. Subclause 35(3) requires a Commonwealth entity's corporate plan to explain how the entity's activities will contribute to achieving the key priorities and objectives set out in Australian Government statements issued under clause 34 (if a statement has been published). However, the extent to which a Commonwealth entity is able to undertake activities to achieve the key priorities and objectives of the Australian Government will depend on its own functions and powers.

230. The obligation in subclause 35(3) applies only where (and to the extent that) the purposes of a Commonwealth entity relate to the priorities and objectives set out in a statement made under clause 34. This means that there will be cases in which it is unnecessary for an entity's corporate plan to set out how its activities will contribute to achieving the stated priorities and objectives, because there will be no relationship between its purposes and those priorities and objectives.

231. Moreover, subclause 35(4) makes it clear that if a Commonwealth entity has enabling legislation, then the obligation for the corporate plan to comply with subclause 35(3) applies only to the extent that compliance is not inconsistent with compliance with its own legislation. Primacy is given to enabling legislation. In some instances it may be necessary to provide an exception in enabling legislation. For example, this requirement should not impinge the statutory independence of entities such as the RBA, SBS, ABC, ANU and the Federal Court of Australia.

232. The rules, to the extent that any requirements are prescribed, will allow for modification of the required content of corporate plans where they might contain sensitive information. For example, a Statement of Corporate Intent which is intended to be an integral part of the corporate plan for GBEs, will not be required to include commercially sensitive information.

Clause 36: Budget estimates for Commonwealth entities

233. Estimates are a critical part of planning at an entity and whole-of-government level. They form the fundamental building blocks of the Commonwealth Budget. The current requirements for the preparation of estimates vary between FMA and CAC Act entities. At present, FMA Regulation 22D requires estimates in a form required by the Finance Chief Executive (that is, the Secretary of the Department of Finance and Deregulation), whereas section 14 of the CAC Act requires estimates in a form required by the Finance Minister.

234. Subclause 36(1) places the responsibility to prepare an entity's budget estimates on the accountable authority of the Commonwealth entity. Budget estimates are required for each reporting period to support the Australian Government's Budget processes. The Finance Minister may also direct estimates to be updated for other periods throughout the year, for

example, to assist the preparation of the Mid-year Economic and Fiscal Outlook, and for key budget deliberations of the Expenditure Review Committee. These budget estimates are to be given to the Finance Secretary in accordance with any directions of the Secretary.

235. Subclauses 36(2) and (3) provide that the Finance Secretary can issue written directions about how budget estimates are to be prepared. Paragraph 36(2)(a) would require an accountable authority to ensure that its entity's estimates fairly present the entity's estimated financial activities. This will provide the Government and Parliament with appropriate comfort that estimates are accurate.

236. Paragraph 36(2)(c) allows the Finance Secretary to require accompanying information on an entity's estimates. This could include underlying assumptions and costing models used by an entity.

237. To assist readers, subclause 36(4) clarifies that the Finance Secretary's directions are not legislative instruments. These directions are of administrative character and not in the nature of legislative instruments, and therefore they do not fall within the definition of a legislative instrument for the purposes of section 5 of the *Legislative Instruments Act 2003* (LI Act).

238. Consistent with existing practice, the enabling legislation of relevant public financial corporation's (such as the RBA) and public non-financial corporations will be amended to continue their exemption from preparing budget estimates. The RBA does, however, provide earnings estimates to the Commonwealth for the Commonwealth's budgeting purposes.

239. The RB Act will be amended to provide that clause 36 does not apply to the RBA. This will achieve a similar substantive outcome to that which exists currently under subsection 7A(1) of the RB Act, which exempts the RBA from compliance with section 14 of the CAC Act (dealing with budget estimates).

Division 3 - Performance of Commonwealth entities

Clause 37: Records about performance of Commonwealth entities

240. Clause 37 requires an accountable authority to keep records that properly record the Commonwealth entity's performance. The model being implemented by clause 37 seeks to mirror broadly the approach for producing financial statements.

241. The focus on ensuring that appropriately managed records are seen as important within governance, resourcing and information management arrangements for entities. As with the requirements for accounts and records to support financial statements, records under this provision will need to be maintained in a manner so they can be proven to be genuine, are accurate and can be trusted, are complete and unaltered and are findable and reasonable. The rules will provide standards for management of records, including to draw from accounting standards as appropriate.

242. This recognises the inherent value of quality performance information in strategic decision making and resource allocation.

Clause 38: Measuring and assessing performance of Commonwealth entities

243. Clause 38 requires an accountable authority to measure and assess how well its Commonwealth entity has performed in achieving its objectives and purposes. This is a key component in the resource management framework being established by this Bill, which

begins with strengthening strategic planning and link this to the measurement, assessment and reporting of performance. Requirements for measuring performance will be detailed Teh focus will be on exchanging the quality and integration of performance information required by Government and the Parliament to assess actual against planned results. The rules may also provide the capacity to mandate particular requirements that are currently voluntary, consistent with the concept of earned autonomy. For example, the Expenditure Review Principles could be mandated for entities that exhibit continuous shortcomings in the quality of evaluations.

244. The measurement and assessment would have to be of a sufficient standard to enable the accountable authority to produce the statement required under clause 39.

Clause 39: Annual performance statements for Commonwealth entities

245. Clause 39 requires the accountable authority to prepare statements on the entity's performance in accordance with the rules, and provide these to the responsible Minister, and the Finance Minister.

246. Standards and rules for reporting under the FMA Act and the CAC Act currently focus on financial reporting. However, public value is not only concerned with financial performance. The requirement for performance statements aims to balance the requirement to prepare financial and non-financial information and focus attention on improving the quality and reliability of performance information in the Commonwealth public sector.

247. It is intended that performance statements will be part of an integrated annual report that brings together material information about an entity's strategy, governance and financial and non-financial performance. A copy of the statements will need to be included in the annual report of the entity when it is tabled in Parliament.

Clause 40: Audit of annual performance statements for Commonwealth entities

248. Clause 40 allows the responsible Minister or the Finance Minister to request the Auditor-General to examine and report on an entity's annual performance statements. The Auditor-General could consider whether the statements meet the rules, and whether the metrics used in assessing performance are relevant. This provision complements the Auditor-General's existing mandate to undertake performance audits and to audit the performance indicators of entities.

249. Importantly, legislating for performance is only a first step in cultural change. Systemic changes will be required to fully embed performance management across Commonwealth entities.

250. Subclause 40(3) ensures accountability and transparency to Parliament by requiring that a report by the Auditor-General on an entity's annual performance statement is tabled in Parliament as soon as practicable after receipt.

Division 4 - Financial reporting and auditing for Commonwealth entities

Clause 41: Accounts and records for Commonwealth entities

251. Clause 41 is a combination of the requirements contained in section 48 of the FMA Act and section 20 of the CAC Act. Requiring Commonwealth entities to have accurate and up-to-date accounts and records of their financial transactions is a basic accountability

requirement that underpins the performance of all other financial reporting duties in the framework.

252. Subclause 41(1) is derived from subsection 20(1) of the CAC Act. It places a duty on the accountable authority of a Commonwealth entity to ensure that there are proper accounts and records of the entity's transactions and financial position. The word 'kept' refers to both preparing and retaining these financial records.

253. Subclause 41(2) requires the form of these records to conform with requirements in the rules and facilitates the preparation of annual financial statements and audit reports.

254. Subclause 41(3) entitles the Finance Minister to access any accounts and records kept in accordance with this clause. This ensures there is appropriate accountability to the Government for financial information. This also assists the Finance Minister fulfil his or her responsibilities for whole-of-government financial reporting.

Clause 42: Annual financial statements for Commonwealth entities

255. Clause 42 derives from section 49 of the FMA Act and clause 2 of Schedule 1 to the CAC Act. Preparing annual financial statements in accordance with consistent rules makes it easier for Ministers and Parliament to compare the financial position and performance of entities across the Commonwealth. It also supports the consolidation of individual entity statements into whole-of-government annual financial statements.

256. Subclause 42(2) requires the accountable authority of a Commonwealth entity to prepare financial statements for a Commonwealth entity in accordance with accounting standards and any rules issued by the Finance Minister. In this Bill, accounting standards means that standards issued by the Australian Accounting Standards Board, as in force or applicable from time to time. This must be done in such a way as to present fairly the entity's financial position, financial performance and cash flows.

257. The introduction of accounting standards as the standards for financial reporting in this Bill strengthens accountability as these standards are determined through independent mechanisms. The Auditor-General has a role in supporting independent accounting standards.

258. The note to subclause 42(2) indicates that an accountable authority must add information to make the financial statements present fairly the entity's financial position, financial performance and cash flows if they do not already do so, having been prepared in accordance with paragraph 42(2)(a).

Clause 43: Audit of annual financial statements for Commonwealth entities

259. Clause 43 generally replicates the effect of subsections 57(1) to (3) and 57(7) of the FMA Act and clause 3 of Schedule 1 to the CAC Act regarding the Auditor-General's audit of the annual financial statements of Commonwealth authorities.

260. A key difference between clause 43 and the previous FMA Act and CAC Act provisions is that under subclause 43(2), the Auditor-General is required to state whether, in the Auditor-General's opinion, the financial statements comply with the accounting standards and any other requirements in the rules.

Clause 44: Audit of subsidiary's financial statements

261. Clause 44 generally replicates the effect of section 12 of the CAC Act. The CAC Act provision has been modified to strengthen the Auditor-General's mandate. Under subclause

44(3) a subsidiary's financial statements must be audited by the Auditor-General unless the subsidiary is incorporated or formed in a place outside Australia and either:

- under the law applying to the subsidiary in that place, the Auditor-General cannot be appointed as auditor of the subsidiary; or
- in the Auditor-General's opinion, it is impracticable or unreasonable for the Auditor-General to audit, or to be required to audit, the statements.

262. Under section 12 of the CAC Act, the directors of a parent company were required to do whatever was necessary to ensure that the Auditor-General audited the financial statements of a subsidiary. However the financial statements of a subsidiary did not have to be audited by the Auditor-General if one of the situations under subclause 44(3) applied. This could potentially have led to some confusion about whether it was up to the directors of a Commonwealth authority to decide whether one of the relevant exemptions applied. The new provision clarifies that it is for the Auditor-General to decide whether he or she will not audit a subsidiary's financial statements.

263. Subclause 44(1) clarifies when this provision applies and reflects subsection 12(5) of the CAC Act.

Division 5 - Audit committee for Commonwealth entities

Clause 45: Audit committee for Commonwealth entities

264. An effective audit committee contributes to strong audit and governance arrangements. The audit committee has become an integral part of risk and compliance management for all Commonwealth entities.

265. Clause 45, if enacted, would require an accountable authority to ensure that its Commonwealth entity has an audit committee that is constituted in accordance with the rules. This clause replicates the existing requirements in section 46 of the FMA Act and section 32 of the CAC Act.

266. The requirements around how an audit committee is to be constituted will be set out in the rules as is the practice under the FMA and CAC Acts. The expectation is that the rules will specify similar requirements to those in the FMA Regulations and CAC Regulations. An emphasis will be placed on ensuring that an audit committee has sufficient external expertise to provide independent advice to the accountable authority.

267. Nothing in the Bill or rules would prohibit one audit committee servicing two or more Commonwealth entities. There may be advantages for certain entities sharing an audit committee, particularly small entities. Establishing a joint audit committee would be at the discretion of the relevant accountable authorities.

Division 6 - Annual report for Commonwealth entities

Clause 46: Annual report for Commonwealth entities

268. The framework being established by the Bill requires a close link between annual reports and corporate plans to allow a comparison of expected and actual performance.

269. Current annual reporting requirements are distributed across various pieces of legislation and policy. Most FMA Act entities report in accordance with the requirements set out under the PS Act. For Commonwealth authorities governed by the CAC Act, the annual report requirements are contained in that Act.

270. Clause 46 provides an opportunity to develop integrated and consistent set of annual report requirements for all Commonwealth entities. Placing the requirements in the Bill would ensure that obligations relating to planning for resource use and reporting on how effectively those resources have been applied are contained in the same legislation.

271. Clause 46 would also standardise the reporting deadline for all Commonwealth entities as the end of the fourth month after the end of a reporting period (or end of a further period under the *Acts Interpretation Act 1901* (AI Act)). This makes 31 October the deadline for entities whose reporting period ends on 30 June. This is consistent with existing deadlines for FMA Act agencies [2] and a slight extension on the existing deadline applying to existing CAC Act authorities.[3]

272. The role of the JCPAA under the PS Act for approving annual report requirements would be preserved by subclause 46(4).

Division 7 - Whole-of-government financial reporting

Clause 47: Monthly financial reports

273. Clause 47 replicates section 54 of the FMA Act. It requires the Finance Minister to publish monthly financial reports in a form consistent with the Budget estimates, as soon as practicable after the end of each month.

274. Monthly reporting is an integral part of the budgeting and reporting cycle as it provides the Government and the publicwith information on how the budget is tracking against the Budget estimates and against spending in the previous financial year. Reports can profile the Government's position on a range of measures including the underlying cash balance, fiscal balance and financial outcomes against estimated revenue and expenses.

275. The requirement to release monthly financial reports as soon as practicable after the end of each month is consistent with the Government's commitment to the International Monetary Fund (IMF) Special Data Dissemination Standards. Under these standards the timeframe for releasing the Monthly Financial Reports is generally by the end of the following month with the exception of the June and July Monthly Financial Reports, for which the IMF has given Australia special dispensation to release before 31 October each year.

Clause 48: Annual consolidated financial statements

276. Clause 48 generally replicates section 55 of the FMA Act. It requires the Finance Minister to prepare a set of annual consolidated financial statements and provide them to the Auditor-General as soon as practicable.

277. The consolidated financial statements present the financial position, financial performance and cash flows of the Australian Government for a particular financial year and

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[2] Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Agencies*, 2012, p. 2.

[3] Under section 9 of the CAC Act, the deadline is the 15th day of the fourth month after the end of the financial year.

complement the Final Budget Outcome compiled under the *Charter of Budget Honesty Act 1998*.

278. Consistent with current practice, the annual consolidated financial statements would comprise the whole-of-government financial statements and the general government sector financial statements required by AASB 1049 *Whole of Government and General Government Sector Financial Reporting*.

279. Monthly reports and annual financial statements are essential accountability mechanisms that provide an overview of the Australian Government's financial position and performance to the Parliament and other stakeholders (including the public). In addition to allowing appropriate scrutiny of the Commonwealth, up-to-date financial reports assist the Government in its financial planning.

280. Clause 48 differs from section 55 of the FMA Act in an important respect. It specifically requires the consolidated financial statements to be prepared in accordance with the accounting standards, which, as detailed earlier, are independently set. This brings an additional level of external accountability to the statements. Under the FMA Act, the FMA Regulations determined the standards for preparing the consolidated statements.

Clause 49: Audit of annual consolidated financial statements

281. Clause 49 replicates the effect of section 56 of the FMA Act. The clause requires the Auditor-General to audit the whole-of-government annual financial statements. Once the audit is complete the Auditor-General must give a report to the Finance Minister who must table the report in the Parliament along with the financial statements.

Part 2-4 - Use and management of public resources

Division 1 - Guide to this Part

Clause 50: Guide to this Part

282. Clause 50 explains Part 2-4 of the Bill.

Division 2 - Funding and expenditure

Clause 51: Making amounts appropriated available to Commonwealth entities

283. This clause provides the Finance Minister with certain powers in respect of the management of the Commonwealth's cash holdings, effectively as the Chief Financial Officer of the Commonwealth, on behalf of the Executive Government in its stewardship for the Parliament and the people.

284. This provision is consistent with the authority of the Finance Minister under the FMA Act and the enabling legislation of many corporate Commonwealth entities including CAC Act bodies.[4] Subclause 51(1) provides the Finance Minister with a discretionary power to make appropriated amounts available in such amounts and at such times as the Finance Minister considers appropriate.

[4] For example, section 67 of the ABC Act.

285. Under the FMA Act, the Finance Minister had the capacity to control the expenditure of appropriated money by FMA Act agencies, because the Minister controlled the issue of drawing rights, without which no person could lawfully make a payment of public money (see FMA Act sections 26 and 27). Continuing to provide the Finance Minister with the power to insert a step between the appropriation of money by Parliament, and the provision of cash amounts under that appropriation to Commonwealth entities for expenditure, retain an appropriate a level of control over expenditure by entities. It also allows the Finance Minister to manage the Commonwealth's cash position, for example, by establishing a schedule of releases of cash to Commonwealth entities.

286. Subclause 51(2) provides a restriction on the Finance Minister's discretion under subclause 51(1). Paragraph 51(2)(a) provides that the Finance Minister must make an appropriated amount available if a law requires the payment of the amount. This recognises that some payments of money are legally required to be made (such as for social security payments). In these cases, the appropriated amount must be released when required to satisfy the full payment.

287. Paragraph 51(2)(a) is constrained by paragraph 51(2)(b) which provides that the Finance Minister must be satisfied that an appropriation is available which will provide authority for the expenditure. This is a constitutional requirement as amounts cannot be expended from the CRF without, at least, an appropriation to support the expenditure.

288. This clause applies to Commonwealth entities that administer an appropriation of any type (annual appropriation, special appropriation and special account).

289. The similar provisions in enabling legislation of many corporate Commonwealth bodies will be proposed for removal through consequential amendments to complement the Bill. Including a general provision in the Bill improves the consistency of appropriation arrangements across the Commonwealth and simplifies the requirements.

Clause 52: Commitment and expenditure of relevant money

290. Clause 52 allows for rules to be created for the commitment and expenditure of relevant money by the Commonwealth or a Commonwealth entity generally. In particular, the rules may detail arrangements to ensure that expenditure of relevant money from the CRF does not occur without a valid appropriation.

Division 3 - Banking

Clause 53: Banking by the Commonwealth

291. Clause 53 provides the Finance Minister with powers relating to Commonwealth banking. By implication no other person may exercise these powers on behalf of the Commonwealth, unless expressly authorised by legislation. This is consistent with arrangements under the FMA Act.

292. Subclause 53(1) gives the Finance Minister the power to enter into agreements with banks relating to the Commonwealth's banking business, which replicates the effect of subsection 8(1) of the FMA Act. In accordance with the continuing devolved financial framework, it is intended that this power will be delegated to the accountable authorities of non-corporate Commonwealth entities. Agreements will not be able to provide for overdraft drawings in relation to a bank account unless the agreement provides for the drawing to be repaid within 30 days.

293. Subclause 53(3) requires the Finance Minister to open and maintain a central bank account with the RBA. This provision reflects long-term administrative practice.

294. Rather than include prescriptive requirements about banking in the primary legislation, it is intended that the rules will include specific requirements relating to banking by the Commonwealth.

Clause 54: Banking by corporate Commonwealth entities

295. Clause 54 would allow the rules to set banking requirements for corporate Commonwealth entities. This will provide more flexibility than under subsection 18(2) of the CAC Act, which simply states a Commonwealth authority must pay all money received into a bank account.

Clause 55: Banking of relevant money by Ministers and officials

296. Clause 55 generally replicates the effect of section 10 of the FMA Act. It is also designed to cover subsection 18(2) of the CAC Act. The clause requires Ministers or officials of all Commonwealth entities as well as Ministers to bank relevant money promptly, and in accordance with any requirements prescribed by the rules (if any).

297. Banking relevant money is necessary to ensure that there is efficient cash management and an effective audit trail when money has been received. It is expected that the rules will not be extensive in order to ensure that entities have flexibility in banking arrangements.

Division 4 - Borrowing

Clause 56: Borrowing by the Commonwealth

298. Clause 56 covers the same matters as sections 37 and 38 of the FMA Act. Subclause 56(1) places a clear limit on when the Commonwealth can borrow - it can only do so if expressly authorised by an Act. There are several Acts that authorise Commonwealth borrowing, including the *Commonwealth Inscribed Stock Act 1911*.

299. Subclause 56(2) authorises the Finance Minister to borrow money by agreement entered into in accordance with any requirements set by the rules. Such an agreement must require the amount borrowed to be repaid by the Commonwealth within 90 days.
This section replaces subsections 38(1) and (2) of the FMA Act. It is intended to authorise the Finance Minister to enter into agreements in relation to borrowing for the purposes of short term advances of money to the Commonwealth, and in relation to the provision of credit to the Commonwealth, for example, through agreements for the issuing of credit cards.

300. Consistent with the requirements under the FMA Act, the rules will specify particular types of permitted borrowing, and the Finance Minister will be able to delegate powers in relation to particular types of permitted borrowing. The borrowing can be from any person, although the rules may prescribe limits on the type of person (for example, a bank) from whom particular types of borrowing may be made. In each case, the agreement concerned must provide that amounts borrowed must be repaid within 90 days.

Clause 57: Borrowing by corporate Commonwealth entities

301. Clause 57 clarifies the capacity of corporate Commonwealth entities to borrow, which was unclear in the past. Any borrowing by a corporate Commonwealth entity must be

expressly authorised by an Act (see for example, section 61 of the *Australian Postal Corporation Act 1989*), or authorised by the Finance Minister, or authorised by the rules.

302. Giving the Finance Minister the power to authorise borrowings will allow the Finance Minister to exercise judgement about borrowing proposals by corporate Commonwealth entities. The rules will also be able to prescribe circumstances in which corporate Commonwealth entities may borrow where circumstances are not spelt out on a corporate entity's enabling legislation. Borrowing entered into in such circumstances will be authorised by the rules in compliance with subclause 57(c). It is expected that the rules will provide that all corporate Commonwealth entities are able to borrow via credit cards and credit vouchers. Under the CAC Act, Commonwealth authorities were given this power in 2008.

303. This provision does not affect the Finance Minister's powers under other legislation to approve borrowing by certain statutory authorities (see for example, section 70B of the ABC Act).

Division 5 - Investment

Clause 58: Investment by the Commonwealth

304. Clause 58 generally replicates section 39 of the FMA Act. This clause authorises the Finance Minister and the Treasurer to invest relevant money on behalf of the Commonwealth. By implication, no other person is permitted to invest on behalf of the Commonwealth, unless expressly authorised by legislation. The types of instruments that can be used for investments are generally limited, reflecting that the Commonwealth has a higher duty to look after the money entrusted to it by the people of Australia.

305. In relation to subparagraph 58(8)(a)(i), a deposit with a bank is money lodged with a bank at call or at term, such as an ordinary savings account or a term deposit; and a certificate of deposit is a negotiable bearer debt security, issued at a discount to the face value. The following investments do not constitute 'a deposit with a bank'[5]:

- medium term notes and fixed or floating rate notes;
- money market trusts/cash management trusts; or
- bills of exchange.

306. Paragraph 58(8)(b) provides that the Treasurer can invest in debt instruments guaranteed by foreign governments, debt instruments issued or guaranteed by financial institutions whose members consist of foreign countries, and debt instruments denominated in Australian currency. The Finance Minister cannot invest in such instruments.

307. In the past, the Finance Minister has only delegated investment powers outside of the Department of Finance and Deregulation where there has been a clear business need to do so (for example, in relation to moneys that stand to the credit of certain special accounts).

308. Subclause 58(5) is slightly different to subsection 39(5) of the FMA Act. The words 'Upon realisation of an investment' have been removed from the start of the subclause. This ensures that any proceeds of the investment of an amount debited from a special account must be credited to the special account at the time they are received, not only on realisation of the investment.

[5] However, these investments may be authorised separately by the rules.

Clause 59: Investment by corporate Commonwealth entities

309. Clause 59 replicates the effect of subsections 18(3) and (4) and section 19 of the CAC Act. This clause gives corporate Commonwealth entities the power to invest in certain instruments. The money that can be invested in accordance with clause 59 is money 'not immediately required for the purposes of the entity'. This phrase is equivalent to the concept of surplus money in the CAC Act.

310. The types of authorised investments are effectively those that the Finance Minister and Treasurer can invest in under paragraph 59(8)(a). Subparagraph 58(1)(b)(i) makes clear (in contrast to subsection 18(3) of the CAC Act) that deposits with a bank will include a deposit evidenced by a certificate of deposit. Other investments may be authorised by the Finance Minister, as has occurred under the CAC Act. Subparagraph 59(1)(b)(iv) provides a direct power in relation to GBEs for investment, subject to a requirement that the money is invested in a manner consistent with sound commercial practice, which is the same arrangement as under paragraph 19(3)(d) of the CAC Act.

311. Subclauses 59(2) and (3) are similar to subsection 18(4) of the CAC Act. These provisions generally exclude contracts for investments under subclause 59(1) from the operation of spending limitations that apply to various corporate Commonwealth entities. Spending limits in enabling legislation usually stop a corporate Commonwealth entity from entering a contract above a certain threshold (for example, $1 million) without the approval of someone else, like a Minister. It would create practical difficulties for corporate Commonwealth entities, including GBEs, if they were required to seek approval every time they wish to enter into a contract for the purposes of clause 59(1), given that such contracts can be short-term and frequent.

312. In managing the cash rate and foreign currency reserve, the RBA engages in a range of activities, including trading in securities and other instruments to achieve its identified policy objectives. Nothing in the Bill should constrain the RBA's activities or decision-making in these areas. Accordingly, the RB Act will be amended to achieve a similar outcome to that which currently exists under subsection 7A(1) of the RB Act, which exempts the RBA from section 18 of the CAC Act.

313. Where current enabling legislation exempts particular corporate entities from the investment restrictions in place under the CAC Act, as in the case of section 195G of the *Aboriginal and Torres Strait Islander Act 2005* in relation to the Indigenous Land Council, these exemptions will need to be remade through consequential amendments; if the Bill is enacted.

Division 6 - Indemnities, guarantees, warranties and insurance

Clause 60: Indemnities, guarantees or warranties by the Commonwealth

314. Clause 60 authorises the Finance Minister to provide an indemnity, guarantee or warranty on behalf of the Commonwealth in accordance with the rules (if any requirements are prescribed in the rules). By implication, no other person may grant an indemnity, guarantee or warranty on behalf of the Commonwealth, unless expressly authorised by legislation. This clause clarifies the role of the Finance Minister in relation to contingent liabilities, which up until now has been mainly based on policy and practice (although, FMA Regulation 11 does have rules around entering into loan guarantees).

315. It is important and timely to recognise the Finance Minister's role in relation to indemnities, guarantees and warranties, given that they can place significant obligations on the Commonwealth should they crystallise. Indemnities, guarantees and warranties have a legitimate role to play in facilitating government business. However the Commonwealth's long standing policy is that a contingent liability should only be accepted if the expected benefits, financial or otherwise, are sufficient to outweigh the level and cost of the risk which the Commonwealth would be assuming.

Clause 61: Indemnities, guarantees or warranties by corporate Commonwealth entities

316. Clause 61 enables the rules to prescribe requirements about the granting of indemnities or guarantees by corporate Commonwealth entities. This is a new clause that does not have an equivalent in the CAC Act. It will provide a mechanism for the Commonwealth to ensure that contingent liabilities are being effectively managed across the Commonwealth entities, although the rules applying to corporate Commonwealth entities are expected to be limited and to apply in certain circumstances only. However, it is intended that rules made under this clause will replicate section 27M of the CAC Act.

Clause 62: Insurance obtained by corporate Commonwealth entities

317. Clause 62 will permit the rules to deal with the obtaining of insurance by corporate Commonwealth entities in relation to insuring officers against liabilities incurred by the officer. The rules made under this clause will, as a minimum replicate section 27N of the CAC Act.

Division 7 - Waivers, set-offs and act of grace payments

Clause 63: Waiver of amounts owing to the Commonwealth

318. Clause 63 would give the Finance Minister the power to waive or otherwise deal with amounts owed to the Commonwealth. This clause generally replicates section 34 of the FMA Act. By implication, no other person may exercise these powers on behalf of the Commonwealth, unless expressly authorised to do so by legislation.

319. A waiver extinguishes an amount owed to the Commonwealth. That is, the amount owing is forgiven so the Commonwealth cannot pursue the amount owing at a later date should the debtors financial circumstances improve.

320. The waiver power is given exclusively to the Finance Minister because of the nature of the power, that is, because using the power extinguishes any legal right the Commonwealth may have had to the debt. It is possible that the Finance Minister will make rules under clause 103(c) dealing with the recovery or write off of amounts owing to the Commonwealth (meaning that for example, setting out the circumstances in which it may be appropriate to cease actions to recover such debts). Write off differs from waiver as the debt continues to exist even though it has been written off.

Clause 64: Setting off amounts owed to, and by, the Commonwealth

321. Clause 64 replicates the effect of section 35 of the FMA Act to permit the Finance Minister, on behalf of the Commonwealth, to exercise a discretion to 'set off' amounts owed to the Commonwealth with amounts payable to the Commonwealth. By implication, no other

person may exercise these powers on behalf of the Commonwealth, unless expressly authorised to do so by legislation.

322. Subclause 64(1) applies in circumstances where a person (including a company or other entity) owes an amount to the Commonwealth, and the Commonwealth also owes an amount to that same person. In these circumstances the Finance Minister may reduce the amount the Commonwealth owes to the person (possibly to nil), by applying the amount the person owes to the Commonwealth against the amount owed by the Commonwealth (that is, by 'setting-off' the two amounts against each other).

323. Subclause 64(2) provides that the following payments are not able to be set-off in this manner:

- an amount cannot be set-off against a payment by the Commonwealth if a law of the Commonwealth provides that the payment is inalienable or 'absolutely inalienable' (see, for example, section 1061EK of the *Social Security Act 1991* and section 66 of the *Paid Parental Leave Act 2010*, which respectively provide that an advance social security payment and a paid parental leave instalment are 'absolutely inalienable'); or
- an amount cannot be set-off against a payment where a law of the Commonwealth provides that the payment is inalienable or right to the payment cannot be assigned by the recipient to another person (see, for example, section 126B of the *First Home Saver Accounts Act 2008*, which states that payments from a First Home Saver Account cannot be assigned).

324. A legislative set-off mechanism that applies at a whole-of-government level avoids the need for the Commonwealth to attempt to rely on common law rules relating to set-off in particular cases.

Clause 65: Act of grace payments by the Commonwealth

325. Clause 65 gives the Finance Minister the power to make act of grace payments in accordance with the rules. Commonwealth financial legislation has included a mechanism to provide act of grace payments since 1979. Act of grace payments are one of a number of discretionary payment mechanisms the Commonwealth uses.

326. Clause 65 is a simplified version of section 33 of the FMA Act. Clause 65 provides the Finance Minister with discretion to authorise one or more payments and, although it is not expressly stated in clause 65, will continue to enable the Finance Minister to authorise periodical payments to a person (which is currently expressly permitted under paragraph 33(1)(b) of the FMA Act).

327. Subclause 65(2) requires that an authorisation under subclause (1) must be in writing and comply with any requirement in the rules. The requirement for teh authorisation to be 'in writing' is new, and has been introduced to improve accountability.

Division 8 - Special provisions applying to Ministers and certain officials Subdivision A - Gifts of relevant property

Clause 66: Gifts of relevant property

328. Clause 66 generally replicates the effect of section 43 of the FMA Act regarding gifts. The clause sets limitations on when gifts can be given by officials of non-corporate Commonwealth entities or Ministers.

329. It would ordinarily be difficult to reconcile an official fulfilling his or her duties in clauses 25 to 29 with the giving of gifts. Situations where it may be appropriate to give a gift include in the context of protocol requirements or where the Commonwealth is disposing of surplus relevant property. Therefore, limitations on when gifts can be made are appropriate.

330. This clause does not apply to officials of corporate Commonwealth entities. Nevertheless, these officials must still consider whether they will be fulfilling their other duties if a gift of relevant property is made.

Subdivision B - Liability of Ministers and certain officials for unauthorised gifts and loss

Clause 67: Liability for unauthorised gifts of relevant property

331. Where an official of a non-corporate Commonwealth entity or a Minister provides a gift of relevant property that is not in accordance with the requirements of clause 66 and any rules, clause 67 requires that they are liable to pay an amount to the Commonwealth that is the equivalent of the value of the relevant property.

332. Where a gift is given in contravention of clause 66, the official or Minister is liable for the value of the relevant property. ‘Value’ has its ordinary meaning.

Clause 68: Liability for loss - custody

333. Clause 68 is an amalgam of sections 15 (liability for loss of relevant money) and 42 (liability for loss of relevant property) of the FMA Act. The clause effectively makes an official of a non-corporate Commonwealth entity or a Minister liable where the official or Minister loses money or public resources that was in their custody at the time of the loss.

334. The term ‘loss’ includes a deficiency of relevant money or a loss of value to property caused by damage or destruction. An official or Minister has a defence if he or she takes reasonable steps to avoid the loss. ‘Reasonable steps’ will depend on the circumstances of the individual situation, but relevant considerations could include the amount of money or value of property, the cost of avoiding the loss and the cost-effectiveness of any recovery action.

335. Subclause 68(3) defines that a person (including an official or a Minister) has nominal custody of relevant money if the money is held by way of cash, such as an advance in the nature of petty cash or change float or money received which has not yet been banked.

336. Subclause 68(4) states that a person has nominal custody of relevant property where they have taken delivery of the property. This is qualified by the requirement that the person taking delivery of the property acknowledges in writing that they will take strict care of the property.

Clause 69: Liability for loss - misconduct

337. Clause 69 makes an official of a non-corporate Commonwealth entity or a Minister personally liable for the loss of relevant money or property where the official or Minister loses public resources, and the official or Minister contributed to the loss through misconduct, or by a deliberate or serious disregard of reasonable standards of care.

338. Subclause 69(2) provides that the Minister or official is liable to pay for the loss to the extent that their misconduct or disregard for reasonable standards of care caused or contributed to the loss.

Clause 70: Provisions relating to liability of Ministers and officials

339. Clause 70 recognises that debts arising for loss of relevant money or property are recoverable through an action in a court of competent jurisdiction. This replicates subsection 42(5) of the FMA Act. Subclause 70(2) confirms that an official or Minister will be required to make payments under either subclause 68(1) or 69(1) – they will not be required to pay for the same loss twice. Subclause 70(3) confirms that a liability for loss under subclause 68(1), 69(1) continues despite a person ceasing to be an official or a Minister.

Division 9 - Special provisions applying to Ministers only

Clause 71: Approval of proposed expenditure by a Minister

340. Clause 71 will place a duty on Ministers to enquire and satisfy themselves as to whether the proposed expenditure of relevant money would constitute a proper use of relevant money before approving that expenditure. It will also require the Minister to then record the terms of approval in writing. This provision has been elevated into primary legislation and will impose equivalent duties on Ministers as those imposed by FMA Regulations 9 and 12.

341. Subclause 71(2) will also incorporate section 36 of the FMA Act in relation to Presiding Officers.

342. Ministers sometimes choose to exercise their power to approve a proposed expenditure of relevant money themselves. This provision is intended to apply where a Minister is, or Ministers are, approving a proposed expenditure (that is, proposed expenditure where the recipient, purpose and other details of the expenditure are particularised), rather than where a Minister is, or Ministers are, deciding in general terms to spend money for a purpose or to achieve an outcome. This clause will ensure that the level of accountability that was imposed on Ministers under the FMA Act is retained. This includes recording, in writing, decisions relating to the approval of expenditure.

343. A Minister must make reasonable inquiries before approving a proposed expenditure as being a proper use of relevant money.

344. Having made such inquiries, a Minister should then determine whether the proposed expenditure is a proper use of relevant money.

345. A Minister should ordinarily not personally approve proposed expenditure if the Minister has a material personal interest in the subject matter of the expenditure. Subclause 71(3) would ensure that there is an appropriate paper trail for accountability purposes, such as an audit by the Auditor-General.

346. Most provisions in this Bill do not apply to Ministers, which is appropriate given their constitutional role and the ability for Parliament to hold them directly to account for their

decisions. However, this provision is considered appropriate given rules around expenditure approval are fundamental to ensure good government, public interest, transparency and accountability.

Clause 72: Ministers to inform Parliament of certain events

347. Clause 72 generally replicates section 39A of the FMA Act, which requires the responsible Minister to inform the Parliament of involvement by the Commonwealth or a prescribed entity in a company. However, the scope of clause 72 is broader than section 39A to improve the transparency.

348. First, the clause requires a notice in the event that the Commonwealth or a corporate Commonwealth entity is involved in one of the events listed in paragraphs 72(1)(a) to (e). This covers all Commonwealth entities, including corporate Commonwealth entities that may have extensive interests in other bodies. Under the FMA Act, section 39A was limited to the Commonwealth or bodies corporate under the FMA Act (of which there were only 13), which left a significant number of Commonwealth entities outside the scope of the section. The extension to all Commonwealth entities will provide greater transparency and is consistent with the principle of government acting as a coherent whole.

349. Second, under subclause 72(2), the rules can prescribe ‘relevant’ bodies for the purposes of clause 72 in addition to companies. This will allow the rules to require notices when the Commonwealth or a corporate Commonwealth entity gets involved in another business form, such as a trust, partnership or incorporated association. The number of these non-company forms across the Government can be significant. For example, in 2009, there were 41 trusts operated by the Commonwealth or Commonwealth entities. These business arrangements are often subject to limited oversight and including them under clause 72 will improve transparency.

350. Events that could trigger the requirement for a notice to be tabled in the Parliament include formation (or participation in the formation) of a company or relevant body, becoming a member of a company or relevant body, and transactions involving shares in a company. Variations in rights attaching to shares or membership, disposal of shares and cessation of membership, also require ministerial notice to the Parliament.

351. The word ‘company’ is used with its general meaning rather than specifically referring to Corporations Act companies, and hence covers involvement in companies that are registered overseas.

352. The provision has a broad coverage, given the breadth of the Commonwealth’s corporate Commonwealth entities’ involvement in companies or relevant bodies. In certain circumstances, participation in the formation of a company will require notification under the provision.

353. Subclause 72(4) provides exceptions to the reporting requirements when authorised investments are made by the Finance Minister or the Treasurer under clause 58, investments made by corporate Commonwealth entities under clause 59 or investments made under the *Future Fund Act 2006* (on the basis that the reporting to Parliament is aimed at transparency on the use of companies in a governance-related form, rather than as a statutorily authorised investment vehicle). The rules provide the capacity to also exempt particular transactions of other entities that have a statutory investment function, such as the Commonwealth Superannuation Corporation.

354. This provision also exempts reporting on involvements with companies by the Commonwealth resulting from the transfer of unclaimed property under Part 9.7 of the Corporations Act. Both exemptions are consistent with section 39A of the FMA Act.

Part 2-5 - Appropriations
Division 1 - Guide to this Part

Clause 73: Guide to this Part

355. Clause 73 explains Part 2-5 of the Bill.

Division 2 - Appropriations relating to non-corporate Commonwealth entities and the Commonwealth

Clause 74: Receipts of amounts by non-corporate Commonwealth entities

356. Clause 74 applies to non-corporate Commonwealth entities. The provision is based upon section 31 of the FMA Act, which permits agencies to add amounts equal to certain receipts (prescribed in FMA Regulation 15) to their most recent departmental item in an annual appropriation Act. However, the operation of this clause has been modified to encompass sections 30 (relating to repayments to the Commonwealth) and 30A (appropriations to take account of recoverable GST) of the FMA Act to simplify and clarify arrangements in respect of appropriation adjustments.

357. To complement this clause, the rules made under the Bill will provide for amounts equal to certain types of amounts received in relation to entity activities to be added by entities to either their most recent departmental annual appropriation item, or, where the rules prescribe, other types of appropriations, such as annual administered and non-operating appropriations and special appropriations and special accounts. This flexibility allows the clause, and the rules made under it, to simplify arrangements with respect to the current arrangements under sections 30 and 30A of the FMA Act.

358. When making payments with a GST component, entities will generally pay the GST component in reliance on the same appropriation which provides the non-GST component of the payment. The rules made under the Bill in relation to clause 74 will provide for GST refunds from the Australian Taxation Office (ATO) to increase the appropriation items used to make the payment to the ATO, thus ensuring that there is sufficient appropriation to make all the required payments.

359. Subclause 74(2) replicates subsection 32A(4) of the FMA Act. Essentially, no changes to current arrangements have been proposed. The effect of this subclause is to clarify the timing of certain adjustments to appropriations. It makes clear that the adjustments to the appropriations only take effect when the receipt is recorded in the relevant entity's accounts and records. This means that changes to appropriations cannot occur without an entity taking active steps to recognise the change. It also clarifies that an entity can, and should, determine the proper characterisation of a receipt of cash in order to record correctly the appropriation that is increased.

360. Subclause 74(6) clarifies that where an amount is expended against the special appropriation contained in subclause 74(4) , then that amount is automatically debited against the special account.

361. Entities need to apply their discretion to these decisions due to a range of factors.

- First, there may be a number of appropriations to which an amount could be credited (such as, a special account, a departmental item or an administered item from an annual appropriation Act, or a special appropriation).
- Second, an entity may not immediately be able to ascertain the best way to characterise an amount that it receives. The correct treatment is often not clear from the details provided with the receipt. Subclause 74(2) allows for the entity's appropriations to remain unaltered, even after the entity has, for example, banked the relevant money into one of its official accounts. This allows for the management of its cash to follow relevant banking procedures, while the management of its appropriations may require analysis in relation to any relevant accounting, legal or policy considerations.

362. Subclause 74 will not affect accounting rules regarding the recognition of potential revenue or assets, and nor will it affect accrual accounting or accrual budgeting requirements. Its purpose is to clarify when, as a matter of law, an entity can, or should, treat the relevant appropriation as having been increased in line with a relevant real or notional transaction.

363. Clause 74 is intended to operate in conjunction with clause 76 of the Bill where a non-corporate Commonwealth entity receives amounts of a kind prescribed by the rules. Amounts received as the result of a notional payment from another non-corporate Commonwealth entity will be able to be credited to an appropriation, in the same way as amounts received as the result of real payments.

364. This clause applies only to non-corporate Commonwealth entities.

Clause 75: Transfers of functions between non-corporate Commonwealth entities

365. Clause 75 closely follows section 32 of the FMA Act in wording and effect. This clause relates to administration associated with the changes to annual appropriations following machinery of government changes and other transfers of functions between agencies, as determined through the Administrative Arrangements Order, for example.

366. Subclauses 75(1), (2) and (3) are essentially the same as FMA Act subsections 32(1), (2) and (3).

367. The wording in subclause 75(4) differs from section 32(4) of the FMA Act so as to be consistent with the *Statute Stocktake (Appropriations) Bill 2013*. This subclause recognises that transfers made on current year appropriations allows for savings to be more directly considered from prior year appropriations in the context of the transfer of function(s), subject to the discretion of the Finance Minister.

368. Subclause 75(5) is unchanged from subsection 32(5) in the FMA Act and subclause 75(6) is also the same as the equivalent in the FMA Act.

369. Subclauses 75(7), (8) and (9) address matters related to the legislative instrument made under this clause. Compared with section 32 of the FMA Act, some re-ordering of words has occurred but the effect remains essentially the same.

370. Subclause 75(7) continues to exempt the determination from disallowance as the changes effected by determinations under this clause are in the nature of administrative changes only, relating to the Executive Government's decisions about the allocation of functions to particular entities. The sunsetting arrangements set out in the LI Act, however, will apply.

371. Subclause 75(8) provides for situations where clarity about the date of a change in functions may require reference to a day before the making of the determination, such as a ministerial announcement or a formal change to the Administrative Arrangements Order. This subclause essentially carries over the effect of subsection 32(8) of the FMA Act. This subclause does have limited scope for retrospective operation to the extent that it is necessary for appropriate administrative, accounting and practical reasons that arise in the context of such transfers of functions. Importantly, however, paragraph 75(9)(a) makes clear that a determination is not able to authorise any expenditure under an appropriation that did not exist at the time of the expenditure. Paragraph 75(9)(b) replicates subsection 32(8) of the FMA Act with respect to subsection 12(2) of the LI Act not applying to subclause 75(8).

372. The wording of this clause differs from section 32 of the FMA Act with the inclusion at subclause 75(10) of a capacity for the rules made under the Bill to make provision in relation to this clause. Under current arrangements the Finance Minister delegates this power to officials within the Minister's department. This arrangement is likely to continue under the Bill. Therefore, this subclause is to support the continuation of current arrangements. The subclause reflects the provisions in the FMA Act at sections 62 (Finance Minister may delegate powers) and 53 (Chief executive may delegate powers) where a delegation may include directions on exercising powers or functions delegated.

373. As specified in the revised explanatory memorandum for the *Financial Framework Legislation Amendment Bill (No.1) 2007* which inserted the section 32 into the FMA Act, clause 75 operates, in effect, as a 'Henry VIII' clause, that is, a subordinate legislative instrument that has an effect on primary legislation (in this case not being the Bill but the relevant annual Appropriation Acts).

374. This clause only applies to annual appropriations.

Clause 76: Notional payments and receipts by non-corporate Commonwealth entities

375. Clause 76 replicates section 6 of the FMA Act. The word 'Agency' in the FMA Act is substituted in the Bill with 'non-corporate Commonwealth entity' in accordance with the structure of the Bill and the 'rules' that can be made under the Bill are explicitly recognised.

376. The purpose of subparagraph 76(a)(i) is to ensure that payments made within the Commonwealth by non-corporate Commonwealth entities, which are analogous to actual payments, are treated as if they were actual payments and subject to this Bill if enacted. For example, where entity 'A' pays entity 'B' and an appropriation is relied on to support the payment, the payment must be in accordance with the duties in relation to the proper use of public resources to be observed in relation to those payments.

377. Subparagraph 76(a)(ii) provides that if a non-corporate Commonwealth entity makes a notional payment that involves reliance on and reduction of an available appropriation to another part of the same entity (such as a different 'business unit' within that entity), this is also to be treated as if it were a 'real' payment. All such payments are real in the sense that amounts are transferred between bank accounts or between bank account sub-ledgers in the same manner as when a payment is made to a recipient outside the Commonwealth. The bank accounts concerned are accounts operated by non-corporate Commonwealth entities.

378. Payments of amounts that rely on an appropriation from one non-corporate Commonwealth entity to another non-corporate Commonwealth entity, or within a non-corporate Commonwealth entity, do not require, in a constitutional sense, an appropriation because the entities (or entity) involved operate within the CRF. However, for reasons of financial discipline and transparency, the practice has arisen for these payments

between entities to be treated as though they required an appropriation and to reduce an appropriation by the amount of the notional payment when such payments are made.

379. Where a non-corporate Commonwealth entity receives a notional receipt it may, if in accordance with clause 74 and the rules applicable to it, treat it as a real receipt and add an amount equal to the amount received to the balance of the relevant appropriation managed by the receiving entity.

380. If provided for by the rules, receipts covered by clause 74 might include payments:

- of amounts equal to the accumulated entitlements of employers who transfer between entities;
- for the supply of goods and services by one entity to another; and
- to a lead entity for access to shared facilities (for example, shared accommodation).

381. Some internal transfers of money that could not be characterised as being effectively similar to 'real' transactions are not notional payments and do not involve reliance upon, and the reduction of, an appropriation. This includes, for example, where an amount is transferred internally within an entity from one bank account to another maintained by the entity other than in relation to the kind of transaction described above, this is not a notional payment or receipt. Similarly, transfers between the OPA and entity bank accounts are not notional payments under the clause.

382. The note provided for the clause is intended to provide additional clarity to the operation of the clause.

383. This clause applies only to non-corporate Commonwealth entities.

Clause 77: Repayments by the Commonwealth

384. Clause 77 relates to the situation where the Commonwealth is required or permitted to make a repayment, but it is necessary for the relevant entity to rely on the special appropriation contained in the clause to support the making of that repayment to another person or entity. The reference to amounts being 'required or permitted' to be repaid is intended to cover circumstances where legislation or the general law requires or permits the amount to be repaid. The law of restitution might, for example, require the Commonwealth to repay an amount in circumstances where it was paid to the Commonwealth by mistake.

385. The proposed clause sets out a description of the process that enables an entity to use the special appropriation contained in the clause. In short, the steps involve an amount having been received by the Commonwealth where some or the entire amount is required or permitted to be repaid, and where, but for this clause, there is no appropriation 'for the repayment'.

386. Clause 77 operates in a similar manner to section 28 of the FMA Act with one substantive modification. Subclause 77(c) is modified from the current paragraph 28(1)(c) of the FMA Act in respect of the inclusion of the requirement for the Finance Minister to be "satisfied that apart from this section, there is no appropriation for the repayment".

387. This modification has been made to allow the Finance Minister to exercise greater control over the circumstances in which a non-corporate Commonwealth entity can utilise the appropriation in this clause. It will be up to the Finance Minister (or delegate) to determine whether there is another appropriation available to support the expenditure. In most situations, where a repayment is required or permitted, an entity should rely on its annual

departmental appropriation item to provide authority for repayments that arise in the course of the entity's departmental activities.

388. The note included under the clause provides examples of where amounts may be required or permitted to be repaid and is intended to be illustrative of situations where repayments may be permitted or required. The note included at (c) makes clear that this clause operates in conjunction with clause 76 of the Bill (Notional payments and receipts by non-corporate Commonwealth entities).

389. This clause applies only to non-corporate Commonwealth entities.

Division 3 - Special accounts

Clause 78: Establishment of special accounts by the Finance Minister

390. A special account is a mechanism that notionally sets aside an amount within the CRF which is, under subclause 78(4), appropriated by special appropriations contained in the Bill to be expended for a particular purpose. The amount of expenditure against the special account is limited to the balance of the particular special account. A special account is like a 'ledger' within the CRF where debits and credits occur as relevant money flows in and out of the CRF.

391. There are two types of special account. One type is established by a determination made by the Finance Minister under the authority of this clause. The other type is established in another Act, recognised by clause 80 of the Bill.

392. Special accounts may only be administered by non-corporate Commonwealth entities.

393. Clause 78 generally replicates section 20 of the FMA Act in respect of giving the Finance Minister power to make determinations establishing, varying or revoking special accounts and governing their operation. This clause differs slightly in form to section 20 in the following respects:

- paragraph 78(1)(d) has been inserted to recognise the concept of 'accountable authority' contained in the Bill and to improve accountability and transparency requirements when compared to the current arrangements;
- subsection 20(5) of the FMA Act has been re-numbered subclause 78(6). The content varies in the Bill only to improve the clarity in respect of when transactions reflecting the additions to, and deductions from, the balance of the special account occur;
- the sunsetting provisions that were contained at subsection 20(6) of the FMA Act are not included in the Bill. Determinations made under this clause will be subject to the sunsetting regime of the LI Act;
- the content related to disallowance provisions that were contained in the FMA Act at subsections 20(7) has been re-located to clause 79 of the Bill;
- subclause 78(7) of the Bill reflects what was subsection 32A(1) of the FMA Act, with the exception of the deletion of the word 'Agency' and its substitution with 'Commonwealth entity' to reflect the changed arrangements under the Bill; and
- FMA Act section 20 contains four notes. This clause retains only the note under subsection 78(4). The note under subsection 20(1) in the FMA Act is not required due to subclause 78(7) in the Bill. The note under subsection 20(4A) is no longer

necessary and the note under subsection 20(6) is now covered by clause 79 in the Bill.

394. Subclause 78(1) sets out the capacity for the Finance Minister to make a determination establishing a special account, specify amounts that may or must be credited to the balance of that account, specify the purpose for which amounts may be expended from the account and specify the accountable authority responsible for the administration of the account.

395. Subclause 78(2) recognises that amounts in special accounts may be debited from a special account without a real or notional payment taking place. This allows the determination establishing a special account to specify that the balance of a special account may be reduced, including to nil, meaning that the amount of the reduction will no longer be available for expenditure for the purposes of the special account.

396. Subclause 78(3) is essentially an 'avoidance of doubt provision' that provides that the Finance Minister may make a determination that varies or revokes a determination made under subclause 78(1).

397. Subclause 78(4) provides a special appropriation of the CRF to enable payments up to the balance for the time being of the special account for specified purposes included in the determination. It is important to note that a special account (and the appropriation contained in this clause) will not support expenditure beyond the balance of the special account at the time of the expenditure.

398. Subclause 78(5) is essentially an 'avoidance of doubt provision' expressing that, unless a contrary intention appears, payments from special accounts that are within the purpose of the special account may also be made for notional payments.

399. Subclause 78(6) clarifies that where an amount is expended against the special appropriation contained in subclause 78(4), then that transaction should also be reflected in the balance of the special account.

400. Subclause 78(7) re-locates subsection 32A(1) of the FMA Act to this clause. It operates in conjunction with subclause 78(6). Its purpose is to clarify when, as a matter of law, an entity can, or should, treat the relevant appropriation, and therefore the balance of the special account, as having been increased, or decreased, in line with a relevant transaction.

Clause 79: Disallowance of determinations relating to special accounts

401. Clause 79 will provide an alternative disallowance regime, to that provided by the LI Act, for determinations made by the Finance Minister under subclauses 78(1) or (3). This provision is a continuation of arrangements currently contained in section 22 of the FMA Act.

402. Clause 79 will apply to special account determinations made under subclauses 78(1) and 78(3) making such determinations not subject to the normal disallowance provisions under the LI Act. Clause 79 would give each House of Parliament five sitting days to pass a motion disallowing a determination. However, a determination establishing a special account does not take effect until after the five sitting days have passed.

403. The disallowance regime in clause 79 allows Parliament to have the final say as to whether or not the determination creating a special account should take effect. This is in recognition of the fact that a determination establishing a special account involves the exercise of a power, in relation to appropriations, by a Minister, and that exercise of this power by a Minister should be subject to a heightened degree of oversight by the Parliament when compared with other exercises of delegated legislative power.

404. The alternative regime will ensure that once the determination is tabled in Parliament, the Parliament will be able to consider whether the special account should be established, varied or revoked before the determination takes effect *after* the disallowance period has expired. This is in distinction to the LI Act arrangements where legislative instruments, when tabled, become law and remain so unless disallowed which allows acts authorised by the instrument to be performed until disallowance.

405. The arrangement seeks to strike a balance between the opportunity for Parliamentary scrutiny of the Governments intentions and the need to not unduly delay the functional operations of financial administration. As noted above, this arrangement will continue the arrangement currently provided for in the FMA Act. The wording related to the disallowance period has only been amended to improve clarity.

406. One further minor addition is paragraph 79(5)(b), which clarifies that a determination could be presented to the Parliament, not be disallowed within five sitting days and then commence at a later date. Under section 22 of the FMA Act, the determination always commenced immediately after the five sitting day-rule expired. The change provides greater flexibility as the Government may not wish a determination to have immediate effect.

Clause 80: Special accounts established by other Acts

407. Clause 80 generally replicates section 21 of the FMA Act in recognising that a special account can be established by another Act of Parliament. Only non-corporate Commonwealth entities may administer special accounts established under an Act.

408. This clause differs from the current section 21 of the FMA Act in only minor respects related to improving the clarity of the provisions.

409. Those respects are:

- note 3 from section 21 of the FMA Act has been deleted as this matter is now dealt with in subclause 80(4); and
- subclause 80(4) of the Bill reflects what was subsection 32A(1) of the FMA Act.

410. Subclause 80(1) recognises that another Act may establish a special account and identify the purposes of the special account. Where that occurs, this subclause will provide that the special appropriation required to support expenditure for the purposes of that special account. That other Act may also establish a balance in the account on its inception. Such cases are termed ‘statutory credits’.

411. Subclause 80(1) also states that any expenditure under the authority of this appropriation cannot exceed the balance, at the time of the expenditure, of the special account. Any expenditure beyond that balance would not be validly supported.

412. It is important to note that where another Act establishes a special account, the special appropriation necessary for the operation of the special account is contained in this clause, not in the other Act establishing the special account.

413. Note 1 to subclause 80(1) clarifies that an Act which establishes a special account will identify amounts that are to be credited to the special account. This is necessary because if amounts that may be credited to the special account are not identified, then the balance of the special account will not be able to rise above a zero balance and therefore no expenditure from the account will be supported.

414. Note 2 to subclause 80(1) will clarify that an annual appropriation Act may provide for amounts to be credited to a special account (thereby raising the available balance for

expenditure of the special account) if any purpose of the special account is a purpose that is covered by an item in an annual appropriation Act.

415. Subclause 80(2) will provide that where amounts may be expended for the purposes of a special account for actual payments then, unless otherwise provided, those amounts may be spent for the purposes of the special account for notional payments unless the contrary intention is expressed in the Act establishing the special account. Clause 76 of the Bill will provide for notional payments.

416. Subclause 80(3) of the Bill is similar to subsection 21(2) of the FMA Act. The wording in the Bill has been amended to improve clarity in respect of the transactions that may occur and should be reflected in accounts and records in relation to the special account.

417. Subclause 80(4) relates to subclause 80(3). Its purpose is to clarify when, as a matter of law, an entity can, or should, treat the balance of the special account, as having been increased, or decreased, in line with a relevant transaction.

Part 2-6 - Cooperating with other jurisdictions
Division 1 - Guide to this Part

Clause 81: Guide to this Part

418. Clause 81 explains Part 2-6 of the Bill.

Division 2 - Cooperating with other jurisdictions

Clause 82: Sharing information with other jurisdictions

419. Clause 82 allows for the Commonwealth and State and Territories to be jointly involved in the governance of Commonwealth entities that are interjurisdictional in nature. This clause replicates the general effect of section 43A of the FMA Act and section 33A of the CAC Act.

420. There are an increasing number of instances where Commonwealth entities involve other jurisdictions in their governance structure. This can include providing other jurisdictions with powers to appoint members of governing boards, requirements for the Commonwealth to consult with other jurisdictions, or joint funding of interjurisdictional bodies. Recent examples include the Australian Commission on Safety and Quality in Health Care and the National Health Performance Authority.

421. Clause 82 effectively allows a State or Territory Minister to obtain reports, documents and information from prescribed Commonwealth entities. The types of reports, documents and information which are to be made available will be prescribed in the rules. However, it is expected that the rules will be broad to cover the activities of a prescribed entity. There may be certain situations where full access to information is curtailed, such as where a State or Territory Minister is only able to access financial information about the funding in relation to their own jurisdiction, rather than for all jurisdictions.

Clause 83: Auditing by State and Territory Auditors-General

422. Clause 83 is designed to facilitate the auditing role of a State or Territory Auditor-General in circumstances where the Commonwealth has provided money to the Auditor-

General's particular State or Territory, a body of the State or Territory or a body to which the State or Territory has also provided money.

423. The effect of the provision is that where Commonwealth money has been provided for an activity or purpose, the Commonwealth cannot impose any restrictions on a State or Territory Auditor-General auditing the use of money for that activity or purpose. In relation to subparagraph 83(1)(a)(iii), this means that a body established by a Commonwealth law could be audited by a State or Territory Auditor-General if the body has received money from the relevant State or Territory (and if the relevant Auditor-General has been given the necessary powers to conduct an audit).

Part 2-7 - Companies, subsidiaries and new corporate Commonwealth entities
Division 1 - Guide to this Part

Clause 84: Guide to this Part

424. Clause 84 explains Part 2-7 of the Bill.

Division 2 - Companies and subsidiaries
Subdivision A - The Commonwealth's involvement in companies

Clause 85: The Commonwealth's involvement in companies

425. Clause 85 replicates the effect of section 39B of the FMA Act. This clause expressly provides the Finance Minister, on behalf of the Commonwealth, with the statutory authority to form and participate in the formation of companies. As the Explanatory Memorandum to the Financial Framework Legislation Amendment Bill (No. 2) 2013 (currently before the Parliament) that introduced section 39B stated: 'The Commonwealth has always believed and still believes that it may, without legislative authority, form or participate in the formation of a company and acquire shares in or become a member of a company to carry out activities within a head of legislative power. However, in the interests of abundant caution following the High Court's decision in *Williams v Commonwealth* [2012] HCA 23 (which involved argument about the outer limits of Commonwealth executive power), the proposed amendments are designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies.'[6]

426. Clause 85 has been simplified by not structuring the provision as a savings power that can be used in the absence of any other power. The clause simply gives the Finance Minister a power to form a company on behalf of the Commonwealth. Nevertheless, this power is in addition to any other power that the Commonwealth may have, such as under executive power granted under the Constitution.

427. The Finance Minister's power under this clause can only be delegated to the Finance Secretary.

[6] Explanatory Memorandum to the Financial Framework Legislation Amendment Bill (No. 2) 2013 at paragraph 21.

Subdivision B - Subsidiaries of corporate Commonwealth entities

Clause 86: Subsidiaries of corporate Commonwealth entities

428. Clause 86 would place an obligation on an accountable authority of a corporate Commonwealth entity to ensure that none of its subsidiaries do anything that the entity itself cannot do. This clause would replicate the effect of section 29 of the CAC Act.

429. Corporate Commonwealth entities are given specific limited powers and functions by the Parliament (as set out in enabling legislation). A subsidiary is subject to the same limitations as its parent. It would be beyond the power of a corporate Commonwealth entity to establish a subsidiary which has the capacity to do things that the entity does not have the capacity to do. This section imposes an obligation on the accountable authority of a corporate Commonwealth entity to ensure that its subsidiaries are aware of this limitation, and act in accordance with it.

430. This principle is particularly important where a Commonwealth entity sets up a company under the Corporations Act or a joint venture with other parties. The accountable authority must be clear in dealing with business partners about the limitations on the powers of the subsidiary.

431. This clause must be read subject to any specific provisions in other legislation that permit a subsidiary to do things that a corporate Commonwealth entity cannot itself do.

Division 3—New corporate Commonwealth entities

Clause 87: Establishing new corporate Commonwealth entities

432. This clause permits the establishment of a body corporate which is not a Commonwealth company, but is instead, a body corporate established under the Bill.

433. New bodies corporate are usually established by an Act of Parliament, as in the case of corporate Commonwealth entities, or under an Act of Parliament, which is the case for companies. Clause 87 would provide a power to create statutory bodies corporate, which are not companies, by rules made under the Bill.

434. The proposed clause will provide a more efficient option for establishing and abolishing new bodies corporate. Importantly, this popwer does not extend to entities established by other mechanisms. That is, it cannot be used to wind-up a company or abolish an entity that has been established by legislation.

435. the proposed clause allows the establishment of bodies corporate by making rules, which will set out the purpose and governance structure of the new body. The range of matters that can be covered is broad and includes the powers and functions of the body corporate and details about the composition of the governing body and the responsible Minister.

436. Bodies under clause 87 will be corporate Commonwealth entities for the purposes of the PGPA Bill, because they will be ‘bodies corporate established by a law of the Commonwealth’, meaning that their governing bodies will be subject to the duties and obligations applying to accountable authorities, and their employees will be officials.

437. The rationale for including clause 87 is that establishing a new statutory authority by an Act of Parliament can be time consuming and can constrain the Government’s ability to react

effectively to changes in its operating environment. In the absence of a mechanism like clause 87, the only alternative which appears to be available for quickly establishing a corporate entity is to establish a company under the Corporation Act. However, this can have disadvantages such as:

- a company-structure not being appropriate for the functions that the organisation performs, which can lead to inefficient or ineffective outcomes;
- the functions listed in a company constitution not constraining the directors in the same way that statutory functions can be constrained;
- a Ministers giving directions to a company that can make the Minister liable to be viewed as a shadow director for the purposes of the Corporations Act;
- companies not generally being subject to the same accountability and transparency arrangements that apply to most Commonwealth bodies. This includes requirements under the Bill and also more broadly, like those under the *Freedom of Information Act 1982*.

438. Importantly, the power under clause 87 provides more opportunity for the Parliament to exercise control over the creation of such bodies than it is able to exercise in relation to a company under the Corporations Act, because the Parliament has the capacity to disallow the legislative instrument creating the body. The Government would then have to either introduce primary legislation or wait six months to introduce the legislative instrument again.

439. Other legislative frameworks, such as the *Freedom of Information Act 1982* and the *Archives Act 1983*, can be applied to bodies corporate created under clause 87 through specification in accordance with paragraph 87(j). This will ensure that appropriate public sector transparency and accountability requirements are maintained. When the Finance Minister proposes to set up a body corporate under clause 87, he or she will undertake consultation with appropriate Ministers to ensure such frameworks apply.

440. The power under clause 87 is not unique. A similar power exists under the *Primary Industries and Energy Research and Development Act 1989* to create statutory authorities for research and development purposes.

441. The power under clause 87 is limited to bodies corporate. Non-bodies corporate (that is, entities that are legally part of the Commonwealth) can be created as executive agencies under the PS Act if the Government desires.

Chapter 3 - Commonwealth companies
Part 3-1 - General
Division 1 - Guide to this Part

Clause 88: Guide to this Part

442. Clause 88 explains Part 3-1 of the Bill.

Division 2 - Core provisions for this Chapter

Clause 89: Commonwealth companies

443. The Corporations Act is the primary regulatory framework that applies to Commonwealth companies, and the preceding provisions of the Bill generally do not apply.[7] Chapter 3 of the Bill contains requirements that Commonwealth companies have to comply with addition to the requirements of the Corporations Act in order to meet the required standard of public sector accountability.

444. Clause 89 is based on subsections 34(1) to (1C) of the CAC Act. This clause defines when a company is a Commonwealth company by determining whether the Commonwealth controls a company. The three tests for 'control' under subclause 89(2) are drafted in equivalent terms as the Corporations Act uses to determine whether a body corporate is a subsidiary of another body corporate.[8]

445. The meaning of the first test is clarified by subclauses 89(3) and (4) and covers the situation where, for example, the Commonwealth is not a member of a company, but has the power to appoint and remove a majority of its directors. The second test is a traditional general law test of control and the third test applies where the Commonwealth holds a majority of shares in a company. These tests of control are not the same as determining control for the purposes of consolidated financial statements.

446. For clarity, a company that is a subsidiary of a Commonwealth company, of a corporate Commonwealth entity or of the Future Fund Board of Guardians is not a Commonwealth company.

447. When the definition was inserted into the CAC Act in 2008 (replacing an out-of-date definition), several companies previously outside the scope of the CAC Act were brought within its scope (normally due to the way the company's constitution had been drafted). This is not expected to occur on the commencement of the Bill given the definition remains the same as under the CAC Act.

Clause 90: Wholly-owned Commonwealth companies

448. The definition of 'wholly-owned Commonwealth company' is identical to the definition in subsection 34(2) of the CAC Act. For the purposes of clarity, where a company limited by guarantee falls under the definition of 'Commonwealth company', it is automatically a wholly-owned Commonwealth company, despite there not technically being any 'owners' of a company limited by guarantee.

Division 3 - Special requirements for wholly-owned Commonwealth companies

Clause 91: Duty to keep the responsible Minister and Finance Minister informed

449. Clause 91 generally reflects the effect of sections 40 and 41 of the CAC Act.

450. The clause places a series of continuous disclosure requirements on the directors of a wholly-owned Commonwealth company to:

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[7] Provisions relating to whole-of-government reporting and consolidated financial statements and general machinery provisions would apply to a Commonwealth company

[8] Corporations Act sections 46 and 47.

- Keep the responsible Minister informed about the activities of the company and its subsidiaries (if any exist) (paragraph 91(1)(a)). Activities would include the performance of functions and powers and interactions with third parties. The responsible Minister and Finance Minister are entitled to any reports, documents and information in relation to the activities of a company or subsidiary. The terms 'reports', 'documents' and 'information' are intended to be given wide interpretation. This reflects notions of responsible government as a Minister must be able to know what is occurring in his or her portfolio given he or she will be held accountable in Parliament (paragraph 91(1)(b)).
- In relation to providing reports, documents and information to the Finance Minister, this is intended to encompass the underlying information, data and assumptions that a company uses to produce final reports, such as estimates numbers. The Finance Minister, as the Minister responsible for managing and reporting Commonwealth spending at a whole-of-government level, requires all relevant information to perform this role.
- Notify the responsible Minister of any significant decisions or significant issues that have affected the company or its subsidiaries (paragraphs 91(1)(c) and (d)) and give the responsible Minister reasonable notice of a significant issue that may affect the company or its subsidiaries (paragraph 91(1)(e)). Reasonable notice is a question of judgment on a case-by-case basis, given some issues may arise quickly.

451. For the purposes of paragraphs 91(1)(c) to (e), in deciding whether a decision or issue is significant, it is intended that the rules provide further context. As a guide, the interpretation of this term will not be dissimilar to that applied to the term 'significant' in the context of sections 15 and 40 of the CAC Act. That is, whether a decision or issue is 'significant' will depend on:

- the materiality of the event – the importance of the event relative to the company's size and functions;
- the risks involved with the decision – is the decision or issue likely to be politically sensitive, would there be contingent liabilities that could affect the Commonwealth's balance sheet, could the decision or issue have a financial impact in the future that could affect the company's financial sustainability; and
- the novelty of the event in the context of the company's previous experience, that is, does the company have experience with the event.

452. Forming, or participating in forming of a business, including a company, trust, partnership, unincorporated joint venture, incorporated association or similar arrangement are all likely to be significant events, as would changing the nature of the company's involvement with such businesses, bodies or relationships or the acquisition or disposal of a business unit.

453. Subclause 91(3) allows the relevant Minister to determine the timeframe for receiving reports requested under subclause 91(1). Where a timeframe is unlikely to be met, the directors should seek an extension.

Clause 92: Audit committee

454. Clause 92 replicates section 44 of the CAC Act. Consistent with the existing provisions, details relating to how the committee is constituted and its functions will be prescribed in the rules.

Clause 93: Application of government policy

455. Clause 93 is a similar provision to clause 22 that deals with the way government policy is applied to wholly-owned Commonwealth companies. The clause would allow the Finance Minister to issue a legislative instrument in the form of a government policy order that would specify a policy of the Australian Government. That is to apply to one or more wholly-owned Commonwealth company.

456. The proposed approach under clause 93 is similar to the approach taken under section 48A of the CAC Act. The instrument would specify the policy and the application of it, given that some policies may not apply universally. However the approach differs in one aspect. Instead of consultation being conducted by the portfolio Minister with entities within their portfolio, the Minister responsible for the particular policy will conduct the necessary consultation.

457. The Finance Minister will need to be satisfied that the Minister responsible for the policy has consulted with each company to which the policy will apply before the Finance Minister makes a government policy order. This recognises the separate legal status of these companies.

458. Given that policies are matters for the Government, instruments made under clause 93 would not be subject to disallowance.

459. Subclause 93(3) then places an obligation on the directors to ensure that its wholly-owned Commonwealth company and the company's subsidiaries comply with a government policy order that applies to the entity. This clause is similar to section 43 of the CAC Act. The directors would only have to ensure compliance to the extent that a government policy order applies. If, for example, a company has been given an exemption from certain parts of the policy, then the directors need not ensure compliance with those parts.

Part 3-2 - Planning and accountability
Division 1 - Guide to this Part

Clause 94: Guide to this Part

460. Clause 94 explains Part 3-2 of the Bill.

Division 2 - Planning and budgeting

Clause 95: Corporate plan for Commonwealth companies

461. Clause 95 requires all Commonwealth companies to prepare a corporate plan in accordance with any requirements prescribed by the rules and provide it to the responsible Minister and Finance Minister.

462. The corporate plan is the primary planning document of a company, setting out the objectives and strategies of the organisation and the outcomes it hopes to achieve in the coming year. The plan should also explain how the resources of the company will be used to achieve the priorities of government.

463. Wholly-owned Commonwealth companies that are GBEs are already required to produce a corporate plan under the CAC Act (section 42). The Bill proposes to extend the

requirement to prepare a corporate plan to all Commonwealth companies. As with Commonwealth entities, the requirements of a corporate plan may differ depending on the type of Commonwealth company being considered. However, most plans are likely to include the following parts:

- the objectives to be pursued by the company;
- the strategies of the company to achieve the objectives;
- forecast revenue and expenses;
- assumptions about the company's business environment, including risks; and
- non-financial performance targets.

464. Subclause 95(3) requires a Commonwealth company's corporate plan to explain how the company's activities will contribute to achieving the key priorities and objectives set out in the Australian Government's statement issued under clause 34 (if a statement has been published). This provision will help ensure that there is a link between the work of individual companies and work at a whole-of-government level, which will contribute to the philosophy of government operating as a coherent whole.

465. Where there is sensitive information contained in a corporate plan given to the responsible Minister and the Finance Minister, the rules will allow it to be removed before the plan is published. This will be similar to the current arrangement for GBEs, where they agree with the responsible Minister a Statement of Corporate Intent that sets out an integral part of the corporate plan, without divulging commercially sensitive information.

Clause 96: Budget estimates for wholly-owned Commonwealth companies

466. Estimates are a critical part of planning at an entity and whole-of-government level. They form the fundamental building blocks of the Budget. Clause 96 replicates the effect of section 39 of the CAC Act.

467. Subclause 96(1) places the responsibility to prepare an entity's budget estimates on the directors of the wholly-owned Commonwealth company. Budget estimates are required for each reporting period as the basis for the preparation of the annual Budget. The Finance Minister may also direct estimates to be updated for other periods throughout the year, for example, to assist the preparation of the Mid-year Economic and Fiscal Outlook. These budget estimates are to be given to the Finance Secretary in accordance with any directions of the Secretary.

468. Paragraph 96(2)(a) requires that the budget estimates must fairly present the estimated financial impacts of the company's activities for the reporting period or other period directed by the Finance Minister.

469. Paragraph 96(2)(b) and subclause (3) provide that the Finance Secretary can issue written directions about how budget estimates are to be prepared, which the company must comply with. Paragraph 96(2)(c) allows the Finance Secretary to require accompanying information on a company's estimates. This could include underlying assumptions and costing models used by a company. The power is being given to the Finance Secretary, rather than the Finance Minister because the production of estimates is an internal administrative process that is more efficiently controlled by the public service. There is no need for ministers to set requirements for estimates. This also accords with long-standing practice under the FMA Regulations, and before that, the FMA Orders.

470. Subclause 96(4) clarifies that the Finance Secretary's directions are not legislative instruments to assist readers. These directions are of an administrative character and do not fall within the definition of a legislative instrument for the purposes of section 5 of the LI Act.

471. As with existing practice, Budget estimates would not be required to be prepared for all wholly-owned Commonwealth companies. Generally, it is only companies in the General Government Sector for which estimates are sought given their ability to affect the whole-of-government financial position of the Commonwealth. Public financial corporations and public non-financial corporations are unlikely to need to prepare estimates ordinarily, given that they are self-funding and do not receive appropriations in the Budget. GBEs will also typically be exempted from this requirement.

Division 3 - Reporting and accountability

Clause 97: Annual reports for Commonwealth companies

472. Clause 97 retains Commonwealth companies' annual reporting obligations previously set out in section 36 of the CAC Act. Clause 97 requires a Commonwealth company to give the responsible Minister a copy of the annual report required under the Corporations Act.[9] The annual reporting requirements for companies are set out in Part 2M of the Corporations Act.

473. In order to ensure a consistent level of reporting and accountability by Commonwealth companies, subclause 97(1) treats all Commonwealth companies as public companies for the purposes of the Bill thus requiring all Commonwealth companies to give their financial statements, directors' report and auditor's report (collectively, the 'annual report') to their responsible Minister. This overrides the Corporations Act which does not require some proprietary companies to prepare annual reports.[10]

474. Paragraph 97(1)(b) is equivalent to paragraph 36(1)(c) of the CAC Act. The paragraph allows the rules to require an annual report for a wholly-owned Commonwealth company to include additional information to that required under the Corporations Act. The public sector often has specific issues that need to be reported on which this paragraph will allow. This could include how the company has performed compared to its corporate plan, or government policy orders with which the company must comply.

475. Subclause 97(2) sets the deadlines for providing the annual reporting documents to the responsible Minister. This provision treats all Commonwealth companies like public companies for the purposes of reporting to the Minister.[11] The Minister does however, have the power to extend the deadline under subsection 34C(5) of the AI Act.

476. Subsection 97(5) requires the responsible Minister to table the annual report in Parliament:

- as soon as practicable after receiving the documents if the company is a wholly-owned Commonwealth company; or
- as soon as practicable after receiving the documents if the company is not required to hold an annual general meeting (for example, a proprietary non-wholly-owned Commonwealth company); or

[9] Commonwealth companies also have normal lodgement requirements with ASIC: section 319 of the Corporations Act.
[10] Corporations Act: section 292.
[11] Corporations Act: section 315.

- as soon as practicable after the annual general meeting in all other cases (for example, a public non-wholly-owned Commonwealth company).

Clause 98: Auditor of Commonwealth companies

477. Clause 98 replicates section 35 of the CAC Act. While the Auditor-General is to be the auditor for each Commonwealth company, this clause recognises that a company is free to choose its auditor under the Corporations Act. However, where the Auditor-General is not the company's auditor, he or she must give a report on the company's financial statements to the Auditor-General.

478. The Auditor-General will also continue to be the auditor of subsidiaries of Commonwealth companies.

Clause 99: Audit of subsidiary's financial statements

479. Clause 99 generally replicates the effect of section 37 of the CAC Act. The clause makes it clear that the mandate of the Auditor-General to audit financial statements extends to subsidiaries of Commonwealth companies. The CAC Act provision has been modified to strengthen the Auditor-General's mandate.

480. Under section 37 of the CAC Act, the directors of a parent company were required to do whatever was necessary to ensure the Auditor-General audited the financial statements of a subsidiary, but did not have to if one of the situations under subclause 99(3) applied. This could have led to an interpretation that it was up to the directors of a Commonwealth company to decide whether an exemption applied, which is not the case. The note to the clause makes it clear that the Auditor-General must do an audit of the financial statements of a subsidiary in addition to any audit done by the subsidiary's auditor except in circumstances provided.

Chapter 4 - Rules and delegations
Part 4-1 - The rules
Division 1 - Guide to this Part

Clause 100: Guide to this Part

481. Clause 100 explains Part 4-1 of the Bill.

Division 2 - The rules

Clause 101: The rules

482. The Bill sets out the fundamental elements of a coherent financial framework that applies to all Commonwealth entities. The primary legislation will contain the main principles and requirements and be supported by rules that are disallowable.

483. The rules made by the Finance Minister under the Bill will replace a range of instruments under the current legislation including the FMA Regulations, CAC Regulations and Finance Minister Orders. They will be used to prescribe the requirements and procedures necessary to give effect to the governance, performance and accountability matters covered by the Bill. Importantly, the Bill does not unnecessarily push requirements from the primary

legislation into the rules. Most issues for which rules can be made are already contained in the subsidiary legislation of the FMA and CAC Acts.

484. The use of rules as the form of legislative instrument is consistent with the current drafting practice of the Office of Parliamentary Counsel that reserves the use of regulations to a limited range of matters that it is considered are more appropriately dealt with in regulations made by the Governor-General than in an instrument made by some other person: matters in this category include offence provisions, powers of arrest or detention, entry provisions and search or seizure provisions. The rules will be legislative instruments which will be subject to disallowance by Parliament and will sunset under the provisions of the LI Act.

485. Allowing for all subordinate matters to be contained in a single set of rules, rather than spread over a range of instruments, will assist with access to the law. This, and the appropriate division of material between the Bill and the rules, is consistent with the Government's Clearer Commonwealth Law initiatives.

486. Subclause 101(2) allows the Finance Minister to tailor rules in specific circumstances. The capacity will operationalise the earned autonomy model, which is a key underpinning enhancement to the Commonwealth's financial framework in order to reduce the compliance burden and improve performance. Earned autonomy will enable the nature and extent of regulatory intervention to be based on an entity's risk profile and performance, and allows for a more nuanced approach than applying blanket requirements across all Commonwealth entities.

487. When proposing rules, the Finance Minister will consult with the Commonwealth entities and companies. As the rules are disallowable, Parliament will also play a key role in appropriately framing the earned autonomy model so there is an appropriate balance between performance and accountability.

Clause 102: Rules relating to the Commonwealth and Commonwealth entities

488. Various provisions throughout the Bill set out circumstances on which rules can be made. The rules will provide the detailed, technical guidance to support the nuanced application of the framework's requirements.

489. The terms of clause 102, particularly subclause 102(a) regarding proper use of public resources, and subclause 102(b) regarding proper accountability for the use and management of public resources, are intended to have broad interpretation. The CFAR reforms are aimed at reducing red tape, and giving entities greater operational independence.

490. The capacity to provide greater operational independence is based on the risk management approach of earned autonomy, where there would be escalating regulation and prescription for higher risk or lower performing entities. The possible scope of the rules for Commonwealth entities may extend to matters covered by the current FMA Regulations and policies of the Commonwealth, and may indeed be more rigorous in some areas.

Clause 103: Rules relating to the Commonwealth and non-corporate Commonwealth entities

491. Clause 103 is a list of additional matters relating to the Commonwealth and non-corporate Commonwealth entities that the Finance Minister may make rules about.

492. Subclauses 103(a) and (b) allow rules to regulate the acquisition, management and divestment of relevant property. In the case of non-corporate Commonwealth entities, this

relates to relevant property that they hold on behalf of the Commonwealth. Rules made under this subclause will work in conjunction with rules in relation to gifts of relevant property (clause 66) and liability for losses (clause 67 to 70).

493. Subclause 103(c) relates to the recovery of debts and amounts owing by the accountable authority of a non-corporate Commonwealth entity. The rules will be able to set out, for example, which accountable authority is responsible for the recovery of particular amounts owed to the Commonwealth, and the circumstances in which it is permissible for debts or amounts owing to be written off. Rules made under this subclause will work in conjunction with rules in relation to waiver and set off of amounts owed to and by the Commonwealth under clauses 63 and 64.

494. Subclause 103(d) allows the rules to treat a part of a non-corporate Commonwealth entity as a separate entity for some purposes. In some circumstances part of an entity will be subject to separate reporting and auditing requirements in order to provide additional transparency and accountability. An example could be the Therapeutic Goods Administration, which will be part of the Department of Health and Ageing (with the Secretary of that Department as the accountable authority), but could be treated as a separate entity for the purposes of reporting and auditing by rules made under this provision.

495. Subclause 103(e) allows the rules to specify what is to happen for reporting and auditing purposes when a non-corporate Commonwealth entity ceases to exist or its functions are transferred to another entity, such as following machinery of government changes. This could include specifying which remaining accountable authority is responsible for preparing financial statements for the former entity.

496. Rules made under subclauses 103(d) and 103(e) will work in conjunction with rules in relation to annual performance statements, accounts and records, financial statements and annual reports.

497. Subclause 103(f) relates to the Finance Minister's power to authorise payment of amounts owed to a person at the time of their death, by the Commonwealth. For example, the rules could provide that payments can be made while probate is still pending.

Clause 104: Rules modifying the application of this Act

498. Clause 104 provides that the Finance Minister may make rules modifying the application of the Bill to certain Commonwealth entities and Commonwealth companies.

499. In the case of intelligence, security or law enforcement agencies, there may be circumstances, such as in relation to sensitive operational activities, where disclosing financial and performance information to the extent required by the Bill may be contrary to the Commonwealth's security interests. Therefore, the rules may exempt these agencies from the requirements of the Bill or vary the provisions they have to meet. This provision is equivalent to section 58 of the FMA Act.

500. Modifications may also be necessary in the case of the Commonwealth Superannuation Corporation (CSC) so as not to interfere with its specific obligations as the corporate trustee of the Australian Government's main civilian and military superannuation schemes under a range of Commonwealth legislation, including the *Governance of Australian Government Superannuation Schemes Act 2011*, several Commonwealth Superannuation Acts and the prudential framework for superannuation in the *Superannuation Industry (Supervision) Act 1993*. One example of a likely modification could be to clause 72 to exempt the CSC from advising the Parliament of its involvement in companies, given it undertakes regular share acquisitions.

501. Subclause 104(3) allows the rules to modify the Bill for parts of a Commonwealth entity that are an intelligence and security agency, but not a separate Commonwealth entity. There are parts of the Department of Defence that fall within this categorisation.

Clause 105: Rules in relation to other CRF money

502. Subclause 105(1) provides for rules to specify requirements in relation to other CRF money.

503. Subclause 105 (2) defines that other CRF money is money that forms part of the CRF recognised by section 81 of the Constitution other than:

- relevant money, which is defined by the Bill, or
- any other kind of money that is of a kind prescribed by the rules.

504. Subclause 105 (3) provides a special appropriation for the purpose of the expenditure of other CRF money by a person other than the Commonwealth or a Commonwealth entity if:

- the expenditure is in accordance with the rules (made under subclause 105 (1)); and
- the Finance Minister is satisfied that the expenditure is not authorised by another appropriation.

505. This provision is contained in the Bill essentially to provide constitutional certainty for certain situations that may arise in relation to money that is not relevant money but may nevertheless be money forming part of the CRF. The rules will clarify the operation of this provision and identify with particular requirements in relation to particular instances relating to other CRF money. However, situations that may be prescribed may be similar to the example below.

506. Occasionally it is the case that persons other than the Commonwealth (or an official of a non-corporate Commonwealth entity) may hold and spend money that is part of the CRF. This situation would arise, for example, if a person outside the Commonwealth was acting as an agent of the Commonwealth in, for example, collecting money payable to the Commonwealth and making payments from that money.

507. For example, if an auction house is selling surplus assets on behalf of the Commonwealth, receives the proceeds of the sales and then takes its agreed commission before returning the balance to the Commonwealth in accordance with its contract, the auction house might be holding and spending money that forms part of the CRF.

508. Where these people are acting for and on behalf of the Commonwealth any money they receive in that capacity and spend, an appropriation may be required to support that spending. This is necessary because of section 83 of the Constitution which relevantly provides:

> 'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.'

509. The special appropriation contained at subclause 105(3) will provide that 'appropriation made by law' is subject to the requirements in paragraph 105 (3)(a) and (b).

Part 4-2 - Delegations
Division 1 - Guide to this Part

Clause 106: Guide to this Part

510. Clause 106 explains Part 4-2 of the Bill.

Division 2 - Delegations

Clause 107: Finance Minister

511. Under clause 107, the Finance Minister can generally delegate his or her powers to an official of a non-corporate Commonwealth entity. However, there are a number of powers which cannot be delegated at all:

- paragraph 57(b) (Borrowing by corporate Commonwealth entities);
- subclauses 71(1) and (3) (Minister to record approval of decision to spend relevant money) – a Minister, including the Finance Minister as relevant, has personally approved the expenditure pursuant to this section, therefore should personally record doing so;
- subclause 72(1) (Minister to inform Parliament of certain events) – given a Minister has overall responsibility to account to the Parliament for what happens in his or her portfolio this clause should not be delegated;
- subclause 78 (Establishment of special accounts by the Finance Minister) – given a special account establishes an appropriation to draw money from the CRF, it would be inappropriate for someone other than the Finance Minister, who is directly responsible to the Parliament, to make a special account determination; and
- clause 101 (The rules) – a general power to make subsidiary legislation should not be delegated without a clear rationale.

512. In addition, some powers can only be delegated to the Finance Secretary (noting that such powers may be subdelegated by the Finance Secretary in accordance with clause 107):

- clause 75 (Transfer of functions) – this would allow the Finance Secretary to make determinations on the transfer of appropriations following machinery of government changes; and
- clauses 85 (Commonwealth's involvement in companies) and 87 (establishing new corporate Commonwealth entities) – this would allow the Finance Secretary to form companies or other bodies corporate under the Bill. It is expected that such a delegation would only operate when the Finance Minister is unable to exercise the power (for example, while he or she is overseas).

513. Compared to the equivalent section in the FMA Act (section 62), the scope of clause 107 is narrower in that delegations to establish special accounts can no longer be made and powers to make determinations following transfers of functions can now only be delegated to the Finance Secretary.

Clause 108: Treasurer

514. Clause 108 replicates section 62A of the FMA Act. This clause allows the Treasurer to delegate his or her investment powers to certain 'eligible delegates'. These will be officials in the Department of the Treasury or a listed entity prescribed in the rules. It is proposed that the rules will prescribe the Australian Office of Financial Management, which undertakes the investment activities under delegation from the Treasurer.

515. Certain functions the Treasurer exercises in his or her capacity as a minister generally cannot be delegated:

- subclauses 71(1) and (3) (Minister to record approval of decision to spend relevant money) – the Treasurer has personally approved the expenditure, therefore should personally record doing so; and
- subclause 72(1) (Minister to inform Parliament of certain events) – given a Minister's have overall responsibility to Parliament for what happens in his or her portfolio this clause should be excluded.

Clause 109: Finance Secretary

516. Clause 109 allows the Finance Secretary to delegate the powers, functions or duties conferred on the Finance Secretary, either from the Finance Minister or directly through the Bill or Rules, to an official in the Department of Finance and Deregulation. This is in addition to the delegation by the Finance Minister to the Finance Secretary as an accountable authority for the purpose of the Bill. The powers, functions or duties that can be delegated are those conferred directly on the Finance Secretary and those delegated to the Finance Secretary by the Finance Minister under subclause 107(1).

517. However, subclause 107(3) allows the Finance Minister to delegate to the Finance Secretary the power to transfer functions between non-corporate Commonwealth entities (clause 75), the power to form companies (clause 85) and establish new corporate Commonwealth entities (clause 87), which cannot be delegated to any other person. Consistent with existing arrangements, under this clause the Finance Secretary can only subdelegate to an official in the Department of Finance and Deregulation the power to transfer functions. The other two powers identified in subclause 107(3) cannot be sub-delegated by the Finance Secretary.

518. Clause 109 also allows the Finance Secretary to give written directions to a delegate about how a delegation made under this clause can be exercised.

Clause 110: Accountable authority

519. Clause 110 generally replicates the effect of section 53 of the FMA Act. This clause permits the accountable authority of a non-corporate Commonwealth entity to::

- delegate their powers, and functions or duties under the Bill (including powers, and functions and duties delegated to the accountable authority by the Finance Minister) to an official of the entity, including delegating this power to delegate (which differs from section 53 of the FMA Act);
- give written directions to a delegate about how a delegation is to be exercised if the accountable authority delegates its own powers and functions; and

- give written directions to a subdelegate about how a delegation from the Finance Minister is to be exercised as long as the directions are not inconsistent with any written directions of the Finance Minister.

520. The accountable authority of a corporate Commonwealth entity does not need a statutory provision to delegate their powers. The legislation establishing a corporate Commonwealth entity will ordinarily provide for the devolution of power within the corporate entity. The enabling legislation of corporate Commonwealth entities will be reviewed and amended to ensure that all entities have an appropriate arrangement for delegation of powers in place, and if necessary, amendments will be made as part of the consequential amendments Bill.