



Australian Government

Department of Finance and Administration

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## Governance Arrangements for Australian Government Bodies August 2005



**Governance Arrangements for  
Australian Government Bodies  
August 2005**

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Department of Finance and Administration  
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## The Financial Management Reference series of publications

- No. 1 List of Australian Government Bodies.
- No. 2 Governance Arrangements for Australian Government Bodies.

## The Financial Management Guidance series of publications

- No. 1 Commonwealth Procurement Guidelines, January 2005.
- No. 2 Guidelines for the Management of Foreign Exchange Risk, November 2002.
- No. 3 Guidance on Confidentiality of Contractors' Commercial Information, February 2003.
- No. 4 Australian Government Cost Recovery Guidelines, July 2005.
- No. 5 Guidelines for Implementation of Administrative Arrangements Orders and Other Machinery of Government Changes, September 2003.
- No. 6 Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort, September 2003.
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- No. 19 Public Private Partnerships Contract Management, May 2005.



This document, *Governance Arrangements for Australian Government Bodies*, has been developed by the Department of Finance and Administration (Finance), with assistance from the Department of the Prime Minister and Cabinet and a number of key Australian Government agencies.

The aim of the document is to promote consistency in the governance arrangements of Australian Government bodies, while reinforcing the principles set out in the *Review of Corporate Governance of Statutory Authorities and Office Holders*, conducted in 2003 by Mr John Uhrig, AC. This is in line with Finance's ongoing role of promoting better practice governance of Australian Government bodies generally.

The policies set out in this document provide a strong platform for informed discussion when officials consult with, or seek advice from, central agencies on the merits of alternative structures for Australian Government bodies. Significant expertise on the structuring and the machinery of government resides within the Australian Government itself. Early consultation can, therefore, often assist greatly in designing better and more sustainable governance solutions.

Improving consistency in governance models across the Australian Government can help maintain important aspects of the financial and other management frameworks. This, in turn, can help promote better integration of, and cooperation between, agencies through more officials having a common understanding of similar structures. This is particularly important, for example, when agencies are working together at a whole-of-Government level.

In short, the importance of a good governance framework is that it helps bodies to implement government policies, deliver services well, meet their organisational goals and achieve sustainable outcomes.

I thank all those Departments and agencies that provided input and feedback on this document's content. It could not have been produced without this assistance.

**I J Watt**

Secretary of the Department of Finance and Administration

August 2005

# Abbreviations and Acronyms

<b>AAO</b>	Administrative Arrangements Order
<b>ABS</b>	Australian Bureau of Statistics
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACMA</b>	Australian Communications and Media Authority
<b>ANAO</b>	Australian National Audit Office
<b>APS</b>	Australian Public Service
<b>APS Commission</b>	Australian Public Service Commission
<b>body</b>	Includes any department, prescribed agency, executive agency, statutory agency or authority, office holder, company, association, cooperative, partnership, trust or departmental function with a distinct branding
<b>CAC Act</b>	<i>Commonwealth Authorities and Companies Act 1997</i>
<b>CE</b>	Chief Executive (of an FMA Act Agency)
<b>CEI</b>	Chief Executive's Instructions
<b>CEO</b>	Chief Executive Officer
<b>CFO</b>	Chief Financial Officer
<b>commission</b>	This document primarily refers to a "commission" to describe a body corporate that comprises more than one person. However, the term also occurs in the name of certain bodies that are led by a single office holder, such as the APS Commission.
<b>Coombs Royal Commission</b>	Coombs, HC, <i>Report of the Royal Commission on Australian Government Administration</i> , Australian Government Publishing Service, 1976
<b>CRF</b>	Consolidated Revenue Fund
<b>Department</b>	Department of State (of the Australian Government)
<b>DEWR</b>	Department of Employment and Workplace Relations
<b>Finance</b>	Department of Finance and Administration
<b>Finance Minister</b>	Minister for Finance and Administration
<b>FMA Act</b>	<i>Financial Management and Accountability Act 1997</i>
<b>FMA Regulations</b>	<i>Financial Management and Accountability Regulations 1997</i>
<b>GBE</b>	Government Business Enterprise (under the CAC Act)

# Abbreviations and Acronyms

<b>GGS</b>	General Government Sector
<b>OPC</b>	Office of Parliamentary Counsel
<b>Parliamentary Department</b>	Department of the Parliament
<b>PFC</b>	Public Financial Corporation
<b>PM&amp;C</b>	Department of the Prime Minister and Cabinet
<b>PNFC</b>	Public Non-financial Corporation
<b>Public Service Act</b>	<i>Public Service Act 1999</i>
<b>State Governments</b>	Includes the Territory Governments
<b>Uhrig Report</b>	Uhrig, J, <i>Review of Corporate Governance of Statutory Authorities and Office Holders</i> , Commonwealth of Australia, June 2003

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## Executive Summary

This governance policy document outlines principles for helping determine the most appropriate structure and governance arrangements for Australian Government bodies.

There is a policy preference to curb unnecessary proliferation of Government bodies. Consequently, a function, activity or power should, if possible, be conferred on an existing department, or another existing Australian Government body, rather than on a new body.

If there are persuasive policy reasons to form a new body, then its purpose — and its financial, legal and staffing status — will need careful consideration. Departments should liaise on these issues with central agencies, and other relevant stakeholders, as early as practicable. The aim is to ensure that the governance arrangements promote the effective implementation of policy. Poor governance structures can threaten good policy outcomes.

It is preferable that bodies operate under the *Financial Management and Accountability Act 1997* (FMA Act). These bodies are financially part of the Commonwealth, holding public money that can only be spent under the authority of an appropriation from the Australian Parliament. The FMA Act should especially apply to primarily budget-funded bodies, regulators and bodies that raise public money under a Commonwealth law.

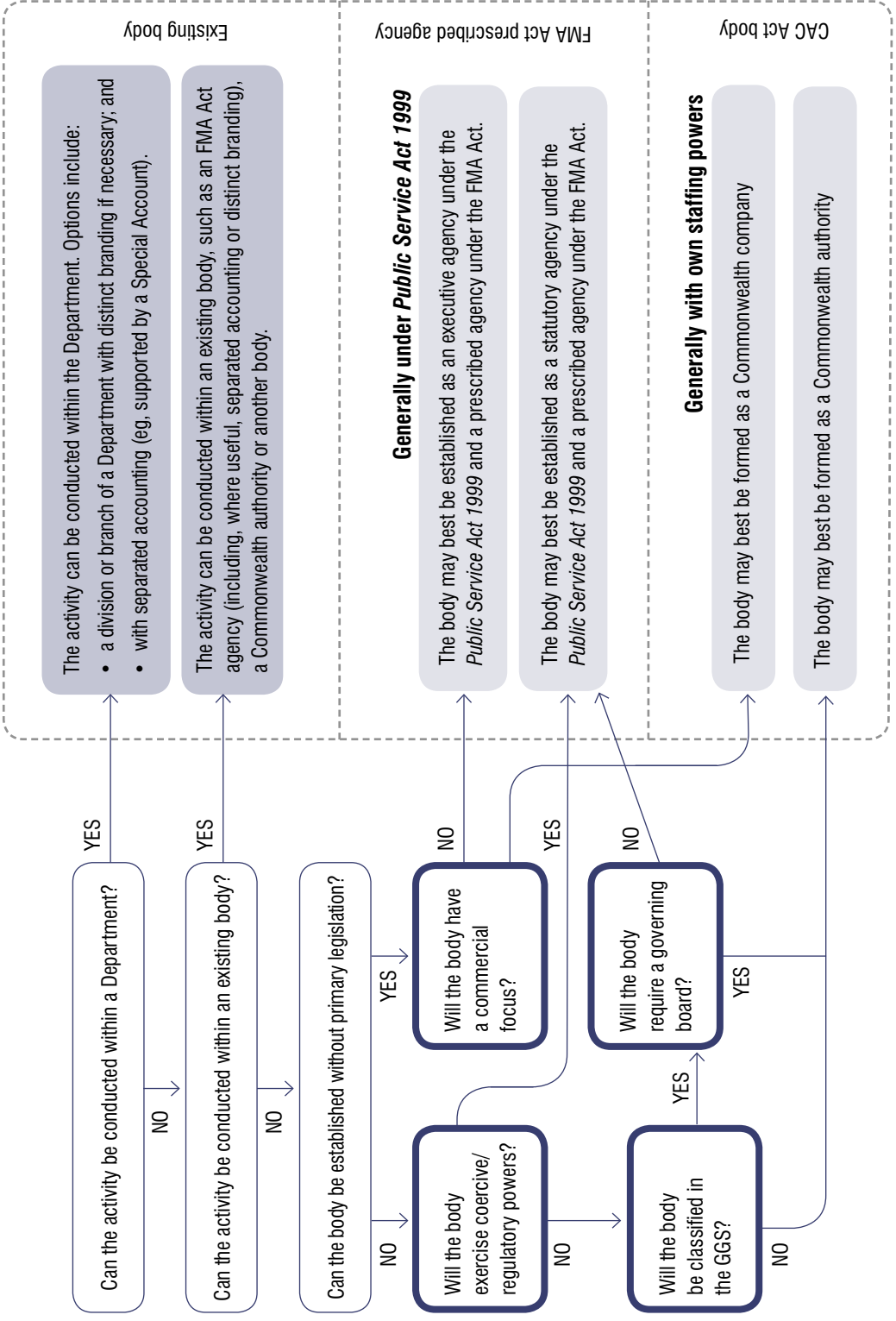
Staff of FMA Act agencies should be employed under the *Public Service Act 1999*, unless there is a persuasive case for a different staffing regime. The FMA Act and the Public Service Act reflect executive management structures. Consequently, a board-like structure for an FMA Act agency should only have an advisory function to assist the Chief Executive, or be used where collective statutory decision-making requires a commission.

If it appears that a governing board will be essential for a body's effective governance, then it would be appropriate for the body to operate under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). These bodies are both legally and financially separate from the Commonwealth. The extent of Government control over a Commonwealth authority depends on its establishing legislation. However, Ministers retain responsibility for legislation in their portfolio and this will, typically, include the right to access information that helps with the oversight of this legislation. Ministers are also entitled to expect advice and assistance from their departments in this role.

There is little reason for bodies to operate outside of, or with exceptions to, the FMA Act or the CAC Act. Inter-governmental bodies, however, may raise issues requiring longer lead-times for establishment and greater consultation between agencies.

If you have any comments on this document, please e-mail: [LegislativeReview@finance.gov.au](mailto:LegislativeReview@finance.gov.au)

# Flowchart for Placing Australian Government Activities





# OVERVIEW

Governance Considerations

# Governance Considerations

## Is it necessary to form a body?

- A new function, activity or power should be conferred on an existing department (or another existing body) unless there is a persuasive case to form a new body.
- First consider a non-legislative structure within the Commonwealth, where the case for a new body is persuasive.

## Applying the financial framework

- It is preferable for the FMA Act to apply to a body which is largely reliant on budget-funding or which raises public money under a law of the Commonwealth. It is also preferable for the FMA Act to apply to bodies categorised as regulators.
- A body corporate (commission) can exist in conjunction with an FMA Act agency where, for example, collective decision-making by a number of statutory office holders is necessary or the body needs to sue or be sued in its own corporate name.
- Where the CAC Act is appropriate, it is preferable to establish a body as a Commonwealth authority, rather than a Commonwealth company.
- Do not establish or participate in establishing bodies outside the FMA Act or the CAC Act without the support of the Department of Finance and Administration (Finance).
- Only consider establishing or participating in a company in exceptional circumstances. These may include situations where the body is going to operate for profit in a competitive environment, is on a path to privatisation or will implement a joint enterprise between the Commonwealth and State Governments and/or the private/not-for-profit sectors.
- It may be preferable to provide grant funding to a body in the private or the not-for-profit sectors, rather than to: establish a new body; seek to control board appointments; or place representatives on a company board.

## Factors influencing governance arrangements

### *Clarity of purpose and interactions*

- A clear and unambiguous purpose is fundamental to designing effective governance arrangements.
- Consider the interaction of a new body with existing Australian Government bodies. Synergies between bodies may suggest that similar governance structures would assist their interaction.
- Consider processes and principles to review the governance of bodies periodically. These might include options where consolidation would be useful, including within a department.

- Consider the name of a proposed body to minimise the potential for conflicts with existing enterprises, including those of other bodies or persons. Consider also acronyms, website and trade mark issues.

## ***Financial classification and materiality***

- The FMA Act only applies to bodies classified as within the General Government Sector (GGS).
- A body under the CAC Act, but still within the GGS, should only be formed if it needs a governing board.
- Bodies need sufficient capacity to devote appropriate resources to governance matters.

## ***Will a governing board be effective?***

- A governing board is appropriate for bodies that are under the CAC Act.
- A governing board should have full power to act in the interests of the relevant body. This will generally include the ability to appoint and remove the Chief Executive Officer.
- Appointees to governing boards should not be there in a representational capacity. Avoid placing an APS employee on a governing board, in particular the Secretary of a department.
- Advisory boards can sometimes assist FMA Act agencies by providing access to skills and expertise, including stakeholder or community representation.
- A requirement for full-time members or commissioners to perform statutory functions suggests the FMA Act may be most appropriate.
- Regulatory bodies do not usually require a governing board and should therefore be under the FMA Act.

## ***How will staff be employed?***

- If establishing a body under the FMA Act, staff should be employed under the *Public Service Act 1999*, unless there is a persuasive reason for a different staffing regime.
- Bodies established under the CAC Act should generally have the power to engage staff outside the *Public Service Act 1999*, unless there are good reasons to the contrary.

## ***Independence***

- The FMA Act and the CAC Act can both accommodate bodies with high degrees of independence.
- Consider the effect of other general laws that apply to Australian Government bodies. For those that are statutory authorities, seek to ensure that the relevant legislation clarifies any potential complexities arising from the application of other laws.



## Forming Clearer Structures

# 1 Forming Clearer Structures

## a) Purpose of this governance policy

1. The purpose of this governance policy is to assist officials, primarily in departments, who may be considering the governance of Australian Government bodies – including in the review or consolidation of existing bodies, or the formation of new bodies, as part of the implementation of Government policy.
2. This governance policy describes the types of bodies that may be formed within the Australian Government and sets out policy considerations for determining the most appropriate structures and governance arrangements. This governance policy focuses particularly on considerations for establishing:
  - agencies under the *Financial Management and Accountability Act 1997* (FMA Act) and/or the *Public Service Act 1999* (Public Service Act); or
  - authorities or companies under the *Commonwealth Authorities and Companies Act 1997* (CAC Act).
3. Forming a new body outside either the FMA Act or the CAC Act framework should not occur unless there are exceptional circumstances. It will need to be supported by the Department of Finance and Administration (Finance).
4. A detailed overview of bodies in which the Australian Government has a governance role appears in a separate publication, also produced by Finance, the *List of Australian Government Bodies*.<sup>1</sup> A broad interpretation of a governance role has been used to compile that document, including a broad interpretation of what constitutes a body.<sup>2</sup>
5. **Striving for clarity** — Entity-specific legislation should not need to modify the application of the financial framework legislation applying to a particular body. This is because principle based legislation, like the FMA Act and CAC Act as well as the Public Service Act already provide considerable flexibility in managing bodies. It is important to recognise that more consistent governance models will help provide a more efficient framework for governing all bodies.
6. Of course, some variety in organisational form and governance arrangements may be appropriate. There is no one-size-fits-all approach to governance arrangements. Thus, the most appropriate governance structure will depend on many factors. Most important will be a body's proposed purposes and functions. That said, diversity has no value as an end in itself in establishing governance models.

<sup>1</sup> The *List of Australian Government Bodies 2002-2003*, published by Finance in 2004, was the first produced by a Department, on behalf of the Government, rather than a Parliamentary Committee.

<sup>2</sup> Similar approaches are taken in this document. The aim is to improve consistency in addressing issues involving statutory authorities and office holders, as well as involvement with other bodies, such as companies and associations. The focus is on involvement at a governance level, such as the Commonwealth owning shares or guaranteeing a company, or being able to appoint directors. Similar issues arise in being involved with relationships that can raise governance questions for the Commonwealth as a whole, such as partnerships and trusts. The definition of a body also encompasses a departmental function with distinct branding.

## b) Contact other relevant agencies early

7. When forming a body, or considering changes to an existing body, early contact should be made with central agencies and then also with other agencies where relevant. Departments and agencies that may need to be consulted, depending on the issues involved, are set out below. This list is not necessarily exhaustive, so always consider other relevant consultation.

Department or Agency	Consult on:
Department of the Prime Minister and Cabinet (PM&C)	Administrative Arrangements Order (AAO), Cabinet process, legislative priorities, appointments and statutory/executive agencies under the Public Service Act
Department of Finance and Administration (Finance)	Appropriations, budget issues, financial reporting, FMA Act agencies, CAC Act bodies, governance templates, company constitutions, government business enterprises (GBEs), superannuation, insurance and registering a “.gov.au” website
Department of Employment and Workplace Relations (DEWR)	Application of the Government’s workplace relations policies, policy framework for determining remuneration, terms and conditions of employment and coverage by long service leave and maternity leave legislation
Attorney-General’s Department (including the Office of Legislative Drafting and Publishing)	Issues arising under constitutional, criminal, administrative or international law and drafting of subsidiary legislation
Department of the Treasury	Issues under the <i>Corporations Act 2001</i> and the <i>Trade Practices Act 1974</i>
Department of Foreign Affairs and Trade	International treaties, dealing with other nations or international organisations
Australian Public Service Commission (APS Commission)	Public Service Act coverage including its implications for employees, application of APS Values and APS Code of Conduct
Australian Bureau of Statistics (ABS)	Sector classification of a body, such as General Government Sector (GGS)
Australian National Audit Office (ANAO)	Financial and performance audit issues and better practice guides on governance related issues
Australian Taxation Office (ATO)	Australian Business Number (ABN) allocation and issues regarding the application of various taxes
Comcare	Coverage for employees’ compensation issues
Commonwealth Ombudsman	Coverage of the Ombudsman’s jurisdiction
IP Australia	Registering trade marks, designs or patents
National Archives of Australia (Archives)	Application of the <i>Archives Act 1983</i> and good record-keeping practices
Office of Parliamentary Counsel (OPC)	Drafting Bills (primary legislation)
Privacy Commissioner	Applying the Information Privacy Principles

# 1 Forming Clearer Structures

## c) What's in a name?

8. The following short descriptions cover terms used in this governance policy, including aspects of how these terms inter-relate:<sup>3</sup>
- **Commonwealth** – the legal entity of the Commonwealth of Australia, created by the Australian Constitution.
  - **Australian Government** – all bodies that comprise the public sector at the national level. This includes the Commonwealth, office holders, statutory corporations, Commonwealth companies and their subsidiaries.
  - **Department** – part of the Commonwealth that is established, under section 64 of the Constitution, as a Department of State. A Department under the Public Service Act and the FMA Act does not directly include the minister.
  - **Parliamentary Department** – part of the Commonwealth that is established as a Department of the Parliament: see the *Parliamentary Service Act 1999*.
  - **statutory authority** – generic term for a body established through legislation for a public purpose. This can include a body headed by, or comprising, an office holder, a commission or a governing board.
  - **FMA Act agency** – a Department of State, a Parliamentary Department or a *prescribed agency* identified in regulations made under the FMA Act. These bodies need an appropriation from Parliament before spending public money.
  - **Executive Agency** – an agency declared as separate from the Department, for staffing and accountability/reporting purposes, under the Public Service Act.
  - **Statutory Agency** – a statutory authority identified in an Act as a “Statutory Agency” for the purposes of the Public Service Act.
  - **body** – Includes any department, prescribed agency, executive agency, statutory agency, statutory authority, office holder, company, association, cooperative, partnership, trust or departmental function with a distinct branding.
  - **body politic** – refers to a legal entity that is a government, such as the Commonwealth or one of the State Governments.
  - **body corporate** – a legal entity, other than a body politic or a natural person. It includes a statutory corporation, a company and an incorporated association.
  - **commission** – a generic term that refers to “a body of persons, authoritatively charged with particular functions”.<sup>4</sup> This document primarily refers to the term in a technical sense to describe a body corporate that comprises more than one person. However, the term also occurs in the name of certain bodies that are led by a single office holder, such as the APS Commission.
  - **statutory corporation** – a statutory authority that is a body corporate.

<sup>3</sup> Appendix D provides further detail on the meaning of the terms: Department, Executive Agency (under the Public Service Act) and Statutory Agency (under the Public Service Act).

<sup>4</sup> *The Macquarie Dictionary*, Federation Edition, 2001, page 393

- **company** – a body corporate which has its status conferred by the *Corporations Act 2001*. It is a body formed through the agreement of its members.
- **company limited by shares** – a company whose members hold shares.
- **company limited by guarantee** – a company whose members are guarantors.
- **member** – a generic term used primarily in this document to describe a person who is a shareholder or a guarantor of a company. (It can also describe a director in terms of being a “member of a board”.)
- **person** – a generic term encompassing any natural person, body corporate or body politic.
- **Commonwealth company** – a company, whether limited by shares or by guarantee, in which the Commonwealth has a “controlling interest”.
- **CAC Act body** – a Commonwealth authority or a Commonwealth company under the CAC Act.
- **Commonwealth authority** – a statutory corporation, regulated by the CAC Act because it is able to hold money on its own account.
- **GGS** – “General Government Sector” comprising bodies that are primarily budget-funded, or that obtain their funds from government generally.
- **Public Non-financial Corporation** – a governmental body corporate, outside the GGS, that primarily trades (formerly called a Government Trading Enterprise).
- **Public Financial Corporation** – a governmental body corporate, outside the GGS, primarily dealing with finance (formerly called a Government Financial Enterprise).
- **CRF** – the “Consolidated Revenue Fund” established by Section 81 of the Constitution, comprising money raised or received by the Commonwealth.
- **Special Account** – a ledger, in law, that allows public money to be drawn from the CRF for specified purposes, up to the Special Account’s balance. It enables separate accounting to support an identified activity, including within a Department.
- **business operation** – an activity, within an FMA Act agency, (formed by Finance’s Secretary), and requiring separately audited financial statements.

## d) Overview of Australian Government activity

9. **What is the Commonwealth?** — The Commonwealth consists of Ministers and officials who work within the “body politic” of the “Commonwealth of Australia”. In general terms, Ministers and officials comprise the executive arm of the government, as opposed to the Parliament (comprising the legislative arm) and the “judicature” (the judicial arm).<sup>5</sup>
10. The executive arm of government also encompasses other Australian Government bodies, in particular statutory authorities created by the Parliament for a public purpose, including statutory corporations that are legally separate from the Commonwealth.

<sup>5</sup> These three arms of Government reflect the doctrine of the “separation of powers” between the Parliament, the executive and the judiciary. See further Aitken, G & Orr, R, *Sawer’s: The Australian Constitution*, 3rd edition, pages 24 - 25.

# 1 Forming Clearer Structures

11. Under the Australian Constitution, Ministers are appointed to administer a Department of State. This position provides certain powers to Ministers, as well as duties to execute and maintain the laws of the Commonwealth. The allocation of legislation to Ministers occurs through the Administrative Arrangements Order (AAO). Made by the Governor-General, on the advice of the Prime Minister, the AAO names the portfolios, the matters dealt with by each department, and the legislation administered by Ministers. It also describes, in general terms, the principal matters administered by the relevant department and the other bodies within the portfolio.
12. **Variety in statutory authorities** — Significant variety can apply to the governance arrangements for statutory authorities or office holders. For example:
  - a body may be legally part of the Commonwealth, but financially autonomous from the relevant department. Alternatively, the body may be able to hold money on its own account.
  - levels of ministerial control can vary. This includes powers to appoint or remove office holders and to give directions about performing functions.
  - a body may be able to receive budget appropriations in its own right. If it is not financially autonomous from the department, then the Secretary of the department controls money appropriated for its purpose (subject, of course, to the views of the relevant Minister).
  - a body may have a governing board or an executive management structure. The latter may involve an advisory board or a commission.
  - a body may be a statutory agency staffed under the Public Service Act and/or have the power to engage employees outside the Public Service Act. It may also, or as an alternative, have staff 'made available' to it by the relevant department or another agency.
  - a body may need to provide reports to the Minister, the Secretary, a Ministerial Council, Parliament or a combination of these.
13. An aim of this governance policy is to clarify the significance of some of these various approaches to structuring Australian Government bodies.
14. **Statutory authorities within the Commonwealth** — Statutory authorities and office holders will form part of the Commonwealth unless their enabling legislation expressly provides otherwise. In general, the FMA Act should regulate the financial management practices of statutory bodies established within the Commonwealth.

15. **Bodies outside the Commonwealth** — Some bodies may, however, be established in statute as a body corporate that is legally separate from the Commonwealth. The legislation creating these bodies may also provide the Minister with power to direct the body in the performance of functions, on either general or specific matters. Accordingly, being legally separate from the Commonwealth does not, of itself, necessarily determine a body's level of independence (see discussion in Part 4(f) below).
16. Also, legal separation does not immediately mean that a statutory body can hold money on its own account. Some statutory corporations are best established without their own financial powers, which means that they will be financially supported as part of the Commonwealth itself. Examples of these bodies include certain regulators. (This will mean that they can only spend money under an appropriation from the Parliament.)
17. The CAC Act applies to statutory corporations that are both legally and financially separate from the Commonwealth. This means they are established as bodies corporate, for a public purpose, with the ability to hold money on their own account. They are more independent from the Commonwealth in a financial sense, but powers of direction can also apply to these bodies in other important ways. (See Appendix E: Comparing the FMA Act and the CAC Act.)
18. **Ministerial responsibility for legislation** — Regardless of the degree of formal control over statutory bodies, Ministers are responsible for the legislation that establishes and regulates statutory authorities and office holders within a Minister's portfolio. This responsibility includes the processes, which are conducted in the department, for initiating and monitoring any amendments to the legislation. This provides departments with an important role for all statutory authorities. It is consistent with the role of departments stated in Uhrig, J, *Review of Corporate Governance of Statutory Authorities and Office Holders*, Commonwealth of Australia, June 2003 (Uhrig Report). It was accepted by the Government in its response to the Uhrig Report that departments should help Ministers in the oversight of portfolio bodies generally.
19. This governance policy does not promote government functions or powers being conferred on bodies outside the more usual departmental or statutory approaches, unless there is a compelling rationale that is also clear to relevant central agencies. More usual structures are often beneficial in helping improve the ability of departments and central agencies to maintain a consistent understanding about the governance of portfolio bodies generally.
20. **Why variety can now be minimised** — The Parliament and the Executive Government have, historically, adopted a broad range of organisational structures to conduct government activities. These have ranged from the traditional mechanisms for performing functions central to the Government and its interests (such as departments) to bodies more at the edge of the Government's sphere of influence (such as subsidiary companies established by Commonwealth authorities).

# 1 Forming Clearer Structures

21. However, the nature of Australian Government bodies has been significantly affected by a range of reforms from the late 1990s onwards, including:
  - the updated financial framework (January 1998),<sup>6</sup>
  - introduction of agency banking and accrual budgeting (July 1999),<sup>7</sup>
  - revised APS employment arrangements (December 1999),<sup>8</sup> and
  - reforms to directors' duties under the then Corporations Law and the CAC Act (March 2000), followed by the commencement of the *Corporations Act 2001* (July 2001).<sup>9</sup>
22. Detailed experience from working with these reforms allows for streamlined and consistent approaches to the governance of the Australian Government bodies. Policy reforms have also supplemented these changes to legislation. This includes implementation of the Uhrig Report and the increased flexibility under the workplace relations system for agencies to determine appropriate remuneration and conditions arrangements for their employees.
23. **Developing effective structures may take time** — With the variety of alternative legal structures available, significant variations have developed in public sector governance in the Australian Government. As the governance structures and arrangements for a body can have significant long-term implications, sufficient time should be made available, where possible, to properly work through the best arrangements for any proposed body (or changes to an existing body).

<sup>6</sup> The FMA Act, the CAC Act and the *Auditor-General Act 1997* replaced the *Audit Act 1901* on 1 January 1998.

<sup>7</sup> Accrual budgeting began with the beginning of the 1999-2000 financial year. The changes involved amendments to the form of the annual Appropriation Acts and removing “fund accounting” concepts in legislation. The latter occurred through deemed changes to legislation made by the *Financial Management Legislation Amendment Act 1999* (from 1 July 1999). Eighty-five Acts affected by these deemed changes were then actually amended through the *Financial Framework Legislation Amendment Act 2005* (from 22 February 2005).

<sup>8</sup> The *Public Service Act 1999* and the *Parliamentary Service Act 1999* replaced the *Public Service Act 1922*. This governance policy does not deal with Parliamentary Departments or Parliamentary Committees.

<sup>9</sup> Through the *Corporate Law Economic Reform Program Act 1999* and the *Corporations Act 2001* respectively.

## e) What this governance policy does not cover

24. This governance policy draws together a number of matters that are integral to the governance arrangements of Australian Government bodies. However, this policy does not seek to work through all the issues that can affect a body's governance. In particular, this policy does not seek to replicate processes or information sources that are already well established through other mechanisms, such as:

- *“Foundations of Governance in the APS”*<sup>10</sup> - A web based resource that draws together the numerous issues that can affect Australian Government bodies, including links to material related to the financial aspects of governance on the Finance website.
- *Designation of the responsible Minister and matters dealt with by a department:* This occurs through the AAO.
- *Appointment processes for directors and office holders:* These are generally dealt with by Cabinet or, in some cases, legislation.
- *Office-holder remuneration and other incentives:* These are generally matters dealt with through the processes of the Remuneration Tribunal.
- *Allocation of appropriations:* Funding decisions are made through the Budget process, with annual appropriations arising from the Budget and further amounts through the Additional Estimates later in the relevant financial year.
- *Designation of a GBE or a statutory marketing authority:* These are listed in regulations made under the CAC Act. GBEs and statutory marketing authorities are CAC Act bodies to which some particular arrangements apply regarding corporate plans, investment powers and similar areas.
- *The making of treaties:* These are managed through Department of Foreign Affairs and Trade, the Attorney-General's Department's Office of International Law (OIL) and the relevant departments, agencies and Ministers.

<sup>10</sup> See [www.apsc.gov/foundations](http://www.apsc.gov/foundations)



Is it Necessary to Form a Body?

## 2 Is it Necessary to Form a Body?

25. Part 2 of this governance policy aims to assist officials to determine whether a new body is required, whether an existing department or body could undertake the activity or whether bodies can be consolidated. An activity includes a power or function (including policy development or providing services).

### a) The extent of Australian Government activity

26. Many activities are carried out within the Australian Government because of the public interest in the proper performance of the relevant powers or functions. However, activities that may previously have been considered the sole domain of Government have, in recent decades, been increasingly considered suitable for the private sector or the not-for-profit sector to conduct. Alternatively, the Australian Government may maintain a role, but in combination with the other sectors.
27. This closer alignment between the private, not-for-profit and public sectors means that it is important that agencies rigorously assess the best way to perform a particular activity.
28. The Australian Government's financial management framework broadly reflects a division of activities between those seen as central to Government and those that are not. The division broadly splits across those undertaken by agencies that operate financially under the FMA Act as against the financially separate bodies governed by the CAC Act.
29. However, many bodies with separate legal and financial status were created before the FMA Act and the CAC Act commenced in 1998. Accordingly, the government decided that the governance arrangements of all statutory authorities would be reviewed in response to the Uhrig Report.
30. Innovations under both the FMA Act and the Public Service Act have provided agencies with increased operational flexibility that might previously have been seen as only available under a CAC Act structure and outside the APS. For example, the introduction of agency banking in July 1999 meant that FMA Act agencies may operate with bank accounts in their department's or agency's name. This includes establishing their own relationship with transactional bankers, rather than accessing a centralised system.<sup>11</sup>
31. Numerous regulators and other bodies operate with a degree of independence from Government, including as bodies corporate, while also being regulated by the FMA Act.
32. That said, whether a body should operate under the FMA Act or the CAC Act is only one factor that needs to be considered when determining the most appropriate governance framework for a body.

<sup>11</sup> Agencies under the FMA Act conduct transactional banking under a delegation from the Finance Minister but must still ensure that an appropriation supports all expenditure. However, the day-to-day effect is similar to the relationship between CAC Act bodies and their transactional bankers.

## b) Use existing departments or bodies

33. Where it would be appropriate for the Australian Government to conduct an activity, it may be preferable for it to be conducted through a department. This option maximises ministerial control, as a department works through its departmental Secretary under the relevant Minister.<sup>12</sup> A departmental structure also allows for well-understood lines of responsibility to operate, including the clear application of other accountability laws and processes.
34. Departmental status works well for functions of government that require close ministerial involvement, direction and responsibility. These include primary functions such as Budget implementation, defence and policy formulation generally.
35. Departmental structures are also more flexible than bodies created by statute.<sup>13</sup> The work they perform may be, and has been, subject to rapid alteration if required by the Government of the day. Indeed, departments themselves can be created and abolished at the discretion of the Governor-General, acting on advice of the Prime Minister, whereas the enabling legislation of a statutory body usually requires amendment to change the body's purposes or structure.
36. If it is not appropriate for a new function to be performed by a department, then the option of using another existing body should be assessed. Relevant considerations would include:
  - synergies between any existing bodies and the proposed new functions; and
  - possible incompatibility with the role of existing bodies, such as functions and powers stated in legislation.
37. Consolidating activities into an existing body, with complementary functions, eliminates the need to create a new body. This reduces the unnecessary proliferation of Australian Government bodies and minimises additional set-up and ongoing administrative costs for the body. This then helps reduce demands placed on public sector resources generally.<sup>14</sup>

### GOVERNANCE CONSIDERATION

A new function, activity or power should be conferred on an existing department (or another existing body) unless there is a persuasive case to form a new body.

## c) Consider non-legislative options

38. When the case for creating a new body is persuasive, officials should first consider the option of a structure that avoids requiring primary legislation. This allows for a higher degree of administrative flexibility and, therefore, responsiveness to Government, as well as clear accountability to Parliament through the Minister.

<sup>12</sup> Section 57 of the Public Service Act states that “[t]he Secretary of the Department, under the Agency Minister, is responsible for managing the Department and must advise the Agency Minister in matters relating to the Department.”

<sup>13</sup> Coombs, HC, *Report of the Royal Commission on Australian Government Administration*, Australian Government Publishing Service, 1976 (Coombs Royal Commission) at page 68.

<sup>14</sup> Maintaining good governance can inherently involve some cost. See further discussion in part 4(b) below.

## 2 Is it Necessary to Form a Body?

39. Proposals to create a new body should be justified by the sponsoring department or agency. Attention should also be paid to:
- ensuring there are avenues and opportunities for full and effective accountability to Parliament and the Government;
  - providing an appropriate degree of Ministerial power of direction;
  - promoting consistency in structures and in relationships with Parliament and the rest of the Government; and
  - guarding against unnecessary fragmentation of the machinery of Government.
40. Noting these factors, the simplest and most appropriate form for a body to take, even if created for specialist purposes, is one within a department that has distinct branding. This approach is used, for example, for functions like those undertaken by Comcar within Finance.<sup>15</sup> This approach combines the advantages of effectively undertaking a function having a distinct branding while still being within a Department.
41. Another reason to establish a body within a Department is that, even if the body were later moved to become a portfolio body outside the Department, the Minister would still need departmental advice on that body. The *Report of the Royal Commission on Australian Government Administration* (Coombs Royal Commission) stated, in 1976, that:
- “there appears to be fairly general agreement that the Minister was entitled to look to his [or her] department for advice on the exercise of his [or her] reserve powers in relation to bodies in his [or her] portfolio and that accordingly there needed to be a capacity in the department to give informed advice.”<sup>16</sup>
42. This view was restated, in general terms, in the Uhrig Report.<sup>17</sup>
43. Where separating staffing and reporting for an activity from a department is appropriate, it may be possible to consider the form of an Executive Agency under the Public Service Act.<sup>18</sup> This is a mechanism to identify a group of APS employees who, under the Executive Agency Head, can perform functions within the portfolio of a Minister. PM&C must first be consulted if consideration is being given to establishing an Executive Agency.
44. As set out in Appendix C below, it is government policy that an Executive Agency will also be prescribed as financially separate from the department under the *Financial Management and Accountability Regulations 1997* (FMA Regulations).

<sup>15</sup> Comcar is a branch within the Ministerial and Parliamentary Services Group of Finance, providing a Commonwealth car with driver service. It is noted in the *List of Australian Government Bodies* as a function of Finance with “distinct branding”.

<sup>16</sup> Coombs Royal Commission at page 89

<sup>17</sup> Uhrig, J, *Review of Corporate Governance of Statutory Authorities and Officeholders*, Commonwealth of Australia, June 2003 (Uhrig Report), at page 11.

<sup>18</sup> See Appendix D.

## Is it Necessary to Form a Body? 2

45. In limited circumstances, however, a prescribed agency may be established in the FMA Regulations without also having separate staffing powers under the Public Service Act. This will provide financial autonomy from the department but the Secretary of the department will still be responsible for managing the agency, including employment matters, its general policies and the annual report covering its operations. This issue is discussed further in Part 3(b) below.
46. Reasons to use subsidiary legislation, including establishing a prescribed agency under the FMA Regulations might include:
  - a more clearly defined role and function — generally a separately identifiable body will have a single or primary role that it is required to perform;
  - greater transparency in how the function or activity is conducted;
  - providing a specialised and clearly defined range of functions may improve efficiency, by better allowing those managing the body to focus solely on their defined role;
  - where the activity has sufficient scale and critical mass to be conducted separately and can absorb the monitoring, reporting and accountability costs associated with good governance; and
  - the activity has been earmarked for commercialisation, corporatisation or privatisation.

### GOVERNANCE CONSIDERATION

First consider a non-legislative structure within the Commonwealth, where the case for a new body is persuasive.

### d) When to use primary legislation

47. Statutory bodies (including those comprising a single office-holder) are an alternative organisational form to just using the department for an activity.
48. As noted in 1976 by the Coombs Royal Commission, “some degree of independence from ministerial and departmental control should be intended if there is to be a statutory body”.<sup>19</sup> The issue, then, is how much independence is required, and in which areas (see further the discussion on this in Part 4(f) below). In all other aspects, it is preferable for a body to adopt uniform governance structures as other similar bodies in the Australian Government.
49. The reasons for establishing a statutory body may include those listed in Part 2(c) above plus reasons such as:<sup>20</sup>
  - the need to recognise a person as a statutory office-holder, whose role is set out in primary legislation;

<sup>19</sup> Coombs Royal Commission at page 84.

<sup>20</sup> Coombs Royal Commission at pages 84-85.

## 2 Is it Necessary to Form a Body?

- the need to develop some degree of independence from a normal department structure (the level of ministerial oversight/direction typically also being set out in the enabling legislation);
  - the need to establish a regulator or statutory decision-maker, including as a commission that is a body corporate;
  - the desire to provide for a more substantial ongoing status for the function, by describing it within legislation; and
  - greater transparency in describing a body's functions and powers in legislation.
50. Where feasible, an alternative to creating a new statutory body may be to vest powers in a statutory office-holder within a department with staff made available by the Department where necessary.<sup>21</sup> One benefit may be that the statutory function can be carried out effectively and at lower cost within a department (which will already support functions like the Chief Financial Officer (CFO) or human resources advice). Another option is to consider adding the proposed functions to an existing statutory body, again with staff made available where necessary.<sup>22</sup>
51. A disadvantage of a body being established in legislation is that the legislation may require updating. This lack of flexibility may limit the ability of a body to respond to evolving circumstances, such as changing Government or community priorities. A sunset clause may also need to be considered to permit a body's timely dissolution.

### e) Consultation

52. As noted above in Part 1(b), where a new body is being considered, it is important for relevant central agencies to be consulted as early as possible. This will include discussions in the lead up to any Cabinet processes and also in relation to any proposed legislation.
53. Drafting Directions issued by the Office of Parliamentary Counsel (OPC) identify departments and agencies that need to be consulted during the preparation of drafting instructions or legislation.<sup>23</sup>
54. For example, Finance must be consulted on any legislation that may affect the financial framework, including proposals to create new bodies or amend legislation relating to existing bodies. The details of relevant contacts in Finance for consulting on statutory authorities and other bodies are also set out in a Legislation Circular issued by PM&C.<sup>24</sup>
55. Other agencies also receive draft legislation from OPC in certain circumstances – these are broadly outlined in Appendix A.

<sup>21</sup> An example along these lines is the Director of Evaluation and Audit, who is an office-holder in Finance.

<sup>22</sup> Merit Protection Commissioner with staff made available by the Public Service Commissioner.

<sup>23</sup> See Appendix A — Extract from Drafting Direction 2005, No. 1 “Referral of Bills to other agencies”.

<sup>24</sup> A copy of the relevant Circular, at the time of writing, is set out in Appendix B.

## Applying the Financial Framework

### 3 Applying the Financial Framework

56. In general terms, either the FMA Act or the CAC Act should regulate the financial management of Australian Government bodies. Any exceptions to this should be avoided in the interests of clarity and consistency across the framework.
57. There are important differences in the way these Acts are structured, the matters they deal with and their effect on the people in the relevant bodies under them (a comparison of the main features of the Acts appears at Appendix E).
58. The FMA Act focuses primarily on the obligations and responsibilities of Chief Executives and the way officials handle public money, public property and other resources of the Commonwealth.
59. The CAC Act, on the other hand, requires directors and officers to exercise their powers and duties in the best interests of the body and for a proper purpose. Directors' duties apply to help ensure that prudent decisions are made on the resources that, as a matter of law, the body holds in its own right.
60. It may be considered that the CAC Act best suits activities that could create financial risk for the Commonwealth. However, the relationship between the Commonwealth and a statutory corporation (or even a company that it controls) is different in character to the relationship between a private sector entity and one of its subsidiaries.
61. For example, if the Government seeks to minimise its financial risk exposure to a body's activities, then it may make more sense to control the finances of that body closely rather than simply assume that using a subsidiary will protect the Commonwealth from any relevant risk.
62. Accordingly, the FMA Act will often be the better approach. It tends to allow the Government to more readily set policies affecting a body's financial management, noting of course that formal responsibility lies with the Chief Executive of the relevant agency to properly manage Commonwealth resources (including in accordance with relevant policies).
63. In contrast, the Government may have relatively restricted powers over the financial management approaches of a body under the CAC Act.<sup>25</sup> The CAC Act allows the Government to rely on the directors to properly govern the relevant body, in line with their directors' duties.

#### a) An FMA Act agency is the preferred form

64. The FMA Act covers all departments and agencies that are financially part of the Commonwealth.<sup>26</sup> Under the Constitution, bodies that are financially part of the Commonwealth require an appropriation authority to support any expenditure of money.<sup>27</sup>

<sup>25</sup> A CAC Act body, however, may be subject to direction through its enabling legislation.

<sup>26</sup> The FMA Act covers the Parliamentary Departments directly. It covers courts prescribed under the FMA Regulations.

<sup>27</sup> Sections 81 and 83 of the Constitution, which describe the CRF and the Treasury respectively.

65. The FMA Act provides a framework for dealing with and managing the money and property of the Commonwealth. All money held by an FMA Act agency is public money, unless it is allowed, by statute, to hold money other than public money.<sup>28</sup> The FMA Act contains specific obligations relating to the handling of public money, reflecting the fact that this money is constitutionally part of the CRF and expenditure from the CRF needs to be supported by an appropriation.<sup>29</sup>
66. As reflected in the explanatory memorandum to the *Financial Management and Accountability Bill 1996*, the “Finance Minister” (that is, the Minister for Finance and Administration) is the custodian of the CRF and the Treasury, as described in the Constitution.<sup>30</sup> As examples of this central role, a group of provisions dealing with public money in the FMA Act cover the following:
- the Finance Minister must open and maintain at least one official bank account and is given the exclusive power to establish a network of others and to issue Orders for dealing with deposits and withdrawals of public money;
  - an official or Minister must deal promptly and properly with receipts of public money;
  - an official or Minister must deposit public money in an “official” bank account;
  - an official or Minister must not agree or arrange, without authority, for a non-Commonwealth person to receive or hold public money; and
  - an official who withdraws money from an official account must have proper authority, involving an appropriation.
67. Chief Executives are “responsible and accountable for much of the day-to-day management performance of the Commonwealth’s financial affairs”.<sup>31</sup> This includes a role in producing chief executive’s instructions (CEIs), which provide a common framework within an agency for financial management matters.
68. The FMA Act provides for an executive management structure, with each FMA Act agency governed by a Chief Executive.<sup>32</sup> The Chief Executive is responsible for managing the agency in a way that, as stated in sub section 44(1) of the FMA Act, promotes the efficient, effective and ethical use of “Commonwealth resources”. This statutory responsibility is central to ensuring that agencies implement the policies of the government of the day. It is supplemented by a requirement, in the FMA Regulations, for the approval of spending proposals to occur in accordance with Commonwealth policies before any arrangements are entered that would or could lead to the spending of public money.<sup>33</sup>

<sup>28</sup> FMA Act agencies that handle money other than public money include the CSS Board and the PSS Board, which are responsible for the statutorily established CSS and PSS Funds.

<sup>29</sup> See Finance Circular 2004/06: *Appropriations and the Consolidated Revenue Fund*.

<sup>30</sup> Explanatory Memorandum, *Financial Management and Accountability Bill 1996*, page 1.

<sup>31</sup> Explanatory Memorandum, *Financial Management and Accountability Bill 1996*, page 1.

<sup>32</sup> See, generally, the Uhrig Report at pages 85-89.

<sup>33</sup> FMA Regulations 9, 10 and 13.

### 3 Applying the Financial Framework

69. While an FMA Act agency, prescribed under the FMA Regulations, is financially autonomous from the relevant department, it is also subject to the general financial management policies of the Australian Government. This does not, however, directly affect the operational independence of a statutory body as outlined in the body's enabling legislation (see further discussion on this at Part 4(f) below).
70. An FMA Act agency is the preferred form for new bodies particularly where:
- the body will raise public money or perform regulatory functions under a law of the Commonwealth; or
  - the body is to be classified as a body as within the GGS. This may occur where a number of the following characteristics apply: the body will engage in non-market production, the body will provide goods and services free of charge or at nominal prices and the body is controlled and financed by government (see further discussions at Part 4(b) below).
71. A governing board is not readily accommodated under the FMA Act. However, an FMA Act agency may encompass a number of statutory office holders, comprising a commission, who make collective regulatory decisions, with relevant levels of statutory independence. This commission can even be recognised as a body corporate, as explained further in Part 3(d) below.

#### b) Financial and staffing autonomy

72. One of the benefits of being established as a separate agency under the FMA Act is to enable a body to receive its own appropriation from the Annual Appropriation Acts. There are, however, numerous reporting and accountability obligations under the FMA Act that arise from this financial autonomy.
73. This results in the Chief Executive of an FMA Act agency having a significant reporting and accountability role compared with, say, the head of a unit with distinct branding within a department. These overheads need to be assessed against the benefits of being financially autonomous from the department.
74. It is preferable, but not essential, for a body that will be financially autonomous to also be established with its own staffing powers. Generally, this should occur under the Public Service Act, but sometimes alternative staffing is appropriate, (such as the Parliamentary Departments or the Australian Federal Police).
75. In contrast, some bodies have been established as prescribed agencies under the FMA Act, but without a staffing capacity or accountability/reporting obligations separate to the relevant department (as noted in Part 2(c) above). This model applies where the body requires financial autonomy from the department, but without a pressing need to separate its staff or activities from control by the Secretary of the relevant department.<sup>34</sup>

<sup>34</sup> This model is not expected to be common: see Finance Circular 2003/01 reproduced at Appendix C.

76. In these cases, the prescribed agency has financial autonomy from the department, but the Secretary of the department will still be responsible for its policies, its annual report and employing staff. A practical approach to this situation in many cases will be for the Secretary to delegate a significant range of these powers to the chief executive of the prescribed agency. That chief executive may also be a primary author of the chapters – or the separate volume – of the departmental annual report dealing with the activities within the prescribed agency.
77. Protocols may be useful for considering how the department and the prescribed agency will interact on matters of common interest under the FMA Act. These may include such matters as procurement practices, internal audit, audit committees and commonalities in CEIs.

### c) Raising public money

78. As noted in Part 3(a) above, the definition of public money for the FMA Act is effectively the same as moneys forming the CRF under the Constitution. The inclusion of moneys raised under coercive powers of the Commonwealth within the FMA Act framework will, therefore, maximise accountability for such moneys and better address constitutional requirements for handling these amounts.
79. A body that is expected to raise public money under a law of the Commonwealth – either by levy, licence fee, cost recovery or any coercive powers – should preferably be established as an FMA Act agency. One key reason is that the FMA Act provides a rigorous framework for the collection, management and expenditure of public money generally.<sup>35</sup>

#### GOVERNANCE CONSIDERATION

It is preferable for the FMA Act to apply to a body which is largely reliant on budget-funding or which raises public money under a law of the Commonwealth. It is also preferable for the FMA Act to apply to bodies categorised as regulators.

### d) Bodies corporate and the FMA Act

80. An FMA Act agency will typically be legally part of the Commonwealth. However, there may be instances where a body requires a separate legal identity to the Commonwealth. This will generally arise where, for example, there is a need for the body to have the power to sue and be sued in its own corporate name (as opposed to a single office holder requiring that capacity, such as the Federal Commissioner of Taxation). Corporate identity may also arise where a group of people need to exercise collective decision-making in the performance of their statutory functions, including a regulatory or enforcement role. In these cases, it may be appropriate for a body corporate to be created by the Parliament.

<sup>35</sup> In some cases bodies outside the Commonwealth are supported by levies, which must still be appropriated from the CRF.

## 3 Applying the Financial Framework

81. A body corporate of this type will normally have no capacity to hold money or property in its own right. Instead, the enabling legislation might explain that any money or property is held on behalf of the Commonwealth. In this regard, such a body corporate is significantly different to a Commonwealth authority or Commonwealth company governed by the CAC Act, as the latter two are both legally and *financially* separate from the Commonwealth.
82. The financial status of the body corporate would, however, be dependent on its establishment as an FMA Act agency, comprising the members of the body corporate (plus the staff who support the body). Importantly, the statutory functions of the body corporate are not directly related to the financial management of the FMA Act agency.
83. There are currently a number of bodies corporate that exist in conjunction with an FMA Act agency, including the Australian Competition and Consumer Commission (ACCC), the Human Rights and Equal Opportunity Commission (HREOC) and the National Offshore Petroleum Safety Authority (NOPSA). More recently, Parliament established the Australian Communications and Media Authority (ACMA) in legislation combining the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) as of 1 July 2005. Significantly, the ABA and the ACA operated under the CAC Act but, when ACMA was considered closely, there was no compelling reason for it to hold money on its own account. Accordingly, ACMA is established under the FMA Act.
84. The members of the body corporate in this instance would have statutory powers (in most cases regulatory) but not generally any governance role. The enabling legislation of the body should address possible tensions between the role of the Chair (as, for example, the Chief Executive of the FMA Act agency), and the members of the body corporate (who could potentially be making decisions that could affect the financial management and accountability of the FMA Act agency).<sup>36</sup>

### GOVERNANCE CONSIDERATION

A body corporate (commission) can exist in conjunction with an FMA Act agency where, for example, collective decision-making by a number of statutory office holders is necessary or the body needs to sue or be sued in its own corporate name.

### e) Bodies governed by the CAC Act

85. The features of CAC Act bodies are that they:
- are bodies corporate (being either a statutory corporation established for a public purpose or a company in which the Commonwealth has a controlling interest);
  - hold money on their own account, rather than on behalf of the Commonwealth; and
  - have a governing board subject to directors' duties (or at least one director, subject to these duties).

<sup>36</sup> With ACMA, section 63 of the *Australian Communications and Media Authority Act 2005* states: "The Chair is not subject to direction by the ACMA in relation to the Chair's performance of functions, or exercise of powers, under the *Financial Management and Accountability Act 1997* or the *Public Service Act 1999*."

86. With a governing board, the directors must act in the interests of the body, as opposed to acting as representatives for other constituencies. A governing board may be helpful where the body has a commercial or entrepreneurial focus. The CAC Act does not give Ministers a general power of direction in relation to a body's functions (this is left to the enabling legislation if required) but it does give the responsible Minister and the Finance Minister broad powers to require the authority to provide information about its activities.
87. Unlike FMA Act agencies, CAC Act bodies are generally not required to comply with general government policies (including those that relate to the use of Commonwealth resources) unless specifically required to do so under either:
- a direction from the responsible Minister (where possible under the relevant enabling legislation or a company's constitution), or
  - a notice provided, after consultation, about a "general policy" of the Australian Government under section 28 or 43 of the CAC Act.<sup>37</sup>
88. This financial autonomy from the Government (and general policies of the Australian Government) can be best understood where a body needs to operate commercially and where the Australian Government does not provide a substantial proportion of its funding through appropriations.<sup>38</sup>
89. The CAC Act includes certain duties for officers of Commonwealth authorities, as well as directors on the board. These include duties of care and diligence, good faith, proper use of position, proper use of information, compliance with statutory duties and, for directors, disclosure of, eg, material personal interests.
90. Directors' duties do not apply to an agency under the FMA Act because the financial management policies of those bodies are directly affected by relevant Government policies, as well as significant capacities for oversight and control, if necessary, by the Finance Minister (see discussion in Part 3(a) above).
91. A CAC Act body may also be prescribed in regulations as a Government Business Enterprise (GBE).<sup>39</sup> The Finance Minister has a particular role in overseeing of GBEs and they are subject to certain further governance requirements and policies. For example, GBEs must prepare an annual corporate plan,<sup>40</sup> must prepare a publicly available Statement of Corporate Intent and follow other aspects of the GBE Governance arrangements.<sup>41</sup>

<sup>37</sup> See Finance Circular 2005/04, "Application of general policies of the Australian Government to bodies under the *Commonwealth Authorities and Companies Act 1997*". Section 28 applies to most Commonwealth authorities and section 43 applies to wholly-owned Commonwealth companies. Note too that certain CAC Act bodies are listed in the CAC Regulations as subject to section 47A of the CAC Act, under which the Finance Minister can direct them to apply the *Commonwealth Procurement Guidelines* to certain procurement activities.

<sup>38</sup> Where a body is jointly funded by State Governments or the private sector (including industry) but Commonwealth legislation is necessary or appropriate, eg to provide it a national focus, then it may still be appropriate for the body to be established under the FMA Act.

<sup>39</sup> GBEs have wider investment powers than other CAC Act bodies. A Statutory Marketing Authority also has wider investment powers than other Commonwealth authorities under the CAC Act.

<sup>40</sup> See section 17 of the CAC Act for a Commonwealth authority and section 42 for a wholly-owned Commonwealth company.

<sup>41</sup> *Governance Arrangements for Commonwealth Government Business Enterprises*, June 1997, <http://www.finance.gov.au/publications/governance-arrangements/index.html>

### 3 Applying the Financial Framework

92. In summary, the presence of most or all of the following factors may make it more appropriate to apply the CAC Act:
- the body operates commercially with the intention of making a profit, in a competitive environment, and it would likely be classified as outside the GGS;
  - the body has an entrepreneurial focus;
  - a governing board would provide effective governance for a body;
  - there is a clear rationale for the assets of the body to not be owned or controlled by the Commonwealth directly; and
  - the body requires a degree of independence from general policies of the Australian Government, unless applied after consultation and formal notification.
93. However, the decision for a body to be established that is subject to the CAC Act requires the agreement of the Finance Minister (which can, in appropriate cases, be communicated through Finance). Where relevant, this will include consultation with PM&C.
94. **Companies** — The Australian Government does not always rely on legislation to form new bodies. It can also establish bodies using the same mechanisms as other persons in the community generally. This includes, most significantly, companies registered under the *Corporations Act 2001*. However, involvement in a company, including one under the CAC Act, requires the support of Finance, which will consult, as necessary, with the Department of the Treasury, given its responsibility for the *Corporations Act 2001*.
95. Companies are established outside the legal entity of the Commonwealth. Each company is formed through registration by its members (shareholders or guarantors), under the *Corporations Act 2001*.<sup>42</sup> However, the relative ease of incorporation underlines the importance of monitoring the creation and use of these entities, including careful attention to their governance processes.
96. Companies can have a range of different attributes. For example, a company may:
- be a public company or a proprietary company;
  - be “limited by shares” or “limited by guarantee”;
  - have a profit focus or a not-for-profit focus;
  - have one member (sole member company) or more than one member; and
  - be listed on a stock exchange or may not.
97. **Commonwealth authority generally preferable to company, but issues require analysis** — If it is appropriate for a body to be governed by the CAC Act, then it is generally preferable to establish it as a Commonwealth authority, rather than a company.

<sup>42</sup> Previously known as the memorandum and articles of association.

98. First, this helps promote transparency about the purpose of the body. Second, it enables the Parliament and Government to clearly articulate the powers, roles and responsibilities of the body in its enabling legislation. This includes spelling out the body's relationship with, and accountability to, Parliament and bodies that scrutinise public sector activity.<sup>43</sup>
99. Even if the objects of a company are well described in its constitution, those objects can be changed with relative ease. Also, under corporate law, those objects are limited in their ability to inhibit the freedom of the company to act outside the objects. Key differences between a company and a statutory authority are:
- a company has the power to enter transactions, borrow money and conduct activities, without further permission from its members, as soon as it is created under the *Corporations Act 2001*; and
  - a statutory authority only has power to conduct activities that are expressly stated in its legislation or are necessarily implied from its legislation. This means that a statutory authority will not be able to hold money on its own account, borrow money, invest money or engage staff other than as provided in its legislation or through other laws that apply to the statutory authority.
100. That said, a Commonwealth company might be more appropriate where the main requirement is for the body to generate profits or to generate other benefits directly to members.
101. For example, a company would generally be more appropriate where competitive necessity dictates that commercial discipline is required, the body has to operate in a commercial/competitive environment (at arm's length from government) and these factors suggest that it should adopt a legal structure more like that used in commercial business generally.
102. However, where a company structure is being considered, an assessment should be made as to whether the Australian Government should be involved, at all, in the particular activity at a governance level. It may be more appropriate for the private sector (or the not-for-profit sector or another government) to undertake the activity. If necessary, the Australian Government could provide financial support without needing formal involvement in terms of its establishment and governance.
103. If the Government decides that it would be appropriate to deliver particular policy outcomes through a company structure, then the body should preferably be wholly-owned by the Australian Government.
104. The *Corporations Act 2001* limits the influence that majority shareholders can have on a company to appropriately protect the interests of minority shareholders. This can increase the complexity of monitoring and managing such companies. For this reason, minority shareholdings should be avoided where the Commonwealth is to be a member.

<sup>43</sup> For example, the ANAO, Ombudsman, Privacy Commission, APS Commission, Archives and Parliamentary Committees.

### 3 Applying the Financial Framework

105. A more appropriate alternative, where the Government seeks to influence particular outcomes, may be to provide grant funding to a non-Commonwealth body, with specific conditions and deliverables clearly specified in a grant agreement. A well-designed and managed grant can often provide an effective means of ensuring that outcomes are achieved, without the governance complexities associated with minority shareholdings.<sup>44</sup>
106. Providing a grant may also be preferable to the Government controlling appointments to the board, or placing Government representatives on a board, if the company is not controlled by the Commonwealth. As noted below at Part 4(c), conflict of role, or a perception of conflict, can arise between the role of a person who is a director and their role as an official (whether as a Secretary, Chief Executive or an APS employee etc). Public servants who are directors of Corporations Act companies could find themselves in situations where they have conflicting legal obligations under the Public Service Act and under the *Corporations Act 2001*, which cannot be resolved. Failure to properly comply with obligations under the *Corporations Act 2001* could expose the director to civil or criminal penalties, while failure to comply with obligations under the Public Service Act could lead to disciplinary proceedings.<sup>45</sup>
107. Ultimately, there may also be less risk for Government in managing grant arrangements compared to being involved in winding-up a company.<sup>46</sup> Indeed, simply placing Government representatives on the board of a private company may unnecessarily expose them to a range of responsibilities and liabilities, without tangible benefits that could not otherwise be attained through a well-managed grant agreement.
108. The following list summarises issues potentially arising from the Australian Government being involved in companies:
- a company is relatively easy to establish, but does not provide an opportunity for Parliamentary scrutiny prior to being established, whereas enabling legislation needs to be proposed in Parliament (or, at the least, subsidiary legislation creating a body which is in many cases also a disallowable instrument);
  - the objects of a company, contained in its constitution, may ordinarily be amended by its members by a special resolution, whereas the functions and powers of a statutory authority can generally be amended only by Parliament;
  - a company has the powers of a natural person and, therefore, may generally do all those things that a natural person may do. For example, companies have a broad power to borrow and invest whereas an authority is restricted to doing only those things that are conferred on it by legislation (or are a necessity implied by legislation);

<sup>44</sup> A grant will typically have accountability conditions enforceable either as a conditional gift or as a contract (the latter described, in some cases, as a funding agreement).

<sup>45</sup> There are legal risks associated with appointing government representatives on company boards. The directors of a company owe fiduciary duties to the company. This means that they must act in the best interests of the company in exercising their power or discretion. However, as employees, any public servants on a company board would also owe a legal duty to their Agency Head. As the duties owed to the company and those to the Agency Head are different legal duties there is the potential for a conflict of duty to arise.

<sup>46</sup> There may be a public perception that the government will guarantee the operations of a Commonwealth company, merely by virtue of the Commonwealth's involvement as owner or member.

- a company is not necessarily an appropriate form for a budget-dependent body, as the *Corporations Act 2001* requires a company to be able to pay all its debts, as and when they become due and payable (that is, it must remain solvent to continue in trade);<sup>47</sup>
  - where there is likely to be an assumption, or a public perception, that there is a government guarantee for the operations of company, in the event of company failure, then the separate legal status of a company could likely be of little practical value;
  - a company may be a preferred form if privatisation at a later date is a possibility; and
  - a company is generally liable to pay income tax and State taxes and charges, whereas a statutory authority may be exempted from these taxes and charges by its enabling legislation (subject to the Australian Government's competitive neutrality policy).
109. Departments, agencies and relevant companies should bear in mind that, under section 45 of the CAC Act, any new or changed involvement by the Commonwealth with *any* company requires a notice to be tabled in Parliament by the Minister responsible for that activity. These notices should be tabled promptly. Note that this applies even to the Commonwealth's involvement in companies that are not under the CAC Act (ie, where the Commonwealth is a member, but without a controlling interest).<sup>48</sup>
110. In summary, companies might be an appropriate structure for bodies with a clear commercial or entrepreneurial focus. However, where the activity involves intergovernmental issues or joint industry-government activities, then more complex considerations will arise including whether to use a company limited by guarantee (as discussed in Part 3(h) below). As mentioned above, participation in companies should not, therefore, occur without consulting Finance.

### f) Bodies other than companies

111. **Incorporated associations and cooperatives** — The Australian Government has in the past also participated in the formation of bodies such as associations incorporated under State and Territory legislation. One reason might be to incorporate a not-for-profit association.
112. However, these types of bodies do not necessarily possess accountability and transparency features appropriate for Australian Government bodies. Additionally, they are not able to transact business across Australia, unless the body is also registered under the *Corporations Act 2001*. Significantly, these bodies are also not governed under the CAC Act, which provides the responsible Minister and the Finance Minister with powers to seek information on a range of matters. For such reasons, departments should consult with Finance if they are considering to participate in such bodies.
113. **Partnerships, trusts and joint ventures** — There are also business structures that are similar to bodies corporate, but that actually comprise relationships between other persons or bodies, rather than constituting bodies corporate in their own right. Common examples are trusts and partnerships, both of which are recognised in State and Territory laws to some extent. Another example (with extremely varied attributes due to its relatively indistinct legal form), is a “joint venture”.

<sup>47</sup> Budget-dependent bodies may, in contrast, legitimately seek to spend up to the limit of funds appropriated to them.

<sup>48</sup> Further information about the tabling of these notices can be found in Finance Circular 2004/12: *Notification to Parliament of changes in the Commonwealth's involvement with a company*.

## 3 Applying the Financial Framework

114. Caution must be exercised in entering these relationships, however, as they may place duties and liabilities on the Commonwealth (potentially as a whole) that may best be avoided. These duties may arise under State and Territory laws or under the general law (eg, the law of equity), depending on the circumstances. In any case, the effect of these relationships on the Commonwealth needs careful analysis.
115. Regarding trusts, exercise care as private sector understandings of trust law may also insufficiently recognise the Australian Government's public sector environment. For example, trust money in the control or custody of the Commonwealth cannot be spent without an appropriation from Parliament. Nor do departments or agencies have authority to agree to investment approaches for trust money beyond authority provided by the Finance Minister under the FMA Act.
116. A trust may be appropriate where legislation allows (or encourages) its use, for specific reasons. However, care should be taken in establishing and managing trusts, as agreeing to become a trustee can raise questions of resource allocation and access to skilled legal advice that may not be readily available to all agencies.

### g) Limited scope for exceptions

117. Where the proposed functions of a body raise particularly unusual or complex issues, there may be an argument for the body to operate either wholly or partly outside the FMA Act or the CAC Act.<sup>49</sup>
118. However, such exceptions should be rare, and should only occur if the proposed structure is well justified. Such a structure should also be subject to regular review, to ensure that it continues to be justified. Indeed, in some cases, overly complex or non-standard governance arrangements may suggest that a more fundamental review of a body's structure would be appropriate.

### h) Inter-jurisdictional arrangements

119. Some significant governance challenges can arise when governments work cooperatively to deliver policy objectives and consider forming bodies that are accountable to more than one government. These challenges arise for bodies involving different levels of governments within Australia. Joint arrangements may require innovative governance solutions.
120. A range of Commonwealth-State bodies have been established under Commonwealth statutes or inter-governmental agreements with some or all of the State Governments. These bodies vary considerably in their nature, depending on the functions they perform (such as, regulatory, administrative, law enforcement and advisory).

<sup>49</sup> This could include inter-jurisdictional bodies and other forms of joint bodies, such as Government-industry or Government-community bodies as mentioned in parts 3(e) and 3(h). However, often the FMA Act or the CAC Act can accommodate such bodies, so those laws should not just be dismissed without first discussing a proposed approach with Finance.

121. Another common approach for delivering Commonwealth-State programs has been to establish companies, usually limited by guarantee, involving the Commonwealth and the State Governments as members. It has also been relatively common to have representatives of all members present on the board. In many cases such companies will not be classified as Commonwealth companies for the purposes of the CAC Act as they will not satisfy the control test under the CAC Act. As discussed in Part 3(e) above, Commonwealth representation on the board of such companies should be avoided, to the extent possible.
122. After relevant consultation, it may even be that the interests of an intergovernmental enterprise can be met within the terms of the FMA Act.<sup>50</sup>
123. The challenges will tend to be more acute, however, when involving the Government of another nation.<sup>51</sup> The creation of such entities — with governance and accountability requirements established by reference to two separate legal systems — will raise some complex legal and regulatory issues.
124. Accordingly, inter-governmental and other joint bodies will typically raise issues requiring close consultation between the sponsoring agency and central agencies, on a case-by-case basis, well before implementation.<sup>52</sup>

### GOVERNANCE CONSIDERATIONS

Where the CAC Act is appropriate, it is preferable to establish a body as a Commonwealth authority, rather than a Commonwealth company.

Do not establish or participate in establishing bodies outside the FMA Act or the CAC Act without the support of Finance.

Only consider establishing or participating in a company in exceptional circumstances. These may include situations where the body is going to operate for profit in a competitive environment, is on a path to privatisation or will implement a joint enterprise between the Commonwealth and State Governments and/or the private/not-for-profit sectors.

It may be preferable to provide grant funding to a body in the private or the not-for-profit sectors, rather than to: establish a new body; seek to control board appointments; or place representatives on a company board.

<sup>50</sup> See, eg, the National Blood Authority or the National Offshore Petroleum Safety Authority.

<sup>51</sup> See, eg, the matters considered in the Department of Health and Ageing, *Report of the Regulatory Reform Taskforce* “Review of Administrative Arrangements for Commonwealth Public Health and Safety Regulation”, September 2001.

<sup>52</sup> For joint bodies, both PM&C and Finance should be consulted early in the policy development process.



Factors Influencing  
Governance Arrangements

## 4 Factors Influencing Governance Arrangements

125. There are some key factors that will influence the governance arrangements for a body and whether a body should operate under the FMA Act or the CAC Act. These include:
- the purpose and functions of the body;
  - the financial sector classification of the body;
  - whether a governing board would be effective;
  - the appropriate employment coverage; and
  - the level of independence of the body.
126. Each of these factors – which are discussed further below – needs careful consideration in assessing the merits of the structures available when reviewing or forming a body or consolidating the activities of existing bodies. Often, no single factor will be determinative.

### a) Clarity of purpose and ongoing rationale

127. Before considering which governance arrangements should apply to a body, it is important, for effective governance, to have a clear view of its proposed outcomes and goals. Bodies that do not operate with clear purpose limit their capacity to define long-term goals. Bodies with unclear purposes will be less likely to meet the objectives of Government, let alone the expectations and needs of stakeholders, including the public generally.<sup>53</sup>
128. Structures and governance arrangements for a body should help with implementing Government policy and achieving a body's goals, in a way that is accountable and transparent. Put another way, unclear governance arrangements can threaten the outcomes of a body's activities and have the potential to undermine good policies.
129. A clear understanding of the relationships and interactions of any proposed body with other parts of the Australian Government can help determine appropriate structures and governance arrangements. For example, making some bodies more alike can help improve their interactions.<sup>54</sup>
130. Good governance should help ensure that relationships with stakeholders are well managed. In many cases, the key terms of relationships should be documented to promote mutual understanding of rights and obligations.
131. The importance of properly naming of Australian Government bodies should not be overlooked. As mentioned in Finance's policy for prescribing agencies under the FMA Act (see Appendix C), agencies should closely consider a body's proposed name (including any acronym formed by that name) taking into account existing names of other bodies with which the proposed body might be closely associated. It is also important to try to reduce the chance for confusion with the titles, acronyms and websites of other existing agencies, companies, business names or trademarks.

<sup>53</sup> Uhrig Report at page 59.

<sup>54</sup> Note, for example, changes in 2005 to bodies in the Human Services portfolio.

## Factors Influencing Governance Arrangements 4

132. Finally, review points should be scheduled to consider the ongoing need for a body. This should preferably occur when the body is first established and could be specified in the body's enabling legislation. The timing for the wind-up, or consolidation of a body, will largely be dependent on when it will have fulfilled its primary function altogether.

### GOVERNANCE CONSIDERATIONS

A clear and unambiguous purpose is fundamental to designing effective governance arrangements.

Consider the interaction of a new body with existing Australian Government bodies. Synergies between bodies may suggest that similar governance structures would assist their interaction.

Consider processes and principles to review the governance of bodies periodically. These might include options where consolidation would be useful, including within a department.

Consider the name of a proposed body to minimise the potential for confusion with existing enterprises, including those of other bodies or persons. Consider also acronyms, website and trade mark issues.

### b) Financial classification and materiality

133. A body is likely to be classified as within the GGS if it:
- is established by legislation (including regulations) or administrative action and is controlled by government;
  - is largely financed by government taxation or government transfers (ie, it is budget-dependent);<sup>55</sup>
  - has express legislative, judicial, or other government authority over other bodies within a given area (that is, it has a regulatory role); and
  - mainly provides its services free of charge or at an economically insignificant (nominal) price; or
  - is a non-profit institution that disposes of its output free or at prices that are not economically significant.
134. All bodies under the FMA Act are within the GGS. Accordingly, one consideration for whether the FMA Act or the CAC Act should govern a body is whether the ABS classifies it as within the GGS.

<sup>55</sup> Being budget-dependent does not mean that the body cannot also raise significant revenue from external sources.

## 4 Factors Influencing Governance Arrangements

135. The principal functions of bodies within the GGS are to:
- provide non-market goods and services to the community at large;<sup>56</sup>
  - redistribute income and wealth by means of transfer;
  - maintain law and order; or
  - regulate and influence economic activity.
136. Bodies outside the GGS are mainly engaged in the production of goods and services for sale in the market with the intention of substantially covering their costs.<sup>57</sup> Importantly, their spending and investment decisions do not directly affect the Australian Government's budget calculations.
137. The factors that could be used to indicate that a body is likely to fall outside the GGS include whether the body:
- generates sufficient revenue to cover its production costs, rather than relying on government subsidies to remain in operation;
  - is not limited to selling its output to bodies in the Australian Government; or
  - is in open competition with other producers of its type of product.
138. If a body falls outside the GGS, it should not be under the FMA Act. Rather, it should be created as a Commonwealth authority or a Commonwealth company under the CAC Act. Often, this will signify that the body has a commercial imperative.
139. However, there may also be good reasons for the CAC Act to govern a body that is classified within the GGS. The primary reason is that a body is likely to derive substantial benefit from a governing board that is comprised of members with a wide range of skills to provide strategic direction to the body. This will generally occur when the body operates for profit or has an entrepreneurial focus. It can also arise for some intergovernmental bodies or joint industry-government activities.
140. Competition or close co-operation with the private sector may also warrant the additional flexibility attainable under the CAC Act. For example, a properly constituted board might maximise performance in a competitive environment (boards are further discussed below under Part 4(c)).
141. The financial classification of a body is a different question to its financial materiality.<sup>58</sup> However, as mentioned in Parts 2(b) and 3(b) above, the size of a body can affect its governance. This applies in at least two ways.
142. First, "material" agencies have more significant financial reporting requirements placed upon them directly. In contrast, the reporting requirements on "small agencies" generally rely more closely on the involvement and oversight of the relevant department.

<sup>56</sup> Non-market production consists of production that is made available free of charge or at prices that are not economically significant. Prices are defined as not economically significant if they do not have a significant influence on the amounts that producers are willing to supply and purchasers to buy (Standard Economic Sector Classifications of Australia, para 2.25).

<sup>57</sup> Australian System of National Accounts, 2000 (5216.0), para 5.41.

<sup>58</sup> Material entities comprise 99% of the revenues, expenses, assets and liabilities of Australian Government bodies, including bodies controlled by the Commonwealth, such as those under the CAC Act, that are not part of the Commonwealth itself. Departments of State are also "material" agencies, regardless of their size, on the basis that they are "material in nature". All remaining agencies are described, for budget purposes, as "small agencies".

## Factors Influencing Governance Arrangements 4

143. Second, it is possible for a body's size to affect the sustainability of its attention to governance matters. For example, a body will typically need financial management procedures, an audit committee and a CFO to support the Chief Executive Officer (CEO) on financial issues. It will also require access to professional advice on the governance regime that applies to it and general matters such as human resources. These requirements could prove cost prohibitive for smaller scale functions.
144. Where a body's size suggests that the effort of attention to these matters would be disproportionate to its size, then the body may best be consolidated into a department or with another body. The infrastructure of an existing body can, therefore, provide important economies of scale as against establishing a small body.

### GOVERNANCE CONSIDERATIONS

The FMA Act only applies to bodies that are classified as within the GGS.

A body under the CAC Act, but still within the GGS, should only be formed if it needs a governing board.

Bodies need sufficient capacity to devote appropriate resources to governance matters.

### c) Will a governing board be effective?

145. In the private sector, a governing board essentially provides the mechanism that enables a company's members (the shareholders or guarantors) to delegate their management powers, and the responsibility for the performance of the company, to the directors. The members, in effect, leave the running of the company to the collective skills and expertise of the board of directors by delegating to the board the full power to act.
146. The power to act is essential to the board's ability to govern effectively. It enables the board to, among other things, set corporate strategy and direction and operate with entrepreneurial freedom. Boards also typically appoint the CEO and are involved in appointing the senior management. In return, the board is accountable to the members through mechanisms such as annual reports, audit, annual general meetings and elections.<sup>59</sup>
147. Governing boards exist in the Australian Government for a range of statutory authorities and companies. The powers and functions of these boards are set out in either the relevant enabling legislation or in the company's constitution. The extent to which a board is subject to government oversight or Ministerial direction would also be determined in either of these and other relevant laws, such as the CAC Act.

<sup>59</sup> Uhrig Report at pages 27-28.

## 4 Factors Influencing Governance Arrangements

148. Boards of directors are an effective governance structure where they have been delegated the full power to act (subject to legal or constitutional constraints).<sup>60</sup> Such powers would usefully include the appointment and removal of the CEO.<sup>61</sup> A board should also have a role in appointing the chairperson and new directors, setting strategic direction, supervising management, defining the values and culture of a body, managing and overseeing risk issues, monitoring the performance of the body and holding management accountable for its performance. The board should be accountable to members for the responsibilities delegated to it, including the financial performance of the body.<sup>62</sup>
149. As noted in the Uhrig Report, a governing board will be inappropriate for many bodies, as it may not be feasible for the Government and/or the Parliament to delegate a full power to act to that board. This may particularly arise where a body has a narrow mandate or where Ministers play a key role in determining policy and strategy for the body, thereby limiting the issues to be addressed by the board to the efficient and effective delivery of outcomes (essentially a management task).<sup>63</sup> The need for entrepreneurial supervision by a governing board might also be removed in cases where, for example, the Government, rather than the body itself, sets standards for price, quality and quantity of goods or services to be produced.<sup>64</sup>
150. Consequently, where a high level of ministerial involvement is appropriate, particularly in determining policy and strategy for a body, it is likely that a CEO or a collection of office holders, possibly operating as a commission, could ensure effective governance. The Uhrig Report noted that “these types of arrangements, with a clear understanding of what is to be achieved and concise delegation of authority, also provide a straightforward basis for accountability”.<sup>65</sup>
151. Conversely, applying a board structure where the board has a limited power to act, and fulfil a governing role, may obstruct good governance and a body’s performance. As stated in the Uhrig Report: “When a board is restricted in its ability to act, either through formal limitations or through informal relationships which bypass the board, it will fail to perform an effective governing role, thereby reducing performance of the authority and providing ineffective supervision of management”.<sup>66</sup>

<sup>60</sup> Uhrig Report at page 65.

<sup>61</sup> Where a board has full power to act, except in appointing and removing the CEO, it may still be possible to regard its powers as comparable to the full power to act, provided that the chair of the board is consulted by the responsible Minister on matters relating to the appointment and removal of the CEO. It may also be appropriate, in some instances, for the responsible Minister, as a key stakeholder, to provide input into a CEO appointment to ensure that broader Government considerations are taken into account.

<sup>62</sup> Uhrig Report at pages 27-28.

<sup>63</sup> A governing board may, however, have a role to play where it is required to exercise entrepreneurial freedom, not only because of a possible commercial imperative (eg, to generate profits) but also to, for example, generate donations and encourage benefactors.

<sup>64</sup> Uhrig Report at page 35.

<sup>65</sup> Uhrig Report at page 35.

<sup>66</sup> Uhrig Report at page 66.

## Factors Influencing Governance Arrangements 4

152. Where a governing board is considered appropriate, arrangements should encourage an environment for promoting its high performance. Other factors that can influence the effectiveness of the board include:<sup>67</sup>

- **board size** — the size of the board should be developed taking into account the size, complexity and risk of a body's operations. The Uhrig Report states “current thinking on best practice in the private sector [is] a board of between six and nine members (including a managing director if there is one)”;
- **board committees** — provide a mechanism for the board to conduct detailed oversight and supervision of areas of special risk that are critical to the success of the entity (including an audit committee);
- **board appointments** — the board should have the necessary skills and experience to carry out its responsibilities. Ministers need to be well supported by their departments in terms of advice in the appointment process;
- **board tenure** — balance the benefits of continuity within a board against the opportunity to enhance performance through introducing fresh thinking (however, avoid all appointments expiring at once);
- **board development** — members need to have the opportunity to acquire knowledge of the operations of the body and to continuously improve their skills as directors; and
- **board performance** — a formal performance assessment process needs to be conducted on a regular basis.

153. The Uhrig Report makes important comments on the role of public servants on governing boards:<sup>68</sup>

“[C]are should be exercised when appointing public servants to boards. In circumstances where a departmental staff member is appointed on the basis of representing the government's interests or having a 'quasi' supervision approach, conflicts of interest may arise and poor governance is likely. Through participation in decision-making, either directly or implied, the departmental representative may become an advocate for the organisation rather than contributing critical comment. ... Membership of the board by the related departmental secretary is unwise unless there are specific circumstances which require it.”

154. A Secretary on a governing board may have a reduced capacity to comment independently on the body in briefing the Minister. Where the body is a Commonwealth authority under the CAC Act, there is a statutory acknowledgement of the role of public servants on boards, and this would also cover a Secretary.<sup>69</sup> However, an equivalent provision does not exist for APS membership of boards of entities formed under the *Corporations Act 2001*, including Commonwealth companies.

<sup>67</sup> Uhrig Report at pages 95 – 103.

<sup>68</sup> Uhrig Report at page 99.

<sup>69</sup> CAC Act, section 27A.

## 4 Factors Influencing Governance Arrangements

### d) Advisory boards

155. As noted above in Part 3(a), a governing board is not an appropriate governance structure for an FMA Act agency. The FMA Act places responsibilities on a single Chief Executive reporting directly to the Minister and/or the Parliament.<sup>70</sup> While it may not be appropriate to establish a governing board, a body may nevertheless derive substantial benefit from the skills and experience offered by a board-like governance structure. The governance structure of an FMA Act agency can, however, well accommodate an advisory board.
156. Advisory boards can provide a forum for the representation of stakeholder views without the stakeholders being involved in the governance of the body. It can also provide a useful consultative mechanism for the Chief Executive, while also providing more streamlined management and clearer accountability.
157. The advisory board's main role might be to provide perspectives from key stakeholders, eminent persons and/or business and broader community interests, as relevant to the functions of the body. In this regard, while representational appointments may be possible for advisory boards, they are not considered better practice for governing boards.
158. Where full-time members are required for a body, such as to perform statutory functions (as opposed to setting the corporate strategy), this tends to indicate that a governing board may not provide the most effective governance structure for the body. In these instances it may be appropriate to establish a body corporate to exist in conjunction with an FMA Act agency. For this reason, as noted in Part 3(d), regulatory bodies would not, as a general rule, operate effectively under a governing board, as the Government typically retains, and is expected to retain, control of policy and approval of strategy.

#### GOVERNANCE CONSIDERATIONS

A governing board is appropriate for bodies that are under the CAC Act.

A governing board should have full power to act in the interests of the relevant body. This will generally include the ability to appoint and remove the CEO.

Appointees to governing boards should not be there in a representational capacity. Avoid placing an APS employee on a governing board, in particular the Secretary of a department.

Advisory boards can sometimes assist FMA Act bodies by providing access to skills and expertise, including stakeholder or community representation.

A requirement for full-time members or commissioners to perform statutory functions suggests the FMA Act may be most appropriate.

Regulatory bodies do not usually require a governing board and should therefore be under the FMA Act.

<sup>70</sup> Chief Executives under the FMA Act also interact directly with the Finance Minister, such as maintaining and providing access to accounts and records or holding delegations from the Finance Minister (eg, delegations to open and operate bank accounts, issue drawing rights and authorise certain types of spending proposals).

## e) How will staff be employed?

159. A key consideration for the governance of any body is how it employs its staff.
160. Staffing issues should be addressed early in the consultation process as staffing and workplace relations issues can be quite complex and require significant lead-time to achieve a workable solution.
161. The central employment framework of the Australian Public Service (APS) is the Public Service Act. The values and principles based approach set out in the Public Service Act and the devolution of employment powers to agency heads, provides a contemporary employment and accountability framework. This framework should be suitable for most public sector agencies engaged in typical public service functions, such as program management, service delivery, policy advising or regulatory activities.
162. In addition, the flexibility now available in the APS, under the workplace relations system, provides APS agencies with significant capacity to determine appropriate remuneration and conditions arrangements for employees. This includes the use of Australian Workplace Agreements to tailor remuneration and conditions arrangements to attract and retain key employees.<sup>71</sup> Consequently, there is now less reason for establishing or moving a body outside of Public Service Act coverage.<sup>72</sup>
163. As a starting point, if a body is to be prescribed under the FMA Act, the body should employ staff under the Public Service Act, unless there are sound arguments to the contrary.<sup>73</sup>
164. If a body is not legally separate from the Commonwealth and does not have a separate staffing power under its enabling legislation (or is not an Executive Agency created under the Public Service Act), then the staff are, by default, engaged by the Secretary of the relevant department (or the agency head of a relevant Statutory Agency).
165. Where it is proposed that a body should have the power to engage staff in its own right, rather than having staff made available by the department (whether under the Public Service Act or a separate statutory power to engage employees), then it should generally also have financial autonomy. This would occur either as a prescribed Agency under the FMA Act or as a Commonwealth authority under the CAC Act.<sup>74</sup> As a matter of policy, all Statutory Agencies or Executive Agencies should also be established as prescribed agencies under the FMA Act.

<sup>71</sup> The power to determine remuneration and terms and conditions within broad Government policy parameters was devolved to Public Service agencies in 1996.

<sup>72</sup> Historically a major motivator for some agencies being, and seeking to be, set up outside the Public Service Act was to enable them to operate outside the boundaries of centralised Public Service pay and conditions employment frameworks.

<sup>73</sup> The FMA Regulations include notes identifying the status that prescribed agencies have under the Public Service Act (ie, Executive Agencies and Statutory Agencies). Situations in which the FMA Act and the Public Service Act do not coincide, however, include military personnel in Defence and officers in the Australian Federal Police (AFP).

<sup>74</sup> A Commonwealth company will, by definition, have financial and staffing autonomy from the Department.

## 4 Factors Influencing Governance Arrangements

166. In these cases, the “agency head” for employment purposes under the Public Service Act should also be the chief executive for financial management purposes under the FMA Act: combining these roles helps to avoid any potential conflicts that could arise between the powers and duties of these positions. Where the roles are not combined, protocols should be developed on how to manage any potential conflicts.
167. In some cases, the enabling legislation of a Statutory Agency may also provide for a separate employment power (that is, a power to engage staff under the agency’s enabling legislation as well as the power to engage staff under the Public Service Act). Dual staffing arrangements should only be necessary in exceptional circumstances and agencies would need to provide justification as to their necessity. There are also some statutory authorities with power to engage personnel outside the Public Service Act altogether, such as the Australian Federal Police and certain intelligence and security agencies.
168. In general, all Commonwealth bodies are subject to the *Workplace Relations Act 1996* and Commonwealth anti-discrimination law. They may also be covered by a range of Commonwealth employment legislation, including that covering superannuation, maternity leave, long service leave, occupational health and safety and compensation. Apart from GBEs, all Commonwealth agencies are also subject to Government policy parameters relating to workplace agreement making.<sup>75</sup>
169. Similarly, statutory office holders will generally be remunerated under the *Remuneration Tribunal Act 1973*.
170. If the Public Service Act is not proposed to govern a body’s employment regime, it could be appropriate for the body to implement a code of conduct and statement of values. These could be based on the APS Values and Code of Conduct in the Public Service Act to help lead to greater coherence across the Australian Government sector generally, without compromising the flexibility that some agencies might need.
171. Some statutory authorities, in addition to provisions giving them Statutory Agency status under the Public Service Act or power to engage employees, also have power to engage people described as ‘a consultant’. This term does not have a distinct meaning, at common law, and probably means, in most cases, an independent contractor. The power may, however, also recognise a capacity to engage a person under a contract of employment.
172. Due to the importance of properly planning for the effect of any organisational change on staff, early consultation should occur with relevant agencies regarding staffing matters and workplace relations in particular. Depending on the issue, those agencies would include PM&C (coverage by the Public Service Act), DEWR (for example, the *Workplace Relations Act 1996* or *Remuneration Tribunal Act 1973* and OH&S legislation) and the APS Commission (the effects of the Public Service Act).

<sup>75</sup> For more information see the “Policy Parameters for Agreement Making in the Australian Public Service”, December 2003, and the “Workplace Relations Arrangements for Commonwealth Authorities”, June 2004 at [www.workplace.gov.au](http://www.workplace.gov.au)

# Factors Influencing Governance Arrangements 4

173. Agencies should be prepared for the fact that staffing and workplace relations matters may be legally complex and time-consuming. Ideally, staff should also have good access to information about any change that is proposed, once a potential change has been announced. Bear in mind, therefore, that this specific issue may require significant lead-times to be factored in.

## GOVERNANCE CONSIDERATIONS

If establishing a body under the FMA Act, staff should be employed under the *Public Service Act 1999*, unless there is a persuasive reason for a different staffing regime.

Bodies established under the CAC Act should generally have the power to engage staff outside the *Public Service Act 1999*, unless there are good reasons to the contrary.

## f) Independence

174. The legislation establishing a statutory body determines the interaction between the body and the responsible Minister.<sup>76</sup> It is the enabling legislation, and not the financial framework, which primarily determines the level of independence of a body. Accordingly, there are various bodies (including office holders) that operate with high levels of independence, whether under the FMA Act or the CAC Act. For example:
- the FMA Act covers the Parliamentary Departments, the Federal Court of Australia, the ACCC<sup>77</sup> and the ANAO;<sup>78</sup> and
  - the CAC Act covers the Reserve Bank of Australia, the Australian Broadcasting Corporation and the Australian National University.<sup>79</sup>
175. In constitutional terms, Ministers must have some general power over any statutory authority to allow Ministers to fulfil their role in terms of the principle of responsible Government. This means, for example, that the Minister has the power to request information from the statutory authority, to the extent this is necessary to fulfil responsibilities to Parliament.
176. In fulfilling this role, the Ministers will be entitled to, and can increasingly expect, informed briefing from their departments about issues concerning portfolio bodies generally.<sup>80</sup>

<sup>76</sup> Uhrig Report at pages 33-34.

<sup>77</sup> Regarding the ACCC, the Chief Executive – who is the Chair of the ACCC – and public servants that assist the ACCC, are described in the FMA Regulations to comprise a prescribed Agency under the FMA Act. The body corporate that is established as the ACCC, in the *Trade Practices Act 1974*, is technically different (as is the “Australian Energy Regulator” which, from 1 July 2005, is also financially part of the ACCC for the purposes of the FMA Act).

<sup>78</sup> Section 8 of the *Auditor-General Act 1997* states that the Auditor-General is an independent officer of the Parliament. However, no implied functions, powers, rights, immunities or obligations arise from this status. It also creates no implied powers of the Parliament. The Auditor-General has complete discretion (subject to any Act) in the performance or exercise of his or her functions or powers. This includes not being subject to direction from anyone in relation to: (a) whether or not a particular audit is to be conducted; (b) the way in which a particular audit is to be conducted; or (c) the priority to be given to any particular matter.

<sup>79</sup> These three bodies are by no means identical, however. For example, due to their enabling legislation, they differ on issues such as: whether they can be asked to comply with general policies of the Australian Government; whether they are subject to the *Commonwealth Procurement Guidelines* over certain thresholds; and their status in the Australian Government’s financial statements.

<sup>80</sup> Uhrig Report, pages 63 - 65.

## 4 Factors Influencing Governance Arrangements

177. In short, a balance needs to be struck between establishing a body's independence while at the same time still enabling government to govern efficiently. This particularly includes not amending generic aspects of the governance framework in ways that overly complicate the administration of Government generally, such as the financial framework or the structure of the APS.
178. The type of activities in which a body engages will raise matters of consultation that should occur with relevant agencies, as listed in Parts 1(b) and 2(e) above, regarding the application of other law to various bodies. Where the body is a statutory authority, there may be value in expressly addressing the interaction of these laws.<sup>81</sup>

### GOVERNANCE CONSIDERATION

The FMA Act and the CAC Act can both accommodate bodies with high degrees of independence.

Consider the effect of other general laws that apply to Australian Government bodies. For those that are statutory authorities, seek to ensure that the relevant legislation clarifies any potential complexities arising from the application of other laws.

<sup>81</sup> For example, if the body is a statutory corporation, but not holding money on its own account, then its position under the FMA Act may be worth spelling out (in consultation with Finance). In terms of administrative law, consider the application of laws dealing with freedom of information, privacy, archives, administrative review and judicial review. Consider too whether a body would be engaged in a business, for the purposes of trade practices laws, or would comprise the "Crown" for the purposes of copyright law or the doctrine on crown immunity. Also consider the application of taxation laws generally to the body.

## APPENDICES

# Appendix A: OPC Drafting Directions

Extract from the Office of Parliamentary Counsel's (OPC's) Drafting Direction 2005, No.1 "*Referral of Bills to other agencies*", January 2005.\*

## Part 1 — Introduction

- 1 This Drafting Direction deals with the referral of Bills to agencies other than the instructing agency. Part 2 deals with the referral of Bills to agencies within the Attorney-General's portfolio, and Part 3 deals with the referral of Bills to other agencies.

### ***Why and to whom do we refer Bills?***

- 2 We refer Bills to agencies who have a right or responsibility to provide policy input in relation to a Bill, generally because the agency has a co-ordinating or whole-of-government responsibility for a matter dealt with in the Bill (such as legal policy issues for the Attorney-General's Department, public sector terms and conditions issues for the Australian Public Service Commission (APSC), etc). The intention is to ensure that our Bills properly reflect over-arching government policies.
- 3 However, we should not amend Acts except on the instructions of the administering agencies, or with their consent.
- 4 Moreover, it is not our responsibility, and nor do we have the resources, to help other agencies keep up-to-date with over-arching government policies that affect them (as opposed to "for which they are responsible"), or more generally to keep up-to-date with other developments in the public sector. Liaison with affected agencies is really the responsibility of the instructors whose Bill will have an impact on other agencies' legislation.
- 5 Therefore we do not have any general right or obligation to distribute draft Bills beyond the agencies mentioned in this Drafting Direction. Apart from these agencies, the decision on how widely a Bill is distributed during the drafting process must be one for our clients rather than for us.

### ***When should Bills be referred?***

- 6 In general, deciding when in the drafting process a Bill should be referred is a matter of judgment. If a Bill is referred too early (i.e. before policy and approach are reasonably well settled), the agencies receiving the draft Bill may waste time considering draft provisions that are later abandoned. If a Bill is referred too late, the agencies receiving it may not have time to provide useful comments or negotiate on policy approaches in which they have an interest.

\* This document is periodically revised by OPC. Agencies should use the latest version through [www.opc.gov.au](http://www.opc.gov.au)

## Appendix A: OPC Drafting Directions

- 7 However there are some projects that should be referred to some interested agencies as early as possible, perhaps even before drafting has started. For instance, the Office of International Law, and the Criminal Law Branch, in the Attorney-General's Department and the Legislative Review Branch of the Department of Finance and Administration have advised that they would prefer to give advice about policy proposals that are relevant to their responsibilities rather than waiting until they see a draft Bill.

[Paragraphs 8-17 have been omitted from this extract].

### Part 3—Other agencies

#### General referral requirements

- 18 Attachment B is a list of draft provisions that should be referred to an agency other than AGD or AGS.

#### Attachment B—Other agencies

Provisions to be referred to other agencies		
Item	If the provision...	Refer it to... (see the Note)
1	creates or abolishes an agency	APSC [Legislation Liaison Officer]
2	relates to the terms and conditions of statutory office-holders	APSC [Legislation Liaison Officer]
3	amends, or refers to, the <i>Public Service Act 1999</i>	APSC [Legislation Liaison Officer]
4	relates to staffing powers (eg by providing for the staffing of a Commonwealth body (whether or not under the <i>Public Service Act 1999</i> ) or empowering a Commonwealth body to appoint consultants)	APSC [Legislation Liaison Officer]
5	provides APS employees will assist a non-APS agency (eg subsection 49(2) of the <i>Public Service Act 1999</i> )	APSC [Legislation Liaison Officer]
6	refers to information published by the Australian Bureau of Statistics	Australian Bureau of Statistics [Legislation Liaison Officer]
7	confers a power or imposes a duty on the Auditor-General	Australian National Audit Office [Legislation Liaison Officer]
8	will affect the Territory of Heard Island and McDonald Islands or the Australian Antarctic Territory (including by amending Acts applying to such a Territory)	Department of the Environment and Heritage [Legislation Liaison Officer]
9	creates a statutory authority or agency, whether or not the authority or agency is to be a body corporate separate from the Commonwealth	Department of Finance and Administration [Branch Manager, Legislative Review Branch]

# Appendix A: OPC Drafting Directions

Provisions to be referred to other agencies		
Item	If the provision...	Refer it to... (see the Note)
10	amends or repeals legislation creating or continuing a statutory authority or agency, whether or not the authority or agency is a body corporate separate from the Commonwealth	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
11	exempts a statutory authority or agency from some or all of the FMA Act or the CAC Act, or is not subject to those Acts	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
12	creates an organisation (eg a company) in which the Commonwealth has an ownership interest	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
13	authorises a Commonwealth body to borrow from the Commonwealth or from financial markets	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
14	authorises the collection of public money by entities that are not part of the Commonwealth and are not owned by the Commonwealth	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
15	exempts from all or any part of the FMA Act money that is part of the Consolidated Revenue Fund	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
16	is a special or standing appropriation, whether or not it is affected by a sunset clause	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
17	creates, or amends provisions creating, a Special Account or relates to the administrative arrangements applying to a Special Account	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
18	creates a fund or account for the Commonwealth or a statutory authority or agency	Department of Finance and Administration [Branch Manager, Legislative Review Branch]
19	specifies, for the purposes of the <i>Archives Act 1983</i> (see section 3A), that a body established for a public purpose is taken never to have been so established (usually in the context of corporatisation or privatisation)	National Archives of Australia [Director-General]
20	transfers assets which may include Commonwealth records from a Commonwealth body to a non-Commonwealth body, or to a body which is intended to become a non-Commonwealth body	National Archives of Australia [Director-General]
21	allows termination of an appointment without cause	PM&C [First Assistant Secretary, Government Division]
22	refers to a specific agency's status as an Executive Agency or Departmental Agency	PM&C [Assistant Secretary, Government Division]

## Appendix A: OPC Drafting Directions

Provisions to be referred to other agencies		
Item	If the provision...	Refer it to... (see the Note)
23	will affect Norfolk Island or any other external Territory (including by amending Acts applying to such a Territory) (Note that provisions that will only affect the Territory of Heard Island and McDonald Islands and/or the Australian Antarctic Territory do not need to be referred.)	Department of Transport and Regional Services [Legislation Liaison Officer]
24	amends the <i>Trade Practices Act 1974</i>	Treasury [Legislation Liaison Officer]
25	might affect the operations of the <i>Corporations Act 2001</i> or related legislation	Treasury [Legislation Liaison Officer]
26	provides for corporatisation or privatisation of a Government organisation	Treasury [Legislation Liaison Officer]
27	includes descriptions of marine boundaries or land boundaries	National Mapping Division, Geoscience Australia
28	seeks to implement an international agreement	Department of Foreign Affairs and Trade [Legal Branch]
29	repeals or amends an Act, Ordinance or Regulation of the Australian Capital Territory	ACT Parliamentary Counsel's Office [Parliamentary Counsel] <b>(only with your instructor's permission)</b>
30	amends, or otherwise affects, legislation administered within a portfolio other than that including the instructing agency (see paragraphs 21 to 23 of this Drafting Direction)	The portfolio Department whose legislation is amended or otherwise affected [The Secretary]

Note: For contact information for these agencies, see the Commonwealth Government Directory, or [www.gold.gov.au](http://www.gold.gov.au).

# Appendix B: PM&C Legislation Circular on Consultation



**Australian Government**

**Department of the Prime Minister and Cabinet**

TELEPHONE: (02) 6271 5111  
FACSIMILE: (02) 6271 5414

3-5 NATIONAL CIRCUIT  
CANBERRA, A.C.T. 2600

## LEGISLATION CIRCULAR NO. 2 OF 2005

**DISTRIBUTION:** Legislation Liaison Officers; First Parliamentary Counsel; Parliamentary Liaison Officer (House of Representatives); Parliamentary Liaison Officer (Senate); Office of Regulation Review; Table Office (House of Representatives); Table Office (Senate)

### GOVERNANCE OF STATUTORY AUTHORITIES AND OTHER PORTFOLIO BODIES

Following the government response to the recommendations of the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig report), the Governance Structures Branch has been established within the Department of Finance and Administration (Finance) to provide advice on its implementation and appropriate governance structures for statutory authorities and other portfolio bodies (excluding Government Business Enterprises).

The Legislative Review Branch within Finance will continue to provide advice on the legislative framework relating to statutory authorities and other portfolio bodies.

LLOs should ensure that the Governance Structures Branch and Legislative Review Branch are consulted at an early stage in the preparation of Cabinet submissions or ministerial correspondence seeking policy approval for legislation that would create new statutory authorities or other portfolio bodies, or vary governance arrangements for existing agencies. It would also be prudent to consult the Governance Structures Branch and Legislative Review Branch as part of the policy development process leading up to the creation of new bodies, or the variation of existing governance arrangements, even if legislation is not required.

Dr Tom Ioannou, who can be contacted on 6215 3538, is the relevant contact officer for the Governance Structures Branch. Mr Marc Mowbray-d'Arbela, who can be contacted on 6215 3657, is the relevant contact officer for the Legislative Review Branch.

The Legislation Handbook will be amended in due course to reflect these requirements.

A handwritten signature in black ink, appearing to read 'D Macgill'.

David Macgill  
Assistant Secretary  
Parliamentary and Government Branch

5 April 2005

# Appendix C: Finance policy for prescribing agencies under the FMA Act

## Finance Circular No. 2003/01

To all Departments and all Agencies prescribed under the *Financial Management and Accountability Act 1997*

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### **Prescribing Agencies under the *Financial Management and Accountability Act 1997***

#### **Purpose**

This circular provides detail on the process for establishing prescribed Agencies under the *Financial Management and Accountability Act 1997* (FMA Act).

#### **Background**

1. A prescribed Agency obtains financial autonomy from a Department of State, for the purposes of the FMA Act, when it is prescribed in a Schedule to the *Financial Management and Accountability Regulations 1997* (FMA Regulations).
2. This involves an amending Regulation being made by the Governor-General, on the request of the Minister for Finance and Administration who, in turn, is assisted by the Department of Finance and Administration (Finance).
3. Finance's criteria for new prescribed Agencies, attached to this Circular, sets out the key requirements that should be met by a body, organisation or group of persons (an entity) for it to be prescribed for the purposes of the FMA Act. The basic premise is that an entity should be legally or administratively independent at a level that justifies financial autonomy.

#### **Process**

##### **Proposals to prescribe an entity for the purposes of the FMA Act**

4. Generally, the process for prescribing an agency begins with a written request from the entity's responsible Minister to the Minister for Finance and Administration. The request should include the following details:
  - a. Name of the proposed prescribed Agency (please consider existing names of other bodies, in particular to minimise the chance for conflicts to arise with the agencies, companies, business names or trademarks);
  - b. Proposed commencement date (it is often preferable that this date coincide with reporting and budgetary processes, for example, 1 July for financial reporting purposes, or another date that may coincide with the enactment of legislation establishing a proposed statutory authority);
  - c. A statement outlining the reasons why making the entity a prescribed Agency is appropriate. Reference should be made to Finance's criteria for new prescribed Agencies (attached);
  - d. Details of relevant legislation or policy guidance relating to the entity, and any consideration of the entity's legal status by Government; and
  - e. Any other information that is relevant to determining whether making the entity a prescribed Agency is appropriate.

## Appendix C: Finance policy for prescribing agencies under the FMA Act

5. It commonly takes two to three months, from the time a proposal is presented, for an Agency to be made a prescribed Agency. It would assist the process if departmental proposals were discussed with officials from Finance and other relevant departments and/or agencies prior to Ministerial correspondence. The Agency Advice Units in Finance's Budget Group are the first point of contact for enquiries.

### **The legislative process\***

6. If the Finance Minister agrees to support a request to prescribe an Agency, a FMA Regulation will be required. Finance will issue drafting instructions to the Office of Legislative Drafting, in the Attorney-General's Department, and prepare the relevant paperwork. The entity will be required to assist Finance by providing relevant information to facilitate this process.
7. The Governor-General considers proposals for making Regulations at meetings of the Federal Executive Council.
8. The Regulation is required to be tabled in each House of Parliament as it is a disallowable instrument.

### **Contacts**

9. If you have any questions regarding the policy in this Finance Circular, please email [LegislativeReview@finance.gov.au](mailto:LegislativeReview@finance.gov.au) or visit our website, [www.finance.gov.au](http://www.finance.gov.au).

Marc Mowbray-d'Arbela  
Branch Manager  
Legislative Review Branch  
4 September 2003

\* As at 1 January 2005 this process became governed by the *Legislative Instruments Act 2003*.

# Appendix C: Finance policy for prescribing agencies under the FMA Act

## Departmental criteria for new prescribed Agencies under the *Financial Management and Accountability Act 1997*

### *Introduction*

In general terms, a prescribed Agency obtains financial autonomy from a Department of State, for the purposes of the *Financial Management and Accountability Act 1997*, when it is prescribed in a Schedule to the *Financial Management and Accountability Regulations 1997*.

This involves amending Regulations being made by the Governor-General, on the request of the Minister for Finance and Administration who, in turn, is assisted by the Department of Finance and Administration (Finance).

### *Criteria*

For the Minister for Finance and Administration to support a request for creating a prescribed Agency, the body should be legally or administratively independent at a level that justifies financial autonomy.

This will generally require formal consideration by Parliament or the Prime Minister. Accordingly, the primary criteria for supporting prescribed Agency status are that the body has been recognised as:

1. An Executive Agency under the *Public Service Act 1999*,
2. A Statutory Agency under the *Public Service Act 1999* (but not already financially autonomous, eg as a Commonwealth authority under the *Commonwealth Authorities and Companies Act 1997* or its enabling Act), or
3. Some other form of statutory authority (or officeholder), not recognised under the *Public Service Act 1999*, for which financial autonomy from a Department of State is appropriate.

Wherever possible, the Chief Executive of the prescribed Agency would be the office holder who is the Agency Head of the Executive or Statutory Agency or, in other cases, the person with prime employment powers on behalf of the relevant body.

### *Exceptions*

If a body is not formally recognised as above, the mere fact that it can show significant financial sustainability does not, of itself, support it being a prescribed Agency. These criteria are a guide only, and exceptions may be supported on a case-by-case basis, although this would be expected to be very rare.

## Addendum D: Departments and Public Service Act Agencies

This appendix describes some of the attributes of the following bodies:

- Departments of State – under the Constitution and the *Public Service Act 1999*
- Executive Agencies – under the Public Service Act
- Statutory Agencies – under the Public Service Act

### Departments of State

When considering potential new government bodies, it is important to recognise the respective roles of Ministers of State and Departments of State.

Chapter II of the Australian Constitution deals with the “Executive Government”.

Section 64 deals with Ministers and Departments as follows:

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen’s Ministers of State for the Commonwealth.

Under the Constitution, the Governor-General, on the advice of the Prime Minister, appoints Ministers, under section 64. The Governor-General, on the advice of the Executive Council, also formally establishes the matters dealt with by each portfolio, by each department (since more than one department may be in a single portfolio), and the legislation administered by each Minister. This information appears in the Administrative Arrangements Order (AAO), available on the website [www.pmc.gov.au](http://www.pmc.gov.au).

The constitutional concept of a Department of State also underpins key aspects of the Public Service Act. The term ‘Department’, in the Public Service Act, means a Department of State, established by the Governor-General under section 64 of the Constitution, excluding any part of the ‘constitutional’ department that is itself

- an Executive Agency under the Public Service Act; or
- a Statutory Agency (declared by an Act to be a Statutory Agency for the purpose of the Public Service Act).

The term ‘Department’ for the purposes of the Public Service Act also excludes a Parliamentary Department established under the *Parliamentary Service Act 1999*.

## Addendum D: Departments and Public Service Act Agencies

Whenever a Department of State is established by the Governor-General, an office of Secretary of that Department is also created. The Secretary of a Department will, under the Minister who administers that Department ('described as the Agency Minister'), be responsible for managing that Department<sup>82</sup>.

The Public Service Act uses the concept 'under the Minister' in relation to the responsibilities of the Secretary, in accordance with statutory terminology used since 1984 and reflecting the constitutional position. However, there is an explicit limitation on Ministerial directions in relation to a Secretary's ordinary individual Australian Public Service (APS) staffing decisions.

The APS as constituted by the Public Service Act consists of:

- Agency Heads (including Secretaries); and
- APS employees (including Senior Executive Service (SES) employees).

Accordingly, the APS includes statutory office holders who are Agency Heads (or APS employees), but not other statutory office holders who are not APS employees (eg, Second Commissioners of Taxation or Second Parliamentary Counsel).

This definition of the APS can be important for references in other legislation to matters relating to the APS (e.g. terms such as 'SES employee in the APS').

Under the previous *Public Service Act 1922*, personnel systems of the APS were based on the concept of "officers" of the APS who occupied and had tenure in formally-created offices. However, as explained in the explanatory memorandum to the *Public Service Bill 1999*, the 'all-pervasive nature' of the concept of an "office" was seen to result in significant rigidities in APS management arrangements. The concept also produced a degree of legislative complexity (e.g. 'unattachment'). Accordingly, the *Public Service Act 1999* is drafted without any use of the concept of office, other than in relation to Agency Heads. The use of the term 'employee' rather than 'officer' was considered to be in keeping with more modern approaches to APS employment. (Formal "positions" can be created if needed for delegation purposes, however).

Some of the most significant consequences of being an APS employee is the duty to comply with the APS Values and the Code of Conduct, which are set out in sections 10 and 13 of the Public Service Act respectively.

<sup>82</sup> Section 57 of the Public Service Act.

# Addendix D: Departments and Public Service Act Agencies

## Executive Agencies – under the Public Service Act

Executive Agencies are a mechanism to identify a group of APS employees who, under an Agency Head, can conduct business within the portfolio of a Minister, without necessarily involving an AAO change. The Executive Agency structure provides a degree of independence from departmental management where that is appropriate to an agency's functions.

An Executive Agency structure may lend itself to a range of situations, including where:

- the functions of the agency may cross portfolio lines, making it inappropriate to place it in a Department;
- it is desirable to separate substantial service delivery functions to allow a policy department to focus on primary business;
- an identity separate from the parent department would assist sponsorship or external funding; or
- a separate agency is desirable to administer a whole-of-government or joint Commonwealth-State initiative.

Executive Agencies are established by an order of the Governor-General. The Governor-General's order may:

- establish or abolish an Executive Agency;
- allocate a name to an Agency or its Head;
- identify the responsible Minister; and
- specify its functions.<sup>83</sup>

An Executive Agency consists of the Agency Head (who is appointed, and whose appointment may be terminated, by the Minister responsible for the agency) and the APS employees assisting the Agency Head.

The Public Service Act provides that the Agency Head is directly accountable to the Minister responsible for the Agency. Section 66 describes the responsibilities of heads of Executive Agencies as follows:

- (1) The Head of an Executive Agency, under the Agency Minister, is responsible for managing the Agency.
- (2) The Head of an Executive Agency must assist the Agency Minister to fulfil the Agency Minister's accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Agency.
- (3) The Head of an Executive Agency is accountable to the government, the Parliament and the public in the same way as the Secretary of a Department.

It is important to note, however, that a Departmental Secretary still retains a role in overseeing the governance of an Executive Agency. This is because the Agency Minister, before appointing an Agency Head, must have received a report about the vacancy from

<sup>83</sup> Section 65, Public Service Act.

## Addendum D: Departments and Public Service Act Agencies

the relevant Secretary. Also, before terminating an appointment, the Agency Minister must have received a report about the proposed termination from the relevant Secretary. For these purposes, the ‘relevant Secretary’ is the Secretary of any Department that is administered by the same Minister who is the Agency Minister.<sup>84</sup> Accordingly, the relevant Secretary will need to be aware at a broad level about the operations of Executive Agencies in order to be able to prepare both reports.

After the end of each financial year, the Head of an Executive Agency will be required to give a report to the Agency Minister, for presentation to the Parliament, on the Agency’s activities during the year. This annual report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.<sup>85</sup>

It is now the practice for an Executive Agency to also be prescribed as an FMA Act agency because, if it is not so prescribed, the Head of the Executive Agency would be subject to the resourcing, financial and appropriations authority of the Secretary of the Department, while having autonomy in terms of staffing decisions and being responsible for “managing the Agency”.

Agencies should contact PM&C if they require more detailed information or guidance on Executive Agencies.

### Statutory Agencies – under the Public Service Act

A statutory authority that is identified, in its enabling legislation, as constituting a “Statutory Agency” (for the purposes of the Public Service Act) will also usually be prescribed under the FMA Act.

For example, the Public Service Commissioner and APS employees assisting the Commissioner “together constitute a Statutory Agency”,<sup>86</sup> and these people are also described, under the name of the “Australian Public Service Commission” as comprising a prescribed Agency under the FMA Regulations.

Statutory Agencies are entities separate from the Department of State (under the Constitution) for the purposes of the Public Service Act. This derives from the definition of a Department, which states “**Department** means a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency.”

The Public Service Act confers general employer powers on the Agency Heads of a Statutory Agency. However, specific accountability obligations of heads of statutory agencies flow from their enabling legislation and not the Public Service Act (that is, there is no equivalent to sections 57 or 66 of the Public Service Act – which set out the responsibilities of Secretaries and Heads of Executive Agencies respectively – applying to Agency Heads of Statutory Agencies).

<sup>84</sup> Section 67, Public Service Act.

<sup>85</sup> Section 70, Public Service Act.

<sup>86</sup> Section 40, Public Service Act.

## Appendix E: Comparing the FMA Act and the CAC Act

The table below compares some of the key governance considerations between the FMA Act and the CAC Act.

Issue(s)	FMA Act	CAC Act
<b>Role of the Finance Minister and the responsible Minister</b>	<p>There are clear lines of accountability and reporting for FMA Chief Executives to the Finance Minister (and the responsible Minister).</p> <p>Generally, there is significant scope for the responsible Minister to direct the Agency, unless constrained by the Agency's enabling legislation.</p> <p>The Finance Minister, as custodian of the Consolidated Revenue Fund, has primary control over public money and the handling of public money by agencies.</p> <p>The Ministers can request information from the Chief Executive.</p>	<p>Executives are accountable to the Board with the Board accountable to the responsible Minister.</p> <p>The scope of any power of direction that the responsible Minister may have is determined by the body's enabling legislation (or company constitution).</p> <p>The responsible Minister may issue directions to comply with Australian Government policies, while the Finance Minister has a power of direction with respect to procurement, in relation to particular bodies that have been prescribed under the CAC Regulations.</p> <p>The Finance Minister and the responsible Minister can request information from the Directors.</p> <p>Directors have a positive obligation to keep the responsible Minister informed of the operations of the body and its subsidiaries.</p>
<b>Employee Arrangements</b>	<p>Where a body comes under this framework, it should generally employ staff under the Public Service Act.</p> <p>However there are appropriate exceptions for military, police and parliamentary personnel etc.</p>	<p>Generally provides for flexible employment arrangements.</p> <p>These bodies should generally be free to determine their own employee arrangements.</p> <p>CAC Act bodies should generally not engage staff under the Public Service Act unless there are good reasons to do so.</p>
<b>Flexible regime for acting efficiently and effectively</b>	<p>The FMA Act provides sufficient flexibility to encourage entrepreneurial activity while at the same time promoting efficient, effective and ethical financial management practices.</p>	<p>The board of a CAC Act body can determine the body's strategic direction (allowing a large degree of flexibility for the body to act in an entrepreneurial fashion), and the responsible Minister may be required to approve the body's corporate plan (depending upon the body's enabling legislation).</p>
<b>Nominees on committees or boards</b>	<p>Representational appointments to an advisory board, including industry and State Governments, may be made.</p>	<p>Governing board appointments should be skills-based, rather than representational.</p>

## Appendix E: Comparing the FMA Act and the CAC Act

Issue(s)	FMA Act	CAC Act
<b>Financial Framework</b>	<p>The FMA Act prescribes rules governing the financial management practices of agencies.</p> <p>FMA Act agencies do not hold money on their own account, but rather hold public money (that is, money that forms part of the Consolidated Revenue Fund).</p> <p>Chief Executives are accountable for the expenditure and handling of any money under the FMA Act.</p> <p>Bodies that fall within the general government sector (GGS) should generally be prescribed agencies under the FMA framework, unless there are strong reasons for a governing board.</p>	<p>The board largely determines the financial management practices of a CAC Act body.</p> <p>CAC Act bodies hold money on their own account and are accountable for the expenditure of that money through annual reports and other reports as requested by the Minister.</p> <p>A CAC Act body could either fall within or outside of the GGS depending upon whether the body is wholly or substantially funded by the government.</p> <p>Bodies that require a governing board for effective governance should be CAC Act bodies.</p> <p>The CAC Act framework is generally well-suited to commercial or entrepreneurial activities.</p>
<b>Independence</b>	<p>The extent of ministerial direction is determined by the enabling legislation of the FMA Act agency.</p> <p>The ANAO, ATO and ACCC are all statutorily independent bodies (that is, they are not subject to government interference in the performance of their functions), and also prescribed under the FMA Act.</p>	<p>Generally, there is a substantial degree of financial independence. These bodies are legally and financially separate from the Commonwealth, although the level of independence can be determined by enabling legislation (for example, by providing for ministerial powers of direction). General policies can be notified to most bodies, but after a consultation process.</p>
<b>Governance Structure</b>	<p>The FMA Act framework does not easily accommodate a governing board. The Chief Executive is accountable under the FMA Act.</p> <p>However, an advisory board may be created, which would instead advise the Chief Executive.</p> <p>No equivalent duties for members of an advisory board to those that exist under the CAC Act. Duties would be negotiated in an instrument of engagement.</p> <p>Where members are required to perform statutory functions, a commission structure may be appropriate.</p>	<p>A governing board is the appropriate governance structure for a CAC Act body.</p> <p>A CAC Act body could also have an advisory board. The advisory board's role would be to advise the governing board.</p> <p>There may be a risk of a conflict of duties where a public servant is a board member.</p> <p>Directors have legal duties under the CAC Act and <i>Corporations Act 2001</i>, with penalties attaching to breaches of these duties.</p> <p>Governing boards should govern a body (such as setting strategy and overseeing management). Performing statutory functions is generally not considered to be governing a body.</p>