Resource Management Guide No. 414

Indemnities, guarantees or warranties granted by the Commonwealth

JANUARY 2015
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This guide contains material that has been prepared to assist Commonwealth entities and companies to apply the principles and requirements of the Public Governance, Performance and Accountability Act 2013 and associated rules, and any applicable policies. In this guide the: mandatory principles or requirements are set out as things entities and officials ‘must’ do; and actions, or practices, that entities and officials are expected to take into account to give effect to those principles and/or requirements are set out as things entities and officials ‘should consider’ doing.
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Audience

This Resource Management Guide is relevant to officials in non-corporate Commonwealth entities who:

- have been delegated the power, under the Public Governance, Performance and Accountability Act 2013 (PGPA Act), to grant an indemnity, guarantee or warranty; or
- intend to request that the Finance Minister grant an indemnity, guarantee or warranty.

Key points

This Resource Management Guide:

- commences January 2015;
- supports section 60 of the PGPA Act and the delegation of that power by the Finance Minister to accountable authorities of non-corporate Commonwealth entities;
- refers to indemnities, guarantees and warranties that create contingent liabilities collectively as indemnities;
- provides an Indemnity Grant Request Form at Attachment A for officials to use to request that the Finance Minister grant an indemnity; and
- includes guidance in relation to granting indemnities. It also advises on the requirements around risk management, insurance and reporting for officials involved in the management of indemnities.

Resources

This document is available on the Department of Finance website at www.finance.gov.au.

Other relevant publications include:

- Resource Management Guide No. 400: Approving commitments of relevant money;
- Commonwealth Risk Management Policy; and

Part 1 — Introduction

1. This Resource Management Guide (RMG) provides advice to accountable authorities and officials considering entering into arrangements that include indemnities. This RMG seeks to reinforce the importance of sound risk management strategies and awareness regarding the prudent use of such arrangements to make good business decisions.
2. Under section 60 of the PGPA Act, the Finance Minister may grant an indemnity on behalf of the Commonwealth. The Finance Minister has delegated this power, with directions limiting the exercise of the power, to accountable authorities of non-corporate Commonwealth entities. When exercising the delegation, the Finance Minister requires accountable authorities to consider two overarching policy principles:

(a) that risks should be borne by the party best placed to manage them; and
(b) benefits to the Commonwealth should outweigh the risks involved.

3. An accountable authority may subdelegate this power, with written limitations that correspond to the limits contained in the Finance Minister’s delegation, to officials of their own entity, or an official of another non-corporate Commonwealth entity. The accountable authority may make additional limitations on the exercise of the delegated power to suit the context of the entity’s operations and appetite for risk (they must not be inconsistent with the Finance Minister’s limitations).

### Part 2 — What is an indemnity, guarantee, or warranty for section 60 of the PGPA Act?

4. Section 60 of the PGPA Act provides:

<table>
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<td>(1)</td>
<td>The Finance Minister may, on behalf of the Commonwealth,</td>
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<td>grant an indemnity, guarantee or warranty.</td>
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<td>(2)</td>
<td>The grant of the indemnity, guarantee or warranty must</td>
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<td>be in accordance with any requirements prescribed by the</td>
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5. This section provides a discretionary power to the Finance Minister, to grant an indemnity on behalf of the Commonwealth. For the purposes of section 60 of the PGPA Act, indemnities, guarantees or warranties are forms of contingent liabilities that may give rise to a liability on the occurrence of a particular future event.

6. For the purposes of section 60 of the PGPA Act, indemnities, guarantees and warranties (collectively referred to as indemnities in this RMG) are legally enforceable obligations which may be included in contractual arrangements between the Commonwealth and another party.

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3. See subsection 110(1) and subsection 110(6) of the PGPA Act.

4. In addition to any limitations on the exercise of the delegated power, an accountable authority may also issue instructions, under section 20A of the PGPA Act, to any official of their own entity ‘about any matter relating to the finance law’. The accountable authority may also issue instructions to an official of another Commonwealth entity in relation to the matters listed in subsection 20A(2) of the PGPA Act.
• An indemnity is a legally binding promise whereby the Commonwealth undertakes to accept the risk of loss or damage another party may suffer.
• A guarantee is a promise whereby the Commonwealth assumes responsibility for the debt, or performance obligations of, another party on default of its obligations.
• A warranty is a promise whereby the Commonwealth provides certain assurances to the other party to an arrangement.

7. Ordinarily, where an arrangement doesn't explicitly allocate liability between the parties, each party's liability may be determined at general law. To create greater certainty and/or shift liability that may accrue to a particular party, sometimes a liability regime may be agreed and set out in a contract. This allocation of risk between parties if a particular future event occurs creates contingent liabilities.

8. Section 60 of the PGPA Act applies to indemnities that create contingent liabilities or, in other words, liabilities that may be incurred by the Commonwealth if a particular future event occurs. By contrast, section 60 would not, for example, apply in cases where the Commonwealth:
   • agreed to reimburse another party for expenses that person incurred in the ordinary course of providing services to the Commonwealth; or
   • warranted that it had title to property that was the subject of sale agreement, or that it was authorised to enter into a transaction. In these circumstances the Commonwealth would be making a representation to another party that did not result in the creation of a contingent liability.

9. If the Commonwealth grants an indemnity that results in a contingent liability the Commonwealth is ultimately agreeing to accept particular risks (often a greater level of risk) so that the other party will bear less risk.

10. The Commonwealth can enter into arrangements involving a contingent liability with any party other than itself. That is, non-corporate Commonwealth entities cannot, legally, enter into these types of arrangements with one another (as they are part of the same legal entity: the Commonwealth). Non-corporate Commonwealth entities may enter into such arrangements with corporate Commonwealth entities due to their separate legal personality from the Commonwealth.

Liability cap

11. Liability caps can operate differently from indemnities, although in some circumstances they may form part of the terms of an indemnity. If an entity agrees to indemnify a supplier, the entity is agreeing that if the supplier suffers a specified type of loss then the entity will meet the cost of that loss. An indemnity need not be unlimited, for example it may be activated only after the loss reaches a pre-agreed value, and/or it may be capped.

12. A liability cap is an arrangement where an entity agrees to a limit on the liability of another party (for example, a supplier). If the entity subsequently suffers a loss as a result of an act or omission of the supplier in relation to the performance of the contract the entity has agreed it will not seek to recover from the supplier more than the amount of an agreed cap.

13. Liability caps may result in the creation of an indemnity involving a contingent liability if they increase the potential cost of an arrangement by including an obligation for the Commonwealth to pay another person in certain circumstances. A liability cap should be treated as an indemnity involving a contingent liability, if:
• it involves limiting a supplier’s contingent liability to a third party so that the Commonwealth is liable to the third party for any excess above that cap; or
• limiting a supplier’s exposure for damage the supplier has suffered itself, so that the Commonwealth is liable to the supplier for any excess.

14. On the other hand a liability cap in an arrangement does not create a contingent obligation to pay another person and should not be treated as an indemnity involving a contingent liability, to the extent that it:

• limits a supplier’s liability to the Commonwealth, under that arrangement with the Commonwealth, so that the Commonwealth cannot recover damages from the supplier if the Commonwealth is sued by a third party; or
• limits a supplier’s liability to the Commonwealth, under that arrangement with the Commonwealth, for damage it directly causes the Commonwealth.

15. Further, a liability cap should not be treated as an indemnity involving a contingent liability if it simply caps a supplier’s liability for certain expenses that the supplier incurs in the ordinary course of providing services to the Commonwealth, so that the Commonwealth must reimburse the supplier for any relevant expenses over the amount of the cap. This situation would not involve a contingent liability.

Part 3 — Delegation from the Finance Minister and guidance for its application

16. The Finance Minister has delegated the power under section 60 of the PGPA Act to grant an indemnity on behalf of the Commonwealth to accountable authorities of non-corporate Commonwealth entities. The delegation is made with limitations that must be adhered to by delegates. The intention of the Finance Minister’s delegation is to streamline processes for the management of routine indemnities. Accountable authorities, and their officials, are expected to manage these arrangements prudently. An accountable authority may also subdelegate this power to an official of a non-corporate Commonwealth entity under the PGPA Act (the second delegate).

17. If an accountable authority subdelegates the power to a second delegate, subsection 110(6) of the PGPA Act provides that the accountable authority:

(a) must give corresponding written directions to the second delegate, and
(b) may give other written directions (not inconsistent with those corresponding directions) to the second delegate

18. Under subsection 110(7) of the PGPA Act, the second delegate must comply with any directions of the accountable authority.

19. Section 20A of the PGPA Act enables accountable authorities to issue written instructions ('accountable authority instructions') to officials of a Commonwealth entity. The accountable authority of a non-corporate Commonwealth entity may provide written instructions to officials of their own non-corporate Commonwealth entity about any matter relating to the finance law including in relation to indemnities. An accountable authority may also give

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The official may be an official of the accountable authorities own non-corporate Commonwealth entity or another non-corporate Commonwealth entity – see further at paragraph 3 of this RMG.

The term ‘finance law’ is defined in section 8 of the PGPA Act.
instructions to an official of another Commonwealth entity in relation to the matters listed in subsection 20A(2) of the PGPA Act. This capacity may be relevant if an accountable authority subdelegates the power to grant an indemnity to an official of another non-corporate Commonwealth entity. Any instructions issued will be part of the finance law.

**Directions under the Finance Minister's delegation of section 60 of the PGPA Act**

20. The limitations accompanying the delegation made by the Finance Minister expressly provide that a delegate cannot grant a guarantee for

- the payment of any amount of principal or interest due on a loan; and

a delegate cannot grant an indemnity that

- would meet the costs of civil or criminal penalties of the indemnified party.\(^7\)

21. The delegation also contains a direction that delegates must consider the following two overarching policy principles when determining whether to grant an indemnity, guarantee or warranty:

- risks should be borne by the party best placed to manage them; and
- benefits to the Commonwealth should outweigh the risks involved.

22. The delegate must consider these principles before exercising the delegation. Generally, when exercising the delegation, the delegate should act consistently with these principles. However, these are principles, not rules and do not necessarily mean an indemnity that does not satisfy one or both of the principles can never be granted by a delegate. Where the arrangement does not fit within the principles, but is otherwise properly within the limitations of the delegation, it would not be necessary for the arrangement to be submitted to the Finance Minister to grant the indemnity.\(^8\)

23. Under the Finance Minister's delegation, a delegate is only empowered to grant an indemnity, guarantee or warranty involving a contingent liability in relation to an event, if:

- the delegate is satisfied that the likelihood of the event occurring is remote, that is it has a less than 5% chance of occurring; and
- the most probable expenditure if the event occurred is not significant, that is it would be less than $30 million.

24. In order to be satisfied in respect of the remoteness of the occurrence of the event and the significance of the expenditure, a delegate is expected to make reasonable inquiries to determine the likelihood and amount of the contingent liability. That is, a delegate must make an investigation into the matter that is 'reasonable' (it will not necessarily need to be an extensive investigation). In conducting reasonable inquiries a delegate should take a

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\(^7\) See discussion at paragraph 3 of this RMG.

\(^8\) Note, the intention is to preclude the granting of an indemnity that would expressly meet the costs of civil or criminal penalties of the indemnified party.

\(^9\) The PGPA Act at section 16 requires an accountable authority to establish and maintain an appropriate system of risk oversight and management and internal control for the entity. It would be expected as part these controls that when officials decide to grant an indemnity, guarantee or warranty involving a contingent liability outside one or both of the principles that officials would be required to maintain an appropriate record of their decision.
proportionate approach. That is, they should consider the complexity, risks involved and materiality of the proposed arrangement. The greater the complexity, risks and materiality of the proposed arrangement the more extensive the inquiry will need to be.

25. When determining the most probable expenditure that would need to be made in accordance with an indemnity, the potential proceeds of insurance must not be taken into account. As non-corporate Commonwealth entities would grant an indemnity on behalf of the Commonwealth, the availability of insurance to cover a contingent liability may not reduce the most probable expenditure that would need to be made by the Commonwealth as a whole, whether by the non-corporate Commonwealth entity directly, by Comcover (which is part of the Commonwealth) or from the Budget. Moreover, it cannot be assumed that a claim on an insurance policy will result in a payment by an insurer under a policy.

26. Although it is not expressly required by section 60 of the PGPA Act or the Finance Minister’s delegation, accountable authorities should require that decisions made in relation to indemnities should be recorded, as a means of demonstrating compliance with the directions. In applying this guidance, accountable authorities should ensure record keeping requirements meet requirements such as those in Comcover’s Statement of Cover.

27. The limitations in the Finance Minister’s delegation also provide that the delegate may grant an indemnity if it has been explicitly agreed in a decision of:

- Cabinet; or
- the National Security Committee of Cabinet (NSC) or its successor; or
- the Prime Minister.

28. In these circumstances, the Finance Minister’s directions discussed above do not apply. However, for a delegate to be satisfied that the indemnity has been ‘explicitly agreed’ this part of the delegation is only available if the submission made to, or the decision taken by, Cabinet, the NSC, or the Prime Minister explicitly provides details on:

- who the party is that the Commonwealth will make the arrangement with;
- the time period covered by the arrangement;
- the risk of the contingent event occurring; and
- the most probable cost to the Commonwealth.

29. A delegate may also grant an indemnity if this in accordance with a written determination of the Finance Minister. The Finance Minister could, for example, determine that a particular entity could grant an indemnity in certain circumstances.

30. Within the parameters of the Finance Minister’s delegation, accountable authorities are responsible for implementing processes and controls for granting indemnities that are appropriate for their entity. The case study, below, provides an example of this.

**Case study:**

An accountable authority wishes to have appropriate processes in place for entering arrangements for venue hire. Venue hire arrangements typically contain indemnity clauses covering damage while being used by the hirer.

The accountable authority aims to streamline internal processes for the granting of indemnities. The accountable authority subdelegates his/her power under section 60 of the PGPA Act to all officials...
that have the power to enter into arrangements (that is subsection 23(1) delegates) where the chance of triggering the indemnity is assessed as remote and the most likely cost, if a contingent event occurs, would be less than, say, $5 million. This will mean that when considering entering into arrangements, subsection 23(1) delegates can also use their powers under section 60 of the PGPA Act to grant the indemnity.

The accountable authority may also provide a checklist in relation to venue hire, through the internal controls of the entity, to guide officials with a delegation to grant an indemnity and a delegation to enter an arrangement. That checklist may set risk parameters such as:

- the venue is within Australia;
- the function will be attended by fewer than 150 people;
- the venue is to be used for the purposes of events attended by public servants and/or reputable external people;
- the likelihood of unsociable behaviour is remote;
- where subcontractors are engaged, the services provided are limited to the provision of facilitation services, scribing services, catering services or the provision of audio/visual services;
- the contract does not provide an indemnity that would expressly meet the costs of civil or criminal penalties of the indemnified party.

The accountable authority may also decide to provide risk mitigation strategies as part of their internal controls, such as:

- officials granting an indemnity should vet attendees;
- officials should advise attendees that they are responsible for their personal equipment and ensure adequate physical security of valuable equipment;
- officials should ensure there is appropriate security at the venue;
- officials should ensure alcohol service (if included) is controlled;
- officials should incorporate contingent liabilities into subcontractor arrangements (where applicable) and ensure the use of reputable subcontractors.

### Part 4 — PGPA Act legislative requirements

31. In addition to section 60, other sections of the PGPA Act are also relevant to the management of indemnities by non-corporate Commonwealth entities.

32. When entering into, varying and administering an arrangement containing an indemnity, accountable authorities must act in accordance with their duties (sections 15 to 19 of the PGPA Act) and the duties on officials (sections 25 to 29).

33. Duties that are particularly relevant are the duty of the accountable authority contained in section 15 (Duty to govern the Commonwealth entity) and section 16 (Duty to establish and maintain systems relating to risk and control). For further information on duties, see Resource...
34. In promoting the proper use and management of public resources and the financial sustainability of their entity, and managing the risks faced by their entity, accountable authorities must take into account the fact that indemnities, if called upon, can place financial obligations, on their entity, and on the wider Commonwealth. This can constrain the ability of an entity, or the Commonwealth more broadly, to allocate resources.

35. The accountable authority should reflect these duties in their accountable authority instructions issued under section 20A of the PGPA Act, or other internal controls, so as to promote amongst officials the proper use and management of public resources.

36. A contract (or other arrangement) including an indemnity will be an ‘arrangement’ for the purposes of the PGPA Act. The power for the accountable authority of a non-corporate Commonwealth entity to enter into, vary or administer an arrangement can come from subsection 23(1) of the PGPA Act, section 32B of the Financial Framework (Supplementary Powers) Act 1997, or other specific legislation.

37. Subsection 23(3) of the PGPA Act empowers the accountable authority of a non-corporate Commonwealth entity to approve a commitment of relevant money for which the accountable authority is responsible. Section 110 of the PGPA Act allows for these powers to be delegated by a written instrument to an official of the entity or another non-corporate Commonwealth entity. For further information on entering into arrangements and commitments of relevant money, see Resource Management Guide No. 400: Approving commitments of relevant money.

In summary, officials (other than the accountable authority of an entity) must not grant an indemnity involving a contingent liability unless their accountable authority has delegated the power to:

- grant an indemnity involving a contingent liability; and
- enter, vary or administer an arrangement, under subsection 23(1) of the PGPA Act or other applicable legislation.

An approval of the commitment of relevant money, under subsection 23(3) of the PGPA Act, may also be necessary depending on the instructions of the accountable authority.

As noted above, officials must also comply with the duties of officials contained in sections 25 to 29 of the PGPA Act when managing indemnities as well as any instructions given by their accountable authority.

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Part 5 — Granting an indemnity outside the directions in the Finance Minister’s delegation

38. When an official believes that an entity may require the approval of the Finance Minister to grant an indemnity that would be outside the scope of the directions in the delegation or entity-specific determination, the entity should provide Finance with:

- copies of any legal advice it has received on the matter;
- copies of any risk assessments; and
- copies of any draft agreements, contracts or other relevant documents.

39. Where the proposed arrangement would constitute new policy it must be considered in accordance with the Budget process. 

40. The entity’s responsible Minister will also need to write to the Finance Minister to formally request the Finance Minister provide authority to grant the indemnity. The letter should specifically identify why the accountable authority of the entity cannot grant the indemnity under the delegation. The letter should also contain the Indemnity Grant Request Form at Attachment A.

41. The Finance Minister will reply, by letter, to the entity’s responsible Minister and if the Finance Minister agrees to the granting of the indemnity the Finance Minister’s letter will provide authority to the accountable authority of the relevant entity, or the accountable authority’s delegate, to grant the specific indemnity.

Part 6 — Guidance on the management of indemnities

42. This part of the RMG provides guidance to assist officials with the management of indemnities.

43. This part sets out the things officials ‘must’ do and things that officials ‘should consider’ doing when managing indemnities. Those things that officials should consider doing are intended to be understood and applied by officials proportionately to the complexity and potential costs of the arrangement. For routine, low risk and low value arrangements (that are within the scope of the Finance Minister’s delegation), accountable authorities may decide that not all of these requirements need be applied in every case. Accountable authorities also have the discretion to manage more routine indemnities through the internal controls of the entity. These controls would be developed in the context of the entity’s appetite for risk and operating circumstances.

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13 Entities that believe they may require the approval of the Finance Minister to grant an indemnity should contact their Agency Advice Unit (AAU) within Finance in the first instance.

14 See paragraph 45 for suggestions on what legal advice may address.

15 To assist in determining whether the proposed arrangement would constitute new policy officials should contact their relevant Agency Advice Unit (AAU) in the Department of Finance.

16 Such as that the granting of the indemnity involving a contingent liability falls outside the scope of the directions of the Finance Minister’s delegation to accountable authorities. The letter may also provide reasons why the Minister believes the indemnity is required.

44. When considering granting an indemnity involving a contingent liability:

- Officials must ensure that the risk management arrangements that are appropriate to the complexity and potential costs of the indemnity are in place before entering, after entering and for the duration of the arrangement (see Risk Management, at Part 7 of this RMG);
- Officials must ensure legislative requirements under the PGPA Act and instruments issued under that Act are satisfied (see further at Part 3 and Part 4 of this RMG);
- Officials should consider whether there is an explicitly identified risk:
  - indemnities should not be issued simply to provide comfort against general, unspecified events. The Commonwealth should be exposed to the minimum risk necessary to achieve a particular objective.
  - officials are expected to make judgements appropriate to the context of each situation. For example, where an indemnity is provided for 'damage to property', it is generally better practice to specify that only damage caused by the entity’s use is covered so as to expose the Commonwealth to the appropriate risk.
- Before granting an indemnity, officials should consider whether options, such as the use by the other party of commercial insurance, are appropriate;
  - if insurance is readily available, then using insurance, where the benefits outweigh the costs, is the preferred course of action.
- Before granting an indemnity, officials should consider whether covering damage resulting from acts by an indemnified person which are malicious, fraudulent, wilful, or reckless etc are undesirable from a policy perspective.
- Officials should consider whether including a requirement that the indemnified party advise the Commonwealth of relevant events and actions as they arise is appropriate.
  - notification clauses of this type are more likely to be appropriate in situations involving more complex issues, potentially of extended duration.
- Officials should consider whether the proposed indemnity will set a precedent that may be undesirable;
  - making these arrangements can set precedents in particular industries or sectors, particularly where there is little competition.
- Before granting an indemnity, officials should consider, whether the entity would be required to fund the potential cost from existing resources or whether insurance provided by Comcover would meet the cost;
  - when funding cannot be met from existing resources, any request for additional funding would need to be made in accordance with the Budget process.
  - this means that entities will need to rigorously investigate and identify the most probable total cost if the cost materialises, and that the price of the risk being borne by the Commonwealth has been factored into the costs/benefits consideration of the proposal.
- Officials should consider whether a maximum financial limit on payments or claims made under the arrangement should be included;
  - the express inclusion of a maximum financial limit can be an important mechanism to protect the position of the Commonwealth in respect of potential costs that may arise.
- Officials should consider including a time limit on the operation of an indemnity;

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18 To determine this, officials may have to discuss a proposed indemnity involving a contingent liability with Comcover officials to ascertain whether Comcover would meet costs that may arise.

19 When assessing the most probable total cost entities should not take insurance coverage into account when making this assessment. See also paragraph 25, above.
- claims should only be able to be made during the term of the arrangement, so these arrangements should not be open-ended.
- options to extend time limits may be appropriate in certain circumstances, but may commit the Commonwealth for a longer duration than necessary.

- Officials should consider including a termination clause in indemnities;
  - it is often appropriate that the arrangement should explicitly reserve the right for the Commonwealth to terminate the arrangement when it is no longer needed.
- Officials should consider whether subrogation and notification clauses are required to be included in an indemnity;
  - if required, the arrangement should include subrogation clauses (clauses providing the Commonwealth with the right to exercise the option of conducting, or participating in, the defence of any claims against the indemnified party, and to require full assistance from that party) and clauses giving the Commonwealth the right to take over any litigation related to the indemnity.

45. Where proposed arrangements involve complexity or significant potential costs, officials should consider seeking legal advice to ensure that the Commonwealth is exposed to the minimum risk necessary to achieve the particular objective. For example:

- whether any applicable legislation restricts the power to enter the arrangement;
- what extra risks the Commonwealth would be accepting if it granted the indemnity;
  - it is expected that legal advisers work with other relevant expert advisers to identify and assess risks.
- whether the proposed indemnity only seeks to replicate liabilities that will already be imposed on the Commonwealth by common law or Commonwealth legislation (including the Competition and Consumer Act 2010);
  - if so, consider excluding these provisions as redundant unless there is a clear justification for not doing so.

### Part 7—Risk management, insurance and reporting

46. To support the duties of the accountable authority under section 16 of the PGPA Act, and to ensure a consistent approach to managing risk across the Commonwealth, the Commonwealth Risk Management Policy was developed. The policy seeks to embed risk management as part of the culture of Commonwealth entities so that the shared understanding of risk leads to well informed decision making.

47. Sound risk management is fundamental to the effective management of exposures that result from the granting of indemnities. The management of these risks requires officials to accept risk in a way that minimises the long term costs to the Commonwealth. Entities should develop systems that consider the allocation of responsibility to officials to:

- manage the relationship with the indemnified party to reduce the likelihood that a contingency is triggered; and

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20 Under section 16 of the PGPA Act, accountable authorities have a duty to establish and maintain systems relating to risk and control within the context of their entities operations. Therefore, an accountable authority may consider establishing internal controls within their entity providing instruction on their requirements for seeking legal advice on granting indemnities containing a contingent liability.

• manage the risks from an entity perspective, by:
  - identifying the context the risk is to be managed in;
  - identifying the risks to be managed, this can be done in consultation with other parties who may have a greater understanding of the risk;
  - analysing the risks, which involves consideration of the possible consequences of the risks and the likelihood that those consequences will occur;
  - identify the need to retain the risk or whether the risk should be transferred;
  - if the risk is to be retained how is the risk to be treated.

Then the process of systematic review is essential to ensure the changing profile of the risks do not expose the Commonwealth to an increased level of risk exposure.

48. Comcover, the Australian Government’s self managed insurance fund, provides corporate and non-corporate Commonwealth entities classified within the General Government Sector (GGS) with cover for normally insurable risks with the exception of worker’s compensation (which is the responsibility of Comcare). Comcover seeks to protect entities against insurable losses. However, prior to entering into any agreement that may include an indemnity, entities need to be aware of, and follow, the terms and conditions outlined in the Comcover Statement of Cover. Comcover recognises that indemnities are sometimes complex but are an essential part of an entity’s approach to managing financial risk. Therefore Comcover staff can provide support and advice to entities on how best to manage these particular risks. However it is important to recognise that under the PGPA Act the ultimate responsibility for risk management resides with the accountable authority of the entity.

49. Indemnities do not impact on fiscal or underlying cash balances unless the contingent event occurs, creating a liability. However, indemnities are legally binding obligations that can result in significant Budget costs if the contingent event occurs.

50. Entities are also required to report contingent liabilities in their annual financial statements in accordance with PGPA legislative requirements.

51. Legislative requirements for reporting contingent liabilities, such as indemnities, are contained in the Charter of Budget Honesty Act 1998 (CBH Act). The CBH Act requires the government to ‘manage financial risks faced by the Commonwealth prudently’ and for the production of ‘a statement of the risks, quantified where feasible, that may have a material effect on the fiscal outlook’. These events include contingent liabilities, publicly announced government commitments and negotiations yet to be finalised. At the time of the publication of this RMG, contingent liabilities with a possible impact on the forward estimates greater than $20 million in any one year, or $50 million over the forward estimates period are disclosed in Budget Paper 1 – Budget Strategy and Outlook.

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22 If officials are considering a proposed indemnity involving a contingent liability above any liability cap in Comcover’s Statement of Cover, they should discuss with Comcover prior to granting the indemnity.

23 The Public Governance, Performance and Accountability Financial Reporting Rule issued under the PGPA Act.

24 See, for example, Budget 2014-15, Budget Paper No. 1: Budget Strategy and Outlook, Statement 8: Statement of Risks.
Indemnity Grant Request Form (see paragraph 40)

Note: In completing this form, please be succinct, but provide sufficient information to enable the Finance Minister to understand the issues and probable cost involved.

1. Brief description of the proposed arrangement and contingent liability.

2. Explanation of why the arrangement requires agreement from the Finance Minister.

3. Name of the relevant outcome and program (if applicable).

4. Date by which agreement is required and reason.

5. Term of agreement (including detail on options for extension) including specific term of all contingent liabilities.

6. Attach a copy of the risk assessment (if complex, please provide a summary. However, you will need to have a comprehensive risk assessment in place for your own records)

   a) Has a risk management plan been established? [ ] (yes or no)
   b) Is there a liability cap in place? [ ] (yes or no)
   c) If yes to b) what is the amount of the cap? $ __________________
   d) What is the most probable total cost of all contingent liabilities? $ __________________
   e) Is the most probable cost that might be payable under any contingent liability significant*? [ ] (yes or no)
   f) Is the likelihood of the contingencies occurring remote#? [ ] (yes or no)
   g) Is there a guarantee for the payment of any amount of principal or interest due on a loan? [ ] (yes or no)
   h) Is there an indemnity by the Commonwealth to expressly meet the costs of civil or criminal penalties of the indemnified party? [ ] (yes or no)

*significant and #remote: as defined in the Finance Minister’s Delegation to Accountable Authorities for section 60 of the Public Governance, Performance and Accountability Act 2013.

7. Has legal advice been obtained in relation to the contingent liability? [ ] (yes or no)

   Please attach a copy of the legal advice.