Australian Government
Cotton Research and Development Corporation

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17 November 2017

PGPA Act Review
Attn: Review Secretary
Department of Finance
1 Canberra Ave
FORREST ACT 2603

Dear Ms Alexander and Mr Thodey

Public Governance, Performance and Accountability Act 2013 **(PGPA Act) and the PGPA Rule Independent Review**

Thank you for the opportunity to provide feedback to the Review.

The Cotton Research and Development Corporation (CRDC) is a corporate Commonwealth entity (CCE) under the PGPA Act and a statutory authority under the *Primary Industries Research and Development Act 1989* (PIRD Act). CRDC is a small regionally based agency with 14 staff members and a board consisting of a Chair, Executive Director and six non-executive directors.

The misapplication of the PGPA Act and PGPA rules has the potential to cause perverse outcomes for CRDC's governance and performance. We experience increasing constraints on organisational governance and a growing compliance burden that drains resources and undermines performance. CRDC's enabling legislation, the PIRD Act, has always had a governance and performance framework. The proposed "earned autonomy model" which would assist small entities like CRDC has not materialised.

Our main points of concern are:

1. Impact on small entities: The PGPA Act is a single act supporting different entity structures however external processes that deliberately use a one-size fits all approach adds unnecessary compliance.
2. Government Policy Orders: The PGPA Act appropriately restricts the application of Government policies to small agencies however parts of the Government have imposed new policy on small agencies while ignoring sections 18, 22 and 93 of the PGPA Act.
3. Differential Regulation: The principle of earned autonomy was proposed as a process to reduce the compliance burden on small agencies but unfortunately has not materialised.
4. Increased Compliance Reporting: While the Belcher Red Tape Review recommended reducing compliance reporting in proportion to risk, the Commonwealth has continued to increase compliance reporting.

1. <u>Impact on small entities:</u>

The PGPA legislative framework was not intended to materially impact small agencies like CRDC. The PGPA Act and PGPA Rule establish a coherent system of governance by clearly distinguishing between the different responsibilities that apply to non-corporate Commonwealth entities (non-CCE), corporate Commonwealth entities (CCE) or Commonwealth

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companies.

During the development of the PGPA Act and PGPA Rule small agencies voiced concern that the amalgamation of agencies from two distinct and separate legislations, the FMA and CAC acts, into one act could result in the FMA compliance regime being imposed on small agencies. The previous FMA and CAC acts provided fit-for-purpose governance platforms that aligned with the responsibilities, duties and outcomes of each type of agency.

Departments or non-CCEs are part of the Commonwealth and perform functions on behalf of the Government. The PGPA Act has specific clauses taken from the FMA Act to ensure the person appointed by the Commonwealth as the accountable authority of the non-CCE continues to perform their Commonwealth duties to a high standard.

CCEs are unique within the Commonwealth as noted in section 11 of the PGPA Act, as they are legally separate from the Commonwealth. CRDC's enabling legislation, the PIRD Act, is 'specific legislation' that establishes the functions, duties and responsibilities of the agency and empowers CRDC's Board, as the accountable authority, to perform those functions and duties as a separate legal entity. The PGPA Act is 'general legislation' and cannot overrule any 'specific legislation'. However, the PGPA Act and PGPA Rule compliment the PIRD Act by enhancing the governance, performance and accountability responsibilities not already covered by the PIRD Act. As an example, CRDC is not required to provide the annual Corporate Plan under section 35 of the PGPA Act because the PIRD Act requires CRDC to provide a 5 year strategic R&D plan and annual operational plans.

Commonwealth companies are treated differently in the PGPA Act and PGPA Rule by including specific sections for Commonwealth companies apart from the non-CCE and CCE sections.

2. *Government Policy Order (GPO):*

The PGPA Act framework built in additional protection for corporate Commonwealth entities through *section 22 Government Policy Order* and *section 18 Duty in relation to requirements imposed on others*.

Section 22 prevents government policy from immediately applying to CCEs by requiring the Finance Minister to make government policy orders (GPOs) that specify a policy or part of a policy of Government that will apply to one or more CCEs. Section 22 requires the Finance Minister and responsible Ministers of the CCEs to consult with the CCEs on the application of the government policy. The Finance Minister then issues a GPO stating which parts of the government policy will apply and to which CCEs. The purpose of sections 18 and 22 was to ensure that small agencies were consulted and that the proposed changes were not in conflict with their specific legislation.

The Finance Minister commenced a GPO consultation period for the Protective Security Policy Framework (PSPF) policy. This was later withdrawn as the *Independent Review of Whole-of-Government Internal Regulation* (Belcher Red Tape Review) recommended that the PSPF policy should be reviewed.

It should also be noted that all GPOs under the CAC Act ceased when the CAC Act ceased and there have been no GPOs legislated since the PGPA Act commenced.

Without consultation, some departments (non-CCEs) have imposed additional red tape, reporting and compliance oversite on CCEs by issuing directives to Ministers or instructions to

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CCEs.

Examples of directives to Ministers that have circumvented the GPO process include:

a. The average staffing level (ASL) cap that imposes a cap on each portfolio and specifically lists the agencies within the portfolio including CCEs. That ASL cap is not a directive to the CCE. However if the CCE exceeds their ASL cap or causes the portfolio to exceed their ASL cap then the portfolio is instructed to reduce staff.
b. The *Australian Government Public Sector Workplace Bargaining Policy 2014* was introduced after the commencement of the PGPA Act. The police applies to all APS and non-APS Australian Government entities which includes non-CCEs and CCEs. The policy establishes the APS Commissioner as the only authority to approve remuneration increases for agencies. However, under sections 21 and 22 of the PGPA Act this policy can only be applied to non-CCEs, it cannot be applied to CCEs unless a GPO is released by the Finance Minister.

An example of a directive or instruction to CCEs that circumvent the GPO process include:

a. The *Comcover's 2015 Risk Management Benchmarking Survey* was changed from 'optional' to 'mandatory' as advised by letter to the CRDC Chair. The benchmarking survey questions and structure changed from being appropriate for both non-CCEs and CCEs to questions specifically designed for non-CCEs.

An example of an accountable authority failing to apply section 18:

a. The Australian Taxation Office (ATO) introduced a new reporting obligation on government agencies requiring agencies to provide a "Taxable Payments Report for Grants and Payments" file to the ATO each year. The ATO advised that they consulted with a few Ministers but did not consult the departments or agencies. The new report will require substantial programming of financial software, testing of the file structure with ATO and assessment of every supplier and every payment during the year to determine if it is reportable or not.

3. Differential Regulation:

During the development of the PGPA Act and PGPA Rule an additional concept to reduce the compliance burden for small agencies was introduced. It was initially called "earned autonomy" and was later rebranded "differential regulation". The intent was that small agencies that are low risk with good governance and reporting would be provided exemption from certain compliance activities. Discussions are ongoing with the Department of Finance on how this scheme would operate.

An example of an "earned autonomy" like change that has been made by the Finance Minister is in the *Budget Process Operational Rules 2017*. Rule 13 Operating Losses was introduced allowing the agencies in the Agriculture and Water Resources portfolio to budget for losses, if within specific guidelines, without requiring the Finance Minister's approval.

This represents a small step towards giving the CRDC Board full authority to determine when to utilise cash reserves.

4. Compliance Reporting:

The Belcher Red Tape Review recommended five principles of internal regulation:

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- the minimum needed to achieve whole-of-government or entity outcomes
- proportional to the risks to be managed and supportive of a risk-based approach
- coherent across government and not duplicative
- designed in consultation with stakeholders for clarity and simplicity in application, and
- reviewed periodically to test relevance and impact.

CRDC notes two new reporting requirements that fail the recommended five principles approach.

Reporting on Contracts and Consultancies over $100,000:

A Senate order extended to CCEs the duty to report contracts over $100,000 on agency websites. The order duplicates information provided through the annual report for RD&E investments and exceeds the minimum needed to achieve CRDC's outcome. CRDC assesses risk and outcomes for contracts before they are approved by the Board. The report does not support any risk-based approach to managing contracts as it is post-contracting.

Reporting Senior Executive Remuneration:

The Secretary of the Department of Prime Minister and Cabinet requested the Secretaries of other Departments to request all agencies in their portfolio to report on their websites senior executive remuneration. The request also noted that the Australian Government Solicitor advised that providing the information may be in breach of the *Privacy Act 1988* where there is only one or a few individuals being reported.

This information was previously provided in the annual financial statements in accordance with an Australian Accounting Standard. The standard has changed over the past few years. In 2016-17, only the total remuneration by benefit type was reportable. CRDC determined the appropriate response was to provide the average senior executive remunerate in the Annual Report instead of directly on the website.

The information is duplicative and the recommended format for the report was not developed in consultation with small agencies.

In Summary, while we support the PGA Act and PGA Rules and the consultation in developing them that sort to address the compliance burden on small agencies our concerns are with processes that seek to circumvent the PGPA framework.

Please contact our Chief Financial Officer, [redacted] if you require further information.

Yours sincerely

[redacted]

Bruce Finney
Executive Director
17 November 2017