



Australian Government
Australian Public Service Commission

Australian Public Service Commissioner

PGPA Act Review
Attention: Review Secretary
Department of Finance
One Canberra Avenue
FORREST ACT 2603
PGPAActReview@finance.gov.au

Dear Ms Alexander and Mr Thodey

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

I refer to your letter of 9 October 2017 inviting a written submission to the above Review.

Comments on the operations of the PGPA Act are at Attachment A. They are provided in the context of the Australian Public Service (APS) Commissioner's role in supporting the APS employment framework.

Additional comments relate to the experience of the Australian Public Service Commission as an agency subject to the arrangements of the PGPA Act.

If you have any questions, the APSC contact is Ms Kerren Crosthwaite, Group Manager, Employment Policy at [REDACTED]

Yours sincerely

[REDACTED]

Stephanie Foster
A/Australian Public Service Commissioner

15 November 2017

Australian Public Service Commission submission to the Independent Review of the Public Governance, Performance and Accountability Act 2013 (the PGPA Act)

The Australian Public Service (APS) employment framework

The Australian Public Service Commissioner has a role in upholding the provisions of the *Public Service Act 1999* (PS Act) and more broadly in supporting the APS employment framework. In this context I would like to raise the following matters:

a. Sections 22 and 93 of the PGPA Act

1. Under these sections of the PGPA Act, a Government policy will apply to Commonwealth entities and wholly owned Commonwealth companies only if the Minister for Finance makes a Government Policy Order (GPO).
2. Depending on their establishing legislation, Commonwealth entities that do not engage employees under the PS Act may require a GPO to direct them in relation to government policy regarding Commonwealth employment. The current arrangements in place to establish a GPO may not be fit for purpose.
3. It may be appropriate to consider alternative mechanisms that would allow Commonwealth agencies to be directed in relation to Commonwealth employment matters.

b. Sections 25 to 29 of the PGPA Act

4. Since the introduction of the PGPA Act, it has been recognised that APS employees should not have different obligations under the PGPA Act and the PS Act. Any alterations to the duties provisions of the PGPA Act (sections 25 to 29) should be considered with care so as to ensure that they do not create confusion or tension between the two Acts.
5. The current section 29 of the PGPA Act places an obligation on all officials to disclose '*any material personal interest that relates to the affairs of the entity*'. In my view, this may be an unfair and onerous burden for many APS employees.
6. I would prefer an obligation to disclose personal interests that give rise to '*a real or apparent conflict of interest in relation to the employees' employment*'. This aligns more closely to obligations in the APS Code of Conduct in section 13 (7) of the PS Act.

c. Section 87 of the PGPA Act

7. The current section 87 of the PGPA Act allows for rules to be put in place that establish new corporate Commonwealth entities. The rules may, among other things, '*provide for the staff of, or any other person working for, the body corporate.*'
8. Section 72 of the PS Act authorises the Australian Public Service Commissioner to move or engage employees following a change to administrative arrangements, including where a new Commonwealth entity is created. The Act includes protections for APS employees' terms and conditions of service.
9. The Australian Public Service Commission also provides advice on remuneration policy, employment conditions and other workplace arrangements.
10. Where a new entity will employ persons under the PS Act, it is my view that any movement of APS employees to that entity should be governed by the PS Act. This will provide consistency and accountability in the way employment matters are dealt with. This should be made clear.

Australian Public Service Commission data

11. The Australian Public Service Commission (APSC) has published data from the APS employee census and agency surveys that may be relevant to this review. For example, in the 2017 APS employee census, 70 per cent of respondents were aware of their agency's risk management framework. However only 47 per cent used their agency's risk management framework as part of their decision making process. Data on the State of the Service is available at <http://www.apsc.gov.au/priorities/sosr-exchange>.
12. APSC data on risk management was used in the recent Australian National Audit Office audit on this topic, available at <https://www.anao.gov.au/work/performance-audit/management-risk-public-sector-entities>.

The Australian Public Service Commission

13. As a small agency subject to the arrangements of the PGPA Act, the Australian Public Service Commission finds that there are no issues with entity operating requirements. We note that performance reporting was to be streamlined under the PGPA Act. However reporting requirements have remained relatively unchanged with some duplication between the Portfolio Budget Statements, Corporate Plans, Annual Reports and Annual Performance Statements.
14. We would like to bring to your attention a technical matter in relation to the delegation of power by the Minister of Finance under section 60 of the PGPA Act. Part of the wording of the delegation is as follows:

6.3 Arrangements consisting of or including indemnities, guarantees or warranties

(1) The delegate may grant an indemnity, guarantee or warranty, involving a contingent liability in relation to an event, if:

(a) the delegate is satisfied that:

- i. the likelihood of the event occurring is remote (less than 5% chance); and
- ii. the most probable expenditure that would need to be made in accordance with the arrangement, if the event occurred, would not be significant (less than \$30 million).

15. Our interpretation of the practical effect of this delegation is that it has created an unintended consequence. Namely, the delegate is *only* permitted to grant an indemnity if both of the two conditions (our emphasis) are satisfied: that is, there is a less than 5% chance of the event occurring and the probable expenditure is less than \$30 million.
16. In practice, this can be problematic in the context of, for example, venue-hire arrangements. In such a case the likelihood of minor damage at an event, such as breakage of cutlery, could easily exceed the 5% chance criteria. However, the value of the indemnification would likely be less than \$30 million.
17. As written, the delegate cannot cover this event, and officials are technically required to seek the approval of the Minister for Finance.

Merit Protection Commissioner

18. The Merit Protection Commissioner is a statutory office holder who conducts independent reviews of employment actions and merit-based decisions. The Merit Protection Commissioner has advised that there is no evidence from casework of any confusion for employees or APS agencies in relation to obligations under both the PGPA Act and the PS Act.