

# PARLIAMENTARY COUNSEL

## Drafting Direction No. 3.6 Statutory and other bodies

---

Document History		
Release number	Release date	Document number
1.0	26 September 2008	S06PF346.v18.doc

---

### Contents

<b>Part 1—Preliminary</b> .....	4
Introduction .....	4
Finance’s role in the establishment of statutory bodies.....	4
Terminology .....	4
Types of agencies .....	5
Check that name does not clash with existing names etc. ....	6
References to non-statutory bodies in legislation.....	6
Executive Agency under the PS Act .....	6
PM&C and Finance’s preferred approach—refer to the body by its name alone.....	6
An alternative approach—avoid referring to a particular body at all.....	7
Effect of name changes.....	7
<b>Part 2—Statutory bodies</b> .....	9
Introduction .....	9
Incorporated or unincorporated? .....	10
FMA body, CAC body, both or neither?.....	11
General .....	11
The mechanics of applying the FMA Act and the CAC Act.....	11
Financial Management and Accountability Act 1997.....	12
Commonwealth Authorities and Companies Act 1997.....	13
Statutory agency under the PS Act, Executive Agency under the PS Act, or not covered under the PS Act? .....	14
<b>Part 3—Drafting issues and precedents: general</b> .....	15
Establishment of statutory bodies .....	15
Establishment and name.....	15
Composition.....	15
Allocation of functions .....	16
Powers.....	16
Performance of functions and exercise of powers outside Australia.....	17
Ministerial directions to the statutory body .....	17
Ministerial directions or statutory body directions to the head of the statutory body ...	18
Corporate and other plan.....	19
Procedures of the Board .....	20
Appointments.....	22
General .....	22
Including public servants or public officials as members of board.....	23

Drafting Direction No. 3.6  
Statutory and other bodies

Acting appointments .....	23
Vacancies in membership .....	24
Gender-specific language—titles for office-holders .....	24
Definitions of “member” .....	25
Terms and conditions .....	25
Terms and conditions—general .....	25
Outside employment .....	25
Remuneration—general .....	26
Remuneration—standard provision .....	26
Offices that are not “public offices” under the <i>Remuneration Tribunal Act 1973</i> .....	27
Remuneration—source of funds .....	27
Requirement for Governor-General’s message for remuneration provisions .....	28
Leave—full-time office-holders .....	28
Leave—part-time office-holders .....	29
Resignation .....	29
Termination—general .....	29
Termination—office-holder requiring special degree of independence .....	30
Termination without cause .....	31
Termination for unsatisfactory performance .....	31
Termination of office-holders covered by Commonwealth superannuation or pension schemes .....	31
Disclosure of interests .....	32
CAC Act bodies .....	32
Non-CAC Act bodies .....	32
Consequences of a failure to disclose .....	34
Other cases .....	34
Disclosure of interests by members of a tribunal .....	35
Disclosure by members of a committee .....	35
Employees .....	36
Consultants .....	37
Committees .....	37
Charging for performance of functions .....	37
Funding .....	38
Special accounts .....	38
Annual report .....	40
Crown immunity .....	41
Providing that a body has Crown immunity .....	41
Providing that a body does not have Crown immunity .....	42
<b>Part 4—Further drafting issues and precedents for incorporated bodies .....</b>	<b>43</b>
Establishing the incorporated body .....	43
Incorporated body regulated under the FMA Act .....	43
Perpetual succession .....	44
Seals .....	45
Capacity to sue and be sued .....	45
Powers .....	45
Powers—general .....	45
Borrowing powers .....	47
Application of CAC Act .....	48
If CAC Act is to apply .....	48
If CAC Act is not to apply .....	48

If CAC Act is to apply but needs to be modified.....	49
Tax exemptions.....	49
General taxation exemption.....	49
Commonwealth taxes—overriding rules of construction.....	49
Use of regulations.....	50
Transaction taxes.....	50
<b>Part 5—Winding-up and transfer of functions of statutory bodies—vesting of moneys in the Commonwealth or other bodies.....</b>	<b>52</b>
<b>Part 6—Privatising or corporatising statutory bodies.....</b>	<b>53</b>
Crown immunity.....	53
Archives Act.....	53
Section 3A of the Archives Act.....	53
Section 28A of the Archives Act.....	53
General consideration of Archives Act.....	54
<b>Part 7—Specific matters of particular concern to Finance.....</b>	<b>55</b>

## Part 1—Preliminary

### **Introduction**

1 This Drafting Direction consolidates and updates all former Drafting Directions on statutory and other bodies. It is aimed at drafters who are drafting Bills to establish new, or amend existing, statutory authorities. However, it might also be useful for instructors of such Bills.

2 As well as offering advice on many matters likely to arise in the drafting of provisions relating to statutory bodies, this Drafting Direction refers to other matters that drafters should consider (as necessary). The Drafting Direction is not exhaustive.

### **Finance’s role in the establishment of statutory bodies**

3 In August 2005, Finance published *Governance Arrangements for Australian Government Bodies* (Financial Management Reference Material No. 2), which outlines principles for helping determine the most appropriate structure and governance arrangements for Australian Government bodies (see Folio Office Documents, Other Drafting Documents or <http://www.finance.gov.au/financial-framework/governance/governance-arrangements-for-australian-government-bodies.html>).

4 Finance currently has responsibility under the Administrative Arrangements Order for general policy guidelines for Commonwealth statutory authorities and for “Government financial accountability, governance and financial management frameworks”.

5 You must ensure that Finance is consulted on the corporate governance structure of a statutory body early in the drafting process. If the drafting instructions have not been sent to Finance, you should discuss this with First Parliamentary Counsel.

### **Terminology**

6 This Drafting Direction uses the generic expressions “statutory body” and “office-holder”. Parts of the Drafting Direction which only apply to a particular kind of body or officer will use more specific terms (e.g. Commonwealth authority).

7 In this Drafting Direction:

- **AAT Act** means the *Administrative Appeals Tribunal Act 1975*;
- **AGS** means the Australian Government Solicitor;
- **AIA** means the *Acts Interpretation Act 1901*;
- **CAC Act** means the *Commonwealth Authorities and Companies Act 1997*;
- **CEO** means Chief Executive Officer;
- **Finance** means the Department of Finance and Deregulation;
- **Finance Minister** means the Minister for Finance and Deregulation;

- **FMA Act** means the *Financial Management and Accountability Act 1997*;
- **Governance Guide** means *Governance Arrangements for Australian Government Bodies* (Financial Management Reference Material No. 2), published by Finance;
- **PM&C** means the Department of Prime Minister and Cabinet;
- **PS Act** means the *Public Service Act 1999*;
- **Uhrig Review** means the Review of the Corporate Governance of Statutory Authorities and Office Holders presented to the Prime Minister on 27 June 2003.

### **Types of agencies**

8 A government body can be:

- (a) a **statutory body**; i.e., a body that is established by legislation; or
- (b) a **non-statutory body**; i.e., a body that is not established by legislation.

9 Primary legislation is necessary to establish a Statutory Agency for the purposes of the PS Act. Primary legislation is also generally used to establish a Commonwealth authority under the CAC Act or create a statutory office, although this can also be done by subordinate legislation.

10 Primary legislation is not necessary to:

- (a) prescribe a body so as to bring it within the FMA Act (this is done by regulation); or
- (b) create an administrative unit of a Department; or
- (c) create an Executive Agency for the purposes of the PS Act (this is done by an order of the Governor-General); or
- (d) allow the Commonwealth to become a controlling shareholder in certain Corporations Act companies (this can be done under the executive power of the Commonwealth in some circumstances).

11 In general, legislation is *not* used for these purposes. If your instructors propose to do so, you should ensure that Finance is consulted at an early stage in the drafting process.

12 Different combinations of people might share the name of the body for different purposes. For example:

- (a) the primary legislation establishing a body by a particular name might say that it comprises a number of statutory office-holders and staff; and

- (b) a Statutory Agency with that same name might have been declared for the purposes of the PS Act, consisting of one of those statutory office-holders together with the staff; and
- (c) a prescribed Agency with that same name might have been prescribed for the purposes of the FMA Act, consisting of all statutory office-holders, staff and consultants.

13 Further, it is also possible that the status of a body may change. For instance, an administrative unit of a Department may be made into an Executive Agency by order of the Governor-General.

**Check that name does not clash with existing names etc.**

14 Finance's Governance Guide notes the importance of checking a proposed name to help avoid a clash with existing entities or trademarks.

***References to non-statutory bodies in legislation***

15 Care needs to be taken when referring to *non-statutory* bodies, such as Executive Agencies under the PS Act and administrative units established within a Department.

**Executive Agency under the PS Act**

16 An Executive Agency is established by order of the Governor-General under section 65 of the PS Act. The Head of the Agency is appointed by the Agency Minister under section 67 of the PS Act.

17 The functions of an Executive Agency are set out in the order by which the agency is established (see paragraph 65(1)(d) of the PS Act).

18 The Head of an Executive Agency is accountable for the performance of the agency. Subsection 66(3) of the PS Act provides:

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.

19 The Head of an Executive Agency is obliged to provide the relevant Minister with sufficient information to allow the Minister to account to Parliament. Subsection 66(2) of the PS Act provides:

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.

**PM&C and Finance's preferred approach—refer to the body by its name alone**

20 If your instructors want to refer to a particular non-statutory body in a Bill, PM&C and Finance would like this to be done by referring to the body by its name alone, and without referring to the means by which the body was established. The reason for this is that the basis on which a body is established can be changed (e.g. it could go from being an Executive Agency to being a different kind of administrative unit of a Department), and

21 For example, if it were necessary to refer to the CrimTrac Agency, the reference should not go on to describe it as having been established as an Executive Agency under section 65 of the PS Act. This way, if it is ever changed from an Executive Agency into a different kind of administrative unit of a Department, the reference will still work (subject to the comments in the next paragraph).

22 Referring to a non-statutory body by its name alone may have some shortcomings, and you should ensure that they are brought to the attention of your instructors. For example:

- The reference will not be very helpful. It will not give a reader any indication of where to go to find out about what the body's status is or what its functions are.
- If the basis on which the body is established is changed, there may be an issue regarding whether Parliament intended to refer only to the specific body of that name that was in existence when the legislation commenced, or whether Parliament intended to refer to whatever body of that name is in existence from time to time. If your instructors' intention is that the reference should be interpreted as being to whatever body of that name is in existence from time to time, the inclusion in the Explanatory Memorandum of a statement to this effect should help ensure that this interpretation is adopted.
- If the body ceases to exist, the reference will cease to have any meaning. Instructors may wish to include a fall-back position. For example, they may want to include an interpretive provision to the effect that the reference is, in such circumstances, to be construed as a reference to the Department that administers the legislation containing the reference (or that administers some other nominated piece of legislation).

23 However, if you are specifically instructed to refer to a non-statutory body, and to specify the means by which the body was established, you should tell your instructors to discuss the proposed reference with the Parliamentary and Government Branch of PM&C and the Legislative Review Branch of Finance.

### **An alternative approach—avoid referring to a particular body at all**

24 Depending on the circumstances, it may not be necessary to refer to a particular non-statutory body at all. For example, instead of referring to employees in a particular Executive Agency, it may be possible instead to refer to APS employees whose duties include specified matters.

### **Effect of name changes**

25 If a non-statutory body is referred to by name in an Act, and the body's name is subsequently changed, there is an issue whether the reference will, after the name change, be construed as a reference to the body under its new name.

Drafting Direction No. 3.6  
Statutory and other bodies

26 If the reference is changed under a statutory provision, the reference should be construed as a reference to the body under its new name. This is due to the combined effect of:

- (a) section 25B of the AIA; and
- (b) paragraph 46(1)(a) of that Act or paragraph 13(1)(a) of the *Legislative Instruments Act 2003*.

## Part 2—Statutory bodies

### *Introduction*

27 A proposed statutory body needs to be characterised in 3 respects:

- (a) Incorporated or unincorporated (see paragraphs 36 to 40 of this Drafting Direction); and
- (b) FMA body, CAC body, both or neither (see paragraphs 41 to 63 of this Drafting Direction); and
- (c) Statutory agency under the PS Act, Executive Agency under the PS Act, or not covered under the PS Act (see paragraphs 64 to 69 of this Drafting Direction).

28 This Part of the Drafting Direction discusses the issues that can arise in choosing these characteristics for a proposed statutory body.

29 Statutory bodies can combine these characteristics in various ways. Only a few combinations are impossible (e.g. a CAC Act Commonwealth authority cannot be unincorporated).

30 The variety of ways in which these characteristics can be combined is apparent from:

- (a) Finance's lists of FMA Act agencies and CAC Act bodies (<http://www.finance.gov.au/financial%2Dframework/docs/FMACACFlipchart.pdf>); and
- (b) Government bodies more generally (<http://www.finance.gov.au/financial-framework/governance/list-of-australian-government-bodies.html>); and
- (c) the APSC's list of APS agencies (<http://www.apsc.gov.au/apsprofile/agencies.htm>).

31 However, there are some patterns in the ways bodies combine these characteristics. For example, an FMA body will often be unincorporated and a Statutory Agency under the PS Act. Similarly, a CAC body will often not be covered under the PS Act.

32 Nevertheless, there are departures from these patterns. For example:

- some incorporated statutory bodies are regulated under the FMA Act;
- some CAC bodies are Statutory Agencies under the PS Act;
- some FMA bodies are Executive Agencies under the PS Act;
- it is possible for a body to be covered by both the FMA Act and the CAC Act, although Finance generally opposes this.

33 The mix of characteristics of an agency is a policy issue to be resolved by the instructing Department in consultation with Finance, the APSC and, in some cases, PM&C.

34 You should be aware that paragraph 6.39 of the Legislation Handbook provides:

The government's general position is that administration by a department (or, where relevant, a company structure or Executive Agency) is preferable to the creation of a statutory authority. Only where it is clear that there is a need for statutory powers to be exercised and where it is clear that those powers need to be exercised by a body that is to some degree independent of government should consideration be given to the establishment of a statutory authority.

35 This general policy is reflected in the Governance Guide.

### ***Incorporated or unincorporated?***

36 The following are some common reasons why the Commonwealth may choose to establish a statutory body as a body corporate with separate legal personality from the Commonwealth:

- where there is a need for the body to sue and be sued in its corporate name (as opposed to a single office-holder requiring that capacity);
- where a group of people need to exercise collective decision-making in the performance of their statutory functions (including a regulatory or enforcement role);
- where the activities to be undertaken are as a result of, or relate to, an agreement between the Commonwealth and the States and Territories, or between the Commonwealth and another country.

37 However, the choice between making a statutory body incorporated or unincorporated usually depends on whether the body is an FMA body or CAC body. The general pattern is as follows:

- (a) an FMA body is usually unincorporated; and
- (b) a CAC body must be incorporated.

38 Finance suggest that in general:

- (a) in the exceptional case that an incorporated statutory body is regulated under the FMA Act, it should have corporators (i.e., the members of the body should actually constitute the body); and
- (b) a CAC body should be incorporated without corporators (i.e., the members of the body should not constitute the body).

39 If you are asked to create an *incorporated* statutory body that is to be regulated under the FMA Act, you should ensure that Finance is consulted early in the drafting process. The approach most recently agreed to by Finance to deal with this situation is as follows:

- the body, its corporators and staff will be a prescribed Agency for the purposes of the FMA Act;
- any real or personal property held by the body will be held for and on behalf of the Commonwealth;
- the body will not hold money on its own account; instead any money received by the body will be received for and on behalf of the Commonwealth;
- any contract entered into by the body will be entered into on behalf of the Commonwealth;
- any financial liabilities of the body will be liabilities of the Commonwealth.

40 For a further discussion of this issue and precedents, see Part 4.

### ***FMA body, CAC body, both or neither?***

#### **General**

41 An FMA body holds money and property on behalf of the Commonwealth. A CAC body holds money and property on its own account.

42 Finance prefers having money and property handled under the FMA Act wherever possible.

43 The following financial arrangements will rarely be acceptable to Finance:

- A statutory body could be regulated under both the FMA Act and the CAC Act. Such a body would hold both money in its own right and public money.

Example: A CAC body could be unfunded by the Commonwealth, and yet hold money on the Commonwealth's behalf (e.g. where the body in effect collects tax on behalf of the Commonwealth).

- A statutory body could be neither an FMA body nor a CAC body.

These kinds of arrangements should be discussed with Finance early in the drafting process.

44 In general:

- (a) an FMA body will not usually have a separate governing Board (but may in some cases have an advisory committee); and
- (b) a CAC body will usually have a governing board.

#### **The mechanics of applying the FMA Act and the CAC Act**

45 To bring a body within the FMA Act, it will often be necessary to prescribe it as a prescribed Agency by amending the FMA regulations. This amendment should be made by regulations. Consistent with paragraph 68 of Drafting Direction 3.8, this amendment should not be made by the Act creating the statutory body (except where there are compelling reasons for doing so).

46 Express provision should be made if the CAC Act is not to apply. If the CAC Act applies automatically, a note should be included. See the precedents set out in paragraphs 275 to 279.

### **Financial Management and Accountability Act 1997**

47 The FMA Act gives overarching responsibility for the Commonwealth's finances to the Finance Minister. It is the Finance Minister who negotiates agreements for handling public money with banks, opens and maintains official bank accounts, causes proper accounts and records of the receipt and expenditure of public money to be kept, borrows money on behalf of the Commonwealth and invests public money.

48 **Public money** is defined in section 5 of the FMA Act as:

- (a) money in the custody or under the control of the Commonwealth; or
- (b) money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money;

including such money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth.

49 In addition, the FMA Act imposes a number of particular obligations on agencies and officials.

50 Under section 5 of the FMA Act:

**Agency** means:

- (a) a Department of State:
  - (i) including persons who are allocated to the Department (for the purposes of this Act) by regulations made for the purposes of this paragraph; but
  - (ii) not including any part of the Department that is a prescribed Agency;
- (b) a Department of the Parliament, including persons who are allocated to the Department (for the purposes of this Act) by regulations made for the purposes of this paragraph;
- (c) a prescribed Agency.

51 You can access a copy of the regulations listing the bodies, organisations or groups of people that are prescribed Agencies under the FMA Act through Comlaw or the Finance website (<http://www.finance.gov.au/financial-framework/fma-legislation/index.html>).

52 **Officials** are persons who are in an Agency or are part of an Agency (section 5 of the FMA Act). Note that a person may be an official because he or she acts on behalf of the Commonwealth (see AGS advice 05206249 of 22 November 2005).

53 Part 3 of the FMA Act imposes obligations on officials in relation to the collection, custody etc. of public money. These obligations include rules on the following:

- banking public money;
- withdrawing money from an official account;
- misapplication and improper use of public money;
- liability for loss of public money.

54 Division 2 of Part 4 of the FMA Act deals with drawing rights in relation to public money, which are required before a payment of public money is made or an amount is debited against an appropriation.

55 Part 6 of the FMA Act deals with the control and management of public property.

56 **Public property** is defined in section 5 of the FMA Act as:

- (a) property in the custody or under the control of the Commonwealth; or
- (b) property in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the property;

including such property that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth.

57 The Act also imposes special responsibilities on the Chief Executive of an Agency. These include the following:

- promoting efficient, effective and ethical use of Commonwealth resources;
- recovering debts;
- maintaining accounts and records as required by the Finance Minister's Orders;
- giving the Auditor-General annual financial statements as required by the Finance Minister's Orders.

58 The **Chief Executive** of an Agency is defined in section 5 of the FMA Act as:

- (a) for a prescribed Agency—the person identified by the regulations as the Chief Executive of the Agency; or
- (b) for any other Agency—the person who is the Secretary of the Agency for the purposes of the *Public Service Act 1999* or the *Parliamentary Service Act 1999*.

### **Commonwealth Authorities and Companies Act 1997**

59 The CAC Act governs the conduct of 2 types of bodies.

60 The first are Commonwealth authorities. Subsection 7(1) of the CAC Act provides as follows:

(1) In this Act, **Commonwealth authority** means either of the following kinds of body that holds money on its own account:

- (a) a body corporate that is incorporated for a public purpose by an Act;
- (b) a body corporate that is incorporated for a public purpose by:
  - (i) regulations under an Act; or
  - (ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance;

and is prescribed for the purposes of this paragraph by regulations under this Act.

61 For the purposes of that subsection, money is taken to be held by a body on its own account unless it is public money, as defined in section 5 of the FMA Act (subsection 7(3), CAC Act).

62 The second type of body is a Commonwealth company. Subsection 34(1) of the CAC Act provides as follows:

- (1) In this Act, *Commonwealth company* means a Corporations Act company that the Commonwealth controls. However, it does not include a company that is a subsidiary of a Commonwealth authority or a Commonwealth company.

Section 34 goes on to define *control*.

63 For a body to be governed by the CAC Act there must be both legal and financial separation from the Commonwealth:

- the body must be incorporated, either under its constituting legislation or under the Corporations Act; and
- the body must hold money on its own account (in the case of a Commonwealth company this is assumed, in the case of a Commonwealth authority it is expressly required).

***Statutory agency under the PS Act, Executive Agency under the PS Act, or not covered under the PS Act?***

64 A statutory body is usually either:

- (a) a Statutory Agency under the PS Act; or
- (b) not covered under the PS Act.

65 In very unusual cases, it is also possible for a statutory body to be an Executive Agency under the PS Act (see paragraphs 16 to 19 of this Drafting Direction for a general discussion of Executive Agencies).

66 Note that it is possible for a statutory body not covered under the PS Act to be assisted by APS employees made available for that purpose. There are also bodies with both PS Act and non-PS Act staffing powers (such as the Australian Bureau of Statistics).

67 You should consult with Finance and the Australian Public Service Commission in choosing one of these classifications for a statutory body.

68 The Australian Public Service Commission made the following statement in commenting on a recent Bill:

...the APS Commission's general policy position is that, where it is demonstrated that the commercial focus of a body is such that CAC Act coverage is appropriate, these bodies should generally be free to employ their staff under their own enabling legislation—i.e. in most circumstances, the body should not be part of the Australian Public Service (APS). However, where a decision is made that FMA Act coverage is appropriate, it is also our view that these bodies should usually employ their staff under the *Public Service Act 1999* (PS Act) and therefore be part of the APS.

69 Finance has taken the view that, as a general rule, a body run by executive management (as opposed to by a governing board) should be regulated as a Statutory Agency under the PS Act.

## Part 3—Drafting issues and precedents: general

### *Establishment of statutory bodies*

#### Establishment and name

70 The standard provision establishing a statutory body is as follows:

- (1) The/A [*name of body*] is established by this section.

71 Different names are appropriate for different kinds of bodies:

- *Authority, Commission, Council, Office* is appropriate for advisory bodies, bodies engaged in administrative work or policy making, and representative bodies;
- *Corporation* is appropriate for commercial bodies, including marketing bodies, often engaged in activities comparable to those of companies;
- *University, College, Institute* may be used for academic or research institutions.

72 You should be careful of naming a CAC body an *Agency*, as it may be confused with an Agency as defined under the FMA Act.

73 For a discussion on the consequences of changing a body's name, see paragraphs 25 and 26. A precedent for changing the name of a body is as follows:

The body known immediately before the commencement of this section as [*previous name of body*] is continued in existence with the new name [*new name of body*].

Note: See also section 25B of the *Acts Interpretation Act 1901*.

#### Composition

74 Your instructors may consider that it is important to include a provision setting out the composition of the body. Legislation establishing an unincorporated statutory body usually includes such a provision. Legislation establishing an incorporated statutory body may establish it with or without corporators (see paragraph 245).

75 Whether or not such a provision is included:

- (a) if the body is a Statutory Agency for the purposes of the PS Act—a separate provision will define its composition for the purposes of that Act; and
- (b) if the body is an FMA body—the FMA regulations will define its composition for the purposes of that Act.

76 If a provision is included setting out the composition of the body, that composition will often depend on the way that powers and functions are allocated under the Act

establishing the body, and on how the body will act. In drafting such a provision, you should consider:

- (a) whether a manager or CEO with primarily administrative functions should be included in the body (contrast the *National Blood Authority Act 2003* with the *National Water Commission Act 2004*);
- (b) whether a Committee or statutory office that has been established to provide advice about the performance of functions should be included in the composition of the body.

77 You will need to consider how the body is to act in performing its functions and powers. It is likely to be necessary to include a delegation power in relation to functions and powers conferred on the body. If the body has a CEO, it may be desirable to include provisions that set out the relationship between the CEO and the body and also to include a delegation power for the CEO. If the body has members (that is, is composed of specified persons), you may need to consider whether particular functions need to be legislatively conferred on specified members, and if so you may need to provide for delegation by those members. You should consider whether a power to make a legislative instrument should be delegable—often this is not appropriate.

78 You should consider whether a delegate should be subject to the directions of the delegator (the Legislative Instrument Regulations provide that such an instrument is not a legislative instrument).

### **Allocation of functions**

79 Some legislation confers functions on the CEO of a body which remains part of the Commonwealth, rather than on the body as a whole. The function of the agency in these cases is to assist the CEO to perform the CEO's functions (see *Commonwealth Services Delivery Agency Act 1997* (section 6A) and *Medicare Australia Act 1973* (section 4A)).

80 This can be contrasted, for example, with the *Parliamentary Counsel Act 1970* (section 3) and the *Australian Bureau of Statistics Act 1975* (section 6), which both confer functions on the body, while conferring a management or control function in relation to the body on the relevant CEO.

81 In many cases, it provides clarity if the functions of statutory bodies run by executive management are given to the CEO (rather than the body itself), unless there are strong policy reasons otherwise. Finance considers that this is consistent with both the FMA Act (section 44) and the PS Act (section 57), which provide the Chief Executive, or Secretary, with the responsibility for managing the body. For background on this issue, see AGS advice 06005773 dated 20 January 2006. However, there are cases where this is not the appropriate model.

### **Powers**

82 In general, it is inappropriate to confer specific powers on unincorporated statutory bodies which exercise powers on behalf of the Commonwealth. If there is a reason to refer to such powers, it should be clear that they are to be exercised on behalf of the Commonwealth. See Part 4 for powers of incorporated bodies.

## Performance of functions and exercise of powers outside Australia

83 Paragraph 21(1)(b) of the AIA provides that in any Act, unless the contrary intention appears, references to localities, jurisdictions and other matters and things are to be construed as references to such localities, jurisdictions and other matters and things “in and of the Commonwealth”. In the absence of a statement to the contrary, this might have the effect that a statutory body can only perform its functions or exercise its powers within Australia.

84 If it is intended that the statutory body be able to perform its functions or exercise its powers outside Australia, you should consider including an express statement to that effect (see subsections 7(2) and 8(3) of the *Australian Sports Commission Act 1989*; section 6 of the *Australian Institute of Marine Science Act 1972*). The FMA Act and the CAC Act extend outside Australia (see section 4 of those Acts).

## Ministerial directions to the statutory body

85 You should discuss with your instructors the extent to which the statutory body should be subject to direction by the Minister.

86 If the body is a Commonwealth authority for the purposes of the CAC Act, section 48A of that Act allows the Finance Minister to make orders about general policy of the Australian Government that the body is required to comply with.

87 If the body is not a CAC body, or if a CAC body is to be subject to more specific direction by its own Minister, you should discuss with your instructors the inclusion of an express provision to provide for this.

88 Without an express provision, the Minister’s ability to direct the body will be unclear. In *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404, Mason and Wilson JJ said (at 429-430):

The extent to which a tribunal or public official required by statute to make decisions which affect the rights of the citizen can take into account and act upon the views of the Government or a minister has been, and no doubt will continue to be, a vexed question. See e.g., the differences in approach and emphasis expressed in the judgments of this Court in *Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd.* (1965); and *Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth* (1977). As these judgments tend to show, the problem is not one which admits of an answer having a universal application. So much depends on a variety of considerations, for there are few cases in which the statute explicitly provides that the tribunal is bound to give effect to, or to give weight to, a ministerial direction. One must take into account the particular statutory function, the nature of the question to be decided, the character of the tribunal and the general drift of the statutory provisions in so far as they bear on the relationship between the tribunal and the responsible Minister, as well as the nature of the views expressed on behalf of the Government. What is permitted to one organization may be prohibited to another. What will be an extraneous consideration to a tribunal applying the law to the facts, e.g., the Court Martials Appeal Tribunal, may be a relevant consideration to a tribunal such as the Commonwealth Conciliation and Arbitration Commission which takes into account government economic policy.

89 For this reason, if the policy is to allow the Minister to give directions, you should include an express provision to provide for this.

90 A number of cases have considered the meaning of “general directions” (e.g. *National Aboriginal & Torres Strait Islander Legal Services Secretariat Limited v Minister*

*for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 287; *Aboriginal Development Commission v Hand* (1988) 15 ALD 410). A “general direction” must be one which is not directed merely to a particular case.

91 A power to direct that is not expressed to be “general” will likely be read as being limited to “general” directions—see Aronson Dyer & Groves, *Judicial Review of Administrative Action* (3rd Ed.), page 285.

92 The following precedent may be used where the policy is to allow the Minister to give “general” directions:

**xx Minister may give directions to [*the statutory body*]**

- (1) The Minister may, [*by legislative instrument*], give written directions to the [*statutory body*] about the performance of its functions.

[Note: Section 42 (disallowance) and Part 6 (sunsetting) of the *Legislative Instruments Act 2003* do not apply to the direction (see sections 44 and 54 of that Act).]

- (2) A direction under subsection (1) must be of a general nature only.

- (3) The [*statutory body*] must comply with a direction under subsection (1).

93 If the direction is to be given to a CAC body, and the provision authorising the giving of the direction does not require it to be laid before the Houses of the Parliament or published in the *Gazette* or elsewhere, then the direction will not be a legislative instrument: see item 5 of the table in subsection 7(1) of the *Legislative Instruments Act 2003*. In this case, do not include the words in italics (or the related note) to make it a legislative instrument without first consulting both Finance and the Office of Legislative Drafting and Publishing.

94 If the direction is required to be tabled or published as mentioned in paragraph 93, or if it is to be given to a non-CAC body, the direction should be made to be a legislative instrument. This is because Finance prefers Ministerial directions to be on the Federal Register of Legislative Instruments.

95 Note that Ministerial directions are not subject to disallowance under item 41 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*, and are not subject to sunsetting under item 46 of the table in subsection 54(2) of that Act.

96 If the policy is to allow the Minister to give directions in relation to particular matters, you will need to do so expressly. In some cases, the subject of the direction will need to be narrowed or provision made for consultation by the Minister with particular bodies before the direction is given.

97 Where the statutory body is created to implement a co-operative agreement between the Commonwealth and the States and Territories, it may be necessary to include a requirement that the direction comply with that agreement (see, for example, section 9 of the *National Blood Authority Act 2003*).

**Ministerial directions or statutory body directions to the head of the statutory body**

98 If the body is a prescribed Agency for the purposes of the FMA Act or a Statutory Agency for the purposes of the PS Act, you should discuss with your instructors the extent

to which the person who is the Chief Executive for FMA Act purposes or the Agency Head for PS Act purposes (the *CEO*) should be subject to direction by the Minister or the body. If the policy is to allow the Minister or body to give directions to the CEO, you should include an express provision to provide for this.

99 The following precedent may be used where the policy is to allow the Minister to give directions to the CEO.

**xx Minister may give directions to [CEO]**

- (1) The Minister may, by legislative instrument, give written directions to the [CEO] about [*specify matter eg: the performance of his or her functions*].

Note: Section 42 (disallowance) and Part 6 (sunsetting) of the *Legislative Instruments Act 2003* do not apply to the direction (see sections 44 and 54 of that Act).

- (2) The [CEO] must comply with a direction under subsection (1).
- (3) Subsection (2) does not apply to the extent that the direction relates to the [CEO's] performance of functions or exercise of powers under the *Public Service Act 1999* in relation to the [*statutory body*].

100 The following precedent may be used where the policy is to allow the statutory body to give directions to the CEO.

**xx [Statutory body] may give directions to [CEO]**

- (1) The [*statutory body*] may give written directions to the [CEO] about [*specify matter eg: the performance of his or her functions*].
- (2) The [CEO] must comply with a direction under subsection (1).
- (3) Subsection (2) does not apply to the extent that:
  - (a) compliance with the direction would be inconsistent with the [CEO's] performance of functions or exercise of powers under the *Financial Management and Accountability Act 1997* in relation to the [*statutory body*]; or
  - (b) the direction relates to the [CEO's] performance of functions or exercise of powers under the *Public Service Act 1999* in relation to the [*statutory body*]; or
  - [(c) *compliance with the direction would be inconsistent with a direction of the Minister under section XX.*]
- (4) A direction under subsection (1) is not a legislative instrument.

101 If the Minister and the body are both able to give the CEO directions, you should consider which direction the CEO should comply with in the case of inconsistency.

**Corporate and other plan**

102 A statutory body that is run by a governing board would usually be required to produce an annual corporate plan, but this is a case by case matter that agencies should discuss with Finance.

103 If the body is a government business enterprise prescribed for the purposes of the CAC Act, section 17 of that Act already requires the directors to prepare a corporate plan.

104 If the body is not such an enterprise, the requirement to prepare and approve a corporate plan will require legislative provisions. The following is a list of things to consider in drafting provisions dealing with corporate plans:

- How often should a corporate plan be prepared? (They are usually prepared annually.)
- Who will prepare the corporate plan?
- What period should be covered by the corporate plan? (A 3 to 5 year period is common.)
- What matters should be covered by the plan?
- Should there be some sort of consultation during the preparation of the plan?
- Is the plan to include performance indicators?
- Who will approve the corporate plan? (Usually, this will be the relevant Minister. The Minister is also given the power to direct that the draft plan be altered in specified ways, if it is not satisfactory.)
- Should the corporate plan be published and, if so, in what manner?
- Should provision be made for altering the plan during its life?
- When should the plan come into force?

105 In some cases, an annual operational plan is required in addition to a corporate plan. The purpose of the annual operational plan is to set out in more detail how the strategic direction set in the corporate plan is to be achieved.

106 Some examples of provisions dealing with corporate plans, strategic plans and annual operational plans are as follows:

- sections 23 to 25 of the *National Transport Commission Act 2003*;
- sections 33 to 38 of the *Tourism Australia Act 2004*;
- sections 64 to 66 of the *Australian Trade Commission Act 1985*.

### ***Procedures of the Board***

107 The following is a list of the basic issues that need to be addressed in drafting provisions dealing with the procedures of a Board (or other decision-making entity):

- Who can convene meetings?
- How often should meetings be held (for example, should there be a minimum number of meetings each year)?

- Should the Minister be given the power to require a meeting be held in some circumstances?
- Who is to preside at meetings?
- What is the quorum for a meeting to be?
- Are decisions to be made at a meeting by a majority vote? If not, by what mechanism?
- Who can vote at a meeting? For example, are ex officio members entitled to vote?
- Will the person presiding at a meeting have a casting, as well as a deliberative, vote?
- Are there to be any other rules about the conduct of meetings, or will the governing body be allowed to sort that out for itself?
- Does the governing body need to be able to make decisions without meetings? If so, can this be by phone, fax, or other electronic communication?

108 The following are some useful examples of provisions dealing with the procedures of a Board:

- sections 14 to 20A of the *Australian Heritage Council Act 2003*;
- sections 7D to 7J of the *Australian Crime Commission Act 2002*;
- sections 22 to 27 of the *Tourism Australia Act 2004*;
- sections 44AAD and 44AAE of the *Trade Practices Act 1974*.

109 The following is a precedent enabling decisions to be made without a meeting:

## **xx Decisions without meetings**

- (1) The Board is taken to have made a decision at a meeting if:
  - (a) without meeting, a majority of the members entitled to vote on the proposed decision indicate agreement with the decision; and
  - (b) that agreement is indicated in accordance with the method determined by the Board under subsection (2); and
  - (c) all the members were informed of the proposed decision, or reasonable efforts were made to inform all the members of the proposed decision.
- (2) Subsection (1) applies only if the Board:
  - (a) has determined that it may make decisions of that kind without meeting; and
  - (b) has determined the method by which members are to indicate agreement with proposed decisions.

- (3) For the purposes of paragraph (1)(a), a member is not entitled to vote on a proposed decision if the member would not have been entitled to vote on that proposal if the matter had been considered at a meeting of the Board.
- (4) The Board must keep a record of decisions made in accordance with this section.

## **Appointments**

### **General**

110 It is normal, although not legally necessary, to provide for appointments to be made in writing. The standard provision is as follows:

- ( ) The [*office-holder*] is to be appointed by the [*appointer*] by written instrument.

Note: The [*office-holder*] is eligible for reappointment: see subsection 33(4A) of the *Acts Interpretation Act 1901*.

111 Subsection 33(4A) of the AIA provides that in any Act, **appoint** includes reappoint. There is therefore no need to include “and is eligible for reappointment” in this provision providing for appointment. However, you should be alert to cases in which your instructors may want to exclude the option of reappointment. This would require policy authority. You may need to make specific provision for reappointment if the appointment provision requires a particular process to be followed which is not required for reappointments.

112 Appointments should be expressed to be full-time, part-time, or either (depending on policy).

113 Appointments may be for a fixed term, or at the pleasure of the appointer.

114 The standard provision for a fixed term appointment is as follows:

- ( ) The [*office-holder*] holds office for the period specified in the instrument of appointment. The period must not exceed [x] years.

115 A provision for appointment at the appointer’s pleasure should generally be avoided. Instead, PM&C prefer a provision for termination of appointment without cause (see paragraphs 167-168). Among other things, this may provide more certainty in relation to matters such as termination payments. However, if you do include a provision for appointment at the appointer’s pleasure, the standard provision is as follows:

- ( ) The [*office-holder*] holds office during the [*appointer’s*] pleasure.

116 It is current government policy that age limits should not be imposed for full-time or part-time office-holders.

117 You should be aware that if an office-holder under an Act is to be appointed or nominated by a body established by the same Act (e.g. a CEO appointed by the Board of a CAC body), section 4 of the AIA cannot be relied upon to appoint the office-holder before the Act commences (see AGS advice 07037981 of 13 August 2007). The AGS advice suggests possible ways to address this issue:

- staggered commencement dates, with provisions relating to the appointing or nominating body commencing before the provisions relating to the office-holder;
- providing that an existing body (e.g. a Minister) make the first appointment of the office-holder (which could be an acting appointment).

### **Including public servants or public officials as members of board**

118 Including public servants or other public officials as members of a body can give rise to conflicts of interest (see AGS advice 03051783, 25 May 2003 and paragraph 106 of the Governance Guide). Any proposal to include public servants or other public officials as members of a body should be referred to Finance early in the drafting process.

### **Acting appointments**

119 Subsection 33(4) of the AIA confers a basic power to make acting appointments on persons or authorities who have power to make substantive appointments. However, it is not usual to rely on it, because of the way in which it is structured.

120 Where power to make acting appointments is specifically conferred, it is common, but not universal, for that power to be conferred on the same person who has power to make the substantive appointments. Especially where substantive appointments are made by the Governor-General, it may be more convenient for acting appointments to be made by another authority (usually the Minister).

121 A standard provision for acting appointments is as follows:

### **xx Acting appointments**

- (1) The [*Minister*] may, by written instrument, appoint a [*member*] to act as the [*Principal Member*]:
  - (a) during a vacancy in the office of [*Principal Member*] (whether or not an appointment has previously been made to the office); or
  - (b) during any period, or during all periods, when the [*Principal Member*]:
    - (i) is absent from duty or from Australia; or
    - (ii) is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
  - (a) the occasion for the appointment had not arisen; or
  - (b) there was a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion to act had not arisen or had ceased.

Note: See sections 20 and 33A of the *Acts Interpretation Act 1901*.

122 These provisions are fleshed out by a number of provisions in the AIA that operate in relation to acting appointments. These are as follows:

- section 20 provides that a reference to the holder of an office covers a person who performs for the time being the duties of the office;

- paragraph 33A(1)(a) provides that an acting appointment may be expressed to have effect only in the circumstances specified in the instrument of appointment;
- paragraph 33A(1)(b) provides that the appointer may determine the terms and conditions of the appointment (including remuneration and allowances) and may terminate the appointment at any time;
- paragraph 33A(1)(ba) provides that a person appointed to act in a vacant office must not continue to act in the office for longer than 12 months;
- paragraph 33A(1)(c) provides that, if the appointee is acting in the office and, during the course of acting the office becomes vacant, the appointee may continue to act until the appointer directs otherwise, the vacancy is filled, or 12 months expires (whichever happens first);
- paragraph 33A(1)(d) provides that the appointment ceases to have effect if the appointee resigns in writing delivered to the appointer;
- paragraph 33A(1)(e) provides that the appointee has, and may exercise, all the powers of the holder of the office and must perform all the functions and duties of the holder of the office. It also provides that the establishing Act and any other Act applies to the appointee as if the appointee were the holder of the office.

### **Vacancies in membership**

123 Subsection 33(2B) of the AIA validates acts done by statutory authorities during vacancies in membership. However, where the number of members is variable, you may want to include a provision validating acts done while the membership falls below the minimum number for a limited period (for example, see subsection 41(3) of the *Racial Discrimination Act 1975*). This is because, even though there may be fewer than the required number of members, there may be no identifiable positions or offices that can be said to be vacant.

### **Gender-specific language—titles for office-holders**

124 The choice of titles for members of statutory bodies and other office-holders is largely a policy matter for instructors. However, the title “Chair” should be used for newly-created offices.

125 If you are amending an Act that refers to “Chairman”, then you should replace “Chairman” with “Chair”. If you are amending an Act that establishes an office of “Chairperson”, you should not replace that title with “Chair” unless requested by your instructors to do so. If you are inserting an office of deputy into an Act that already provides for a Chairperson, you should create a new office of Deputy Chairperson.

126 There are other titles that may be used instead of “Chair”, including “President”, “Chief Executive”, “Principal Member”, “Senior Member” and “Convenor”.

127 Note that section 18B of the AIA allows the occupant of an office of Chair to be referred to as the Chair, Chairperson, Chairman, Chairwoman or any other such term. Similar provision is made in respect of the office of Deputy Chair. No express provision is made in respect of the offices of Chairman or Chairperson or their deputies.

### Definitions of “member”

128 The word *member* is frequently defined in Bills establishing statutory bodies as meaning a member of the body. If there is a Chairperson, President, etc. of the body, and the word “member” is intended to include that person, the definition of *member* should, for the avoidance of doubt, be expressed to include that person.

### Terms and conditions

#### Terms and conditions—general

129 You should include a general provision in the following form:

- ( ) The [*office-holder*] holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the [*appointer*].

130 Providing for the other terms and conditions to be set out in the instrument of appointment is, in general, too restrictive.

#### Outside employment

131 Generally, full-time holders of statutory offices should be prohibited from engaging in outside employment without permission from an appropriate authority (usually the Minister, but possibly the head of a statutory body, for another member of, or office-holder in, the statutory body). However, this is ultimately a matter for your instructors. If this restriction is to be imposed, the standard provision is as follows:

- (1) The [*office-holder*] must not engage in paid employment outside the duties of his or her office without the Minister’s approval.

132 Sometimes it is desirable to restrict the other activities of part-time office-holders. If so, a provision along the following lines should be used. The following provisions are the most frequently used—you should discuss with your instructors which is appropriate:

- (1) The [*office-holder*] must not engage in any paid employment that conflicts or may conflict with the proper performance of his or her duties.

#### OR

- (1) The [*office-holder*] must not engage in any paid employment that, in the [*Minister’s*] opinion, conflicts or may conflict with the proper performance of his or her duties.

133 You will need to ensure that an office-holder is not covered by both provisions set out in paragraphs 131 and 132. A contravention of the outside employment provision should generally (subject to your instructors’ views) be included as a ground for termination (see paragraphs 159-163). This would not be necessary if the power of termination is unlimited.

134 There are precedents for dealing with outside employment only in the termination provision. However, since engaging in outside employment (especially for a part-time member) is not an obvious ground for termination (unlike, for instance, misbehaviour or being absent without leave), it will usually be desirable to deal with it as a stand-alone aspect of the office-holder's terms and conditions.

### **Remuneration—general**

135 In general, the remuneration of statutory office-holders (whether full-time or part-time) is determined by the Remuneration Tribunal. Subsection 3(4) of the *Remuneration Tribunal Act 1973* lists offices that are *not* covered by the definition of “public office” in that Act.

136 Subsection 5(2A) of the *Remuneration Tribunal Act 1973* permits the Remuneration Tribunal to determine a classification structure for “principal executive offices” (listed in regulations made under the *Remuneration Tribunal Act 1973*). The employing body for the principal executive office is then empowered, under section 12C, to determine remuneration and allowances, and other terms and conditions, for the office. The employing body must not make a determination inconsistent with the classification structure determined by the Remuneration Tribunal without first requesting the Tribunal's advice (see subsection 12C(2)). A determination made under section 12C overrides a provision of another Act providing terms and conditions for the principal executive office (unless the other Act expressly overrides section 12C) (see subsection 12C(3)).

137 For the time being, however, Bills creating new statutory offices, including offices in the nature of principal executive offices, should still include the standard remuneration and allowances provisions set out below. Note that if your instructors wish to quarantine a new principal executive office from section 12C of the *Remuneration Tribunal Act 1973*, you will need to override the section by an express reference.

138 Occasionally, there is a policy decision that the remuneration of what would otherwise be a public office under the *Remuneration Tribunal Act 1973* is to be determined by someone else (e.g. a Minister). In such a case, the question of source of funds needs to be considered, as the rules in the *Remuneration Tribunal Act 1973* will not apply (see paragraphs 146-149).

### **Remuneration—standard provision**

139 The standard *Remuneration Tribunal Act 1973* remuneration provision is as follows:

#### **xx Remuneration**

- (1) A [*member*] is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is prescribed by the regulations.
- (2) A [*member*] is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

140 In the *Remuneration Tribunal Act 1973*, **remuneration** includes annual allowances (see subsection 3(2) of the *Remuneration Tribunal Act 1973*), but not travelling allowance, and extends to remuneration payable on other than an annual basis (e.g. daily sitting fees). These are the kinds of payments that may be determined under subsection (1) of the standard provision.

141 The Tribunal is also empowered to determine any matter that is significantly related to remuneration (see subsection 7(4) of the *Remuneration Tribunal Act 1973*). This power has been taken to extend to allowances such as travelling allowances (but not annual allowances). The Tribunal is not obliged to make such determinations, which is why the “default” provision in subsection (2) of the standard provision refers to prescribing allowances.

142 If the Tribunal does determine allowances of the kinds covered by subsection (2), subsection (3) of the standard provision ensures that the Tribunal’s determination prevails over any regulations made for the purposes of subsection (2).

143 Subsection (3) also ensures the application of provisions of the *Remuneration Tribunal Act 1973* that have the effect, in certain circumstances, of debarring the office-holder from receiving remuneration (for instance, if he or she is at the same time a full-time public servant).

#### **Offices that are not “public offices” under the *Remuneration Tribunal Act 1973***

144 If the Remuneration Tribunal is to be given power to determine the remuneration payable to the holder of an office that is not a public office as currently defined in subsection 3(4) of the *Remuneration Tribunal Act 1973*, you will need to amend that subsection to include a reference to the new office. This will be rare, since the current definition of **public office** is very wide.

145 The Bill will need the standard remuneration provision set out in paragraph 139 as well.

#### **Remuneration—source of funds**

146 Subsection 7(9) of the *Remuneration Tribunal Act 1973* sets out the source of funds for payments in accordance with Tribunal determinations. In many cases, payments are to be made out of the funds of the relevant statutory body. In cases not covered expressly by paragraphs 7(9)(a) to (ae), paragraph 7(9)(b) provides for payments to be made out of the Consolidated Revenue Fund, which is appropriated for the purpose by subsection 7(13).

147 Despite these provisions, payments of office-holder remuneration are almost universally paid out of the funds of the relevant statutory body or other agency. For instance, the salaries of the First and Second Parliamentary Counsel must be paid out of funds appropriated for OPC in the annual Appropriation Acts. This means that, in the usual case, the Bill establishing a statutory office need not make any specific provision for payment of the office-holder’s remuneration.

148 The Attorney-General’s Department has advised that the existence of an applicable standing appropriation does not prevent a payment being made out of other funds that are lawfully available for the payment. For budget-funded agencies at least, the matter is of no

practical significance. The agency's running costs are determined having regard to any office-holder remuneration payable, and would be reduced accordingly (by Finance) if the remuneration were paid out of a separate appropriation.

149 If, for policy reasons, the approach outlined in paragraph 146 is not suitable, you may need to amend subsection 7(9) of the *Remuneration Tribunal Act 1973* to insert an appropriate provision about the source of the relevant funds. If the payments are to be made out of money otherwise appropriated, a message will not be required.

### **Requirement for Governor-General's message for remuneration provisions**

150 A Bill creating a new statutory office for which remuneration is payable does not require a message merely because of the creation of the office if the office would in any case come within the definition of "public office" in the *Remuneration Tribunal Act 1973*. The view is taken that the *Remuneration Tribunal Act 1973* would operate on the mere creation of the office to enable determination and payment of remuneration from funds appropriated by the *Remuneration Tribunal Act 1973*, and that the standard remuneration provision included in the establishing Bill is, strictly speaking, not necessary to achieve this.

151 The position set out in paragraph 150 was the subject of an agreement reached in 1980 between this Office and the Clerks of the two Houses (originally referred to in Drafting Direction No. 6 of 1980). Whether or not the agreement itself still has any force, the position appears to carry the authority of a long-standing practice.

152 A Bill will require a message if it:

- creates a new statutory office which would not be a public office for the purpose of the *Remuneration Tribunal Act 1973*; and
- amends the *Remuneration Tribunal Act 1973* to bring the office within the scope of the expression "public office"; but
- does not also provide for payments to be made out of money otherwise appropriated (by amending subsection 7(9) of the *Remuneration Tribunal Act 1973* or otherwise).

153 The argument is that, in this case, the amending Bill itself is enabling the payment of funds out of the Consolidated Revenue Fund (by invoking the operation of paragraph 7(9)(b) and subsection 7(13) of the *Remuneration Tribunal Act 1973*).

### **Leave—full-time office-holders**

154 Subsections 7(3AA) to (3AD) of the *Remuneration Tribunal Act 1973* deal with the recreation leave entitlements of a full-time holder of public office, if a law of the Commonwealth provides for those entitlements to be determined by the Tribunal.

155 The standard provision for attracting the *Remuneration Tribunal Act 1973* provisions is set out below. It should be used wherever a public office capable of being held on a full-time basis is established. If the relevant office can only be held on a full-time basis, "full-time" should be omitted from the standard provision.

## xx Leave of absence

- (1) A [full-time] [member] has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The [Minister] may grant a [full-time] [member] leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the [Minister] determines.

## Leave—part-time office-holders

156 In the past, it was common to provide for part-time office-holders to be granted leave to be absent from meetings of the relevant body. The more general provision set out below would cover such situations, and a variety of others as well.

- ( ) The [Chair] may grant leave of absence to any [other] [part-time] [member] on the terms and conditions that the [Chair] determines.

## Resignation

157 The standard resignation provision is as follows:

- ( ) [The office-holder] may resign his or her appointment by giving [the appointer] a written resignation.
- ( ) The resignation takes effect on the day it is received by [the appointer] or, if a later day is specified in the resignation, on that later day.

158 An acting office-holder resigns by writing delivered to the appointer as provided for in paragraph 33A(1)(d) of the AIA. If the AIA provision is relied on, no other provision is needed in the Bill creating the office.

## Termination—general

159 Generally, the power to terminate an appointment should be given to the appointer.

160 The standard provision for the termination of a full-time office-holder is as follows:

## xx Termination of appointment

- (1) The [appointer] may terminate the appointment of [the office-holder] for misbehaviour or physical or mental incapacity.

## OR

- (1) The [appointer] may terminate the appointment of [the office-holder]:
  - (a) for misbehaviour; or
  - (b) if [the office-holder] is unable to perform the duties of his or her office because of physical or mental incapacity.
- (2) The [appointer] [must] [may] terminate the appointment of [the office-holder] if:
  - (a) [the office-holder]:
    - (i) becomes bankrupt; or
    - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or

- (iii) compounds with his or her creditors; or
- (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- (b) [*the office-holder*] is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- (c) [*the office-holder*] engages, except with the [*appropriate authority's*] approval, in paid employment outside the duties of his or her office (see [*outside employment provision*]); or
- (d) [*the office-holder*] fails, without reasonable excuse, to comply with [*disclosure of interests provision*].

161 AGS's advice is that the 2 versions of subsection (1) do not have the same legal effect (see opinion 08041883 of 18 June 2008). The second version limits termination to the case where the person's physical or mental incapacity is such that the person is unable to perform his or her duties of office. If you use the second version of subsection (1), you will need to advise your instructors to obtain policy approval for it. Also, if you are inserting the second version into an Act that already has the first version in it, you should amend the Act so that it only has the second version.

162 For a part-time office-holder, you will need to discuss with your instructors whether paragraph (2)(b) is appropriate. If the office-holder is a member of a statutory body and there are provisions for meetings of the body, an alternative paragraph (2)(b) is as follows:

- (b) [*the office-holder*] is absent, except on leave of absence, from 3 consecutive meetings of the [*statutory body*]; or

163 For a part-time office-holder, paragraph (2)(c) should be replaced with the following paragraph, the wording of which should be consistent with the applicable prohibition (see paragraph 132):

- (c) [*the office-holder*] engages in paid employment that [, *in the Minister's opinion,*] conflicts or may conflict with the proper performance of his or her duties (see [*outside employment provision*]); or

### **Termination—office-holder requiring special degree of independence**

164 Where an office-holder requires some special degree of independence (e.g. the Auditor-General, the Ombudsman or the members of a tribunal), the termination provision may provide for the involvement of Parliament in certain cases. Provisions of this sort should not be used where the office-holder or the relevant body is exercising governmental or commercial functions.

165 The provision may allow the appointer to remove the office-holder in reliance on a resolution passed by each House of the Parliament. Alternatively, the provision may allow the office-holder to be suspended pending consideration of the matter in the 2 Houses, and then either reinstated or removed from office depending on the views of the Houses.

166 There are relatively few provisions of this kind, and they differ from each other in a number of matters of detail. If you need to draft such a provision, you should use the existing examples as a basis for devising a provision which suits your instructors' wishes. Examples can be found in:

- AAT Act (e.g. section 13); and
- *Auditor-General Act 1997* (clause 6 of Schedule 1).

### **Termination without cause**

167 The *Air Services Act 1995* provides as follows:

### **40 Termination of appointment**

The Board may at any time terminate the appointment of the CEO.

168 This kind of provision is likely to become more common in the future (see paragraph 115). For the time being, however, if you are asked to include such a provision in a Bill without specific Prime Ministerial or Cabinet authority, you should draw it to the attention of the First Assistant Secretary, Government Division, PM&C, who will consider whether the particular statutory officer needs any special degree of independence and should therefore not be subject to termination without cause.

### **Termination for unsatisfactory performance**

169 There are a number of recent precedents for termination on the grounds that the performance of an office-holder, or of a body of which the office-holder is a member, “has been unsatisfactory [for a significant period of time]”.

170 Taking action under such a provision would raise a number of difficult issues. This kind of provision should not be included in a Bill without specific Prime Ministerial or Cabinet authority for its use.

### **Termination of office-holders covered by Commonwealth superannuation or pension schemes**

171 Subsection 13(1) of the *Superannuation Act 1990* contains a provision to the effect that a member of the scheme established by that Act who is under 60 cannot be retired from employment or office because of a mental or physical condition unless a certificate has been given under that subsection that the member will be entitled to receive invalidity benefits under the scheme. Subsection 54C(1) of the *Superannuation Act 1976* contains a similar provision.

172 Where a later Act provided for termination of an appointment on the ground of incapacity without mentioning a requirement for a certificate, it was thought that this impliedly repealed those subsections. For this reason, provisions such as clause 6 of Schedule 1 to the *Auditor-General Act 1997* and section 13 of the AAT Act were often included in later Acts to make termination for incapacity dependent on such a certificate being granted.

173 However, on the basis of AGS advice (see opinions 00010635 of 30 June 2000 and 2000039432 of 30 August 2000), you should now act on the view that the mere fact that a provision providing for termination on the grounds of incapacity was enacted after the *Superannuation Act 1990* or the *Superannuation Act 1976* does not mean that it is not subject to the limitations set out in those Acts. Consequently, you should not include

provisions such as clause subclauses 6(3) to (6) of Schedule 1 to the *Auditor-General Act 1997* and subsections 13(9), (12), (13) and (14) of the AAT Act.

## ***Disclosure of interests***

### **CAC Act bodies**

174 Where a statutory body is a Commonwealth authority for the purposes of the CAC Act, the directors of the body (for the purposes of that Act) will be subject to the disclosure requirements and restrictions on voting set out in Subdivision B of Division 4 of Part 3 of that Act.

175 If the CAC body has a CEO who is not also a member of the Board, you will need to provide separate disclosure requirements for the CEO (because the CEO will not be a “director” of the body for the purposes of the CAC Act). The following provision should be included:

#### **xx Disclosure**

The CEO must give written notice to the *[appointer]* of all material personal interests that the CEO has or acquires and that conflict or could conflict with the proper performance of the CEO’s duties.

### **Non-CAC Act bodies**

#### ***Members of the body***

176 Where the statutory body is not a Commonwealth authority, disclosure requirements and restrictions on participation in the decision-making processes of the body will need to be dealt with in the body’s constituting legislation.

177 One of the following provisions should be included to deal with the interests of the person or persons constituting the body. You should discuss with your instructors and Finance which of the following provisions to include:

#### **xx Disclosure of interests to the Minister**

- ( ) The *[member]* must give written notice to the Minister of any direct or indirect pecuniary interest that the *[member]* has or acquires and that conflicts or could conflict with the proper performance of the *[member’s]* functions.

**OR**

#### **xx Disclosure of interests to the Minister**

- ( ) The *[member]* must give written notice to the Minister of all interests, pecuniary or otherwise, that the *[member]* has or acquires and that conflict or could conflict with the proper performance of the *[member’s]* functions.

178 The member should also be required to disclose the interest to the statutory body. You should include the following provisions:

**xx Disclosure of interests to the [statutory body]**

- (1) A [member] who has a [refer to same kind of interest covered by the provision set out in paragraph 177] in a matter being considered or about to be considered by the [statutory body] must disclose the nature of the interest to a meeting of the [statutory body].
- (2) The disclosure must be made as soon as possible after the relevant facts have come to the [member's] knowledge.
- (3) The disclosure must be recorded in the minutes of the meeting.
- (4) The [member]:
  - (a) must not be present during any deliberation by the [statutory body] on the matter; and
  - (b) must not take part in any decision of the [statutory body] with respect to the matter.

179 There may be cases where it is not practical to exclude a member of a statutory body from the decision making process. For example, excluding a particular member from that process may deny the body the benefit of the expertise of the only member who has knowledge or experience of the particular subject. That member may even have been appointed because of that expertise. Another example is where the statutory body has industry representation. In that case, a high proportion of the members of the body may have interests in the industry regulated, and so it may be difficult to get a quorum if they are excluded.

180 The Report of the Committee of Inquiry into Public Duty and Private Interest in 1980 (the *Bowen Committee*), recommended that these kinds of problems be dealt with by allowing either the Minister or the disinterested members of the body to determine whether the member is authorised to take part in the deliberations or decisions of the body on a matter in which he or she has an interest. Where the circumstances require this approach, subsection (4) referred to in paragraph 178 should, subject to paragraph 181, be replaced with one of the following alternatives:

**Where the Minister will decide whether the member is to be present**

- (4) Unless the Minister otherwise determines, the [member]:
  - (a) must not be present during any deliberation by the [statutory body] on the matter; and
  - (b) must not take part in any decision of the [statutory body] with respect to the matter.

**Where the statutory body will decide whether the member is to be present**

- (4) Unless the [statutory body] otherwise determines, the [member]:
  - (a) must not be present during any deliberation by the [statutory body] on the matter; and
  - (b) must not take part in any decision of the [statutory body] with respect to the matter.
- (5) For the purposes of making a determination under subsection (4), the [member]:
  - (a) must not be present during any deliberation of the [statutory body] for the purpose of making the determination; and
  - (b) must not take part in making the determination.
- (6) A determination under subsection (4) must be recorded in the minutes of the meeting of the [statutory body].

181 However, if the statutory body concerned includes members who are representative of a particular group or of particular persons, the Bowen Committee points out that disqualification from participating in the deliberations or decisions of the body because of the existence of a pecuniary interest has the effect of disfranchising persons or groups whom the member is supposed to represent. An example is where the statute provides that a member of the body is nominated by, or a representative of, an industry body such as the National Farmers' Federation. In this case, there should not be any limitation on the presence of the member at deliberations (that is, neither the subsection (4) referred to in paragraph 178 nor any of the subsections referred to in paragraph 180 should be included).

#### **Statutory office-holders (whether or not members of the body)**

182 In many cases the statutory body will have a CEO (or some other statutory office-holder). That person may or may not be a member of the statutory body.

183 If that person is a member of the statutory body, one of the provisions referred to in paragraph 177 will deal with disclosures affecting that person's duties as a member of the body. If that person has separate duties as the CEO (or other statutory office-holder), you should consider whether one of the provisions referred to in paragraph 177 should also be included to deal with disclosures affecting that person's duties as the CEO (or other statutory office-holder).

184 If that person is not a member of the statutory body, one of the provisions referred to in paragraph 177 should be included to deal with disclosures affecting that person's duties as the CEO (or other statutory office-holder).

#### **Consequences of a failure to disclose**

185 A provision should be included in the relevant legislation to ensure that a failure, without reasonable excuse, by a person to comply with requirements relating to disclosure of interests or with requirements prohibiting participation in deliberations or decisions following disclosure of interests, will result in termination of office.

186 The Bowen Committee emphasised that it is only where the failure is without reasonable excuse that it should result in termination.

187 The termination should not be self-executing, but should provide for the appointing authority to terminate the relevant appointment when the failure occurs.

#### **Other cases**

188 There are some other statutory disclosure of interests provisions in legislation, for example, the provision of the *Trade Practices Act 1974* that requires disclosure to the public by a member participating in an inquiry of any interest held by him or her in a business or body corporate that is the subject of the inquiry. Anyone who is asked to draft such a provision, or make an amendment affecting such a provision, should raise the issue with First Parliamentary Counsel.

189 In the case of some statutory bodies, it may be that no question of conflict of interest is likely to arise or some modification of the standard forms may be necessary to

meet the special circumstances of the body concerned. If such a case arises, you should raise the matter with First Parliamentary Counsel.

### **Disclosure of interests by members of a tribunal**

190 Except where there are special circumstances, the provisions of the AAT Act should be used as the model for disclosure of interest provisions for the members of a tribunal.

191 Section 14 of that Act provides:

#### **14 Disclosure of interests by members**

- (1) Where a member is, or is to be, a member of the Tribunal as constituted for the purposes of a proceeding and he or she has or acquires any interest, pecuniary or otherwise, that could conflict with the proper performance of his or her functions in relation to that proceeding:
  - (a) he or she shall disclose the interest to the parties to the proceeding; and
  - (b) except with the consent of all the parties to the proceeding, he or she shall not take part in the proceeding or exercise any powers in relation to the review by the Tribunal of the decision to which the proceeding relates.
- (2) Where the President becomes aware that a member is, or is to be, a member of the Tribunal as constituted for the purposes of a proceeding and that the member has, in relation to that proceeding, such an interest as is mentioned in subsection (1):
  - (a) if the President considers that the member should not take part, or should not continue to take part, in the proceeding—he or she shall give a direction to the member accordingly; or
  - (b) in any other case—he or she shall cause the interest of the member to be disclosed to the parties to the proceeding.

192 The consequences of the failure of a member of a tribunal to comply with a disclosure provision will depend on the terms of the Act. In the case of the AAT Act, removal from office is based upon misbehaviour and presumably non-disclosure would constitute misbehaviour. Where the Act constituting a tribunal is more specific as to the circumstances in which the office of a member of the tribunal is to be vacated, provision should be included for vacation of office to take effect upon failure, without reasonable excuse, to comply with the obligation to disclose.

193 Where an authority or tribunal holds an inquiry, sections 144A and 144B of the *Copyright Act 1968* should be used as a precedent for the provision. The key distinction between these provisions and section 14 of the AAT Act is in subsection 144A(3).

### **Disclosure by members of a committee**

194 Whenever you are called upon to provide for the establishment of a committee (whether advisory or otherwise), you should consider whether any disclosure-of-interest provisions should be included. If the relevant provision of the Bill merely authorises the making of regulations providing for committees, it would seem appropriate for any disclosure provisions to be left to the regulations. However, where the Bill itself provides for the committee, a disclosure provision should ordinarily be included.

195 Finance takes the view that the requirements in the precedents in paragraphs 177, 178 and 180 for dealing with a disclosure of interests is not appropriate where the body does not have a decision-making or governing function. If, for instance, the body only has a function of providing advice, it is not necessary for the Bill to set out explicitly the procedure for dealing with a disclosure of interests.

## **Employees**

196 The following provision is designed for cases where staff are to be employed by a statutory body on behalf of the Commonwealth under the *Public Service Act 1999*:

### **xx Staff**

- (1) The staff of the [*statutory body*] must be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
  - (a) the [*CEO*] and the [*statutory body*] staff together constitute a Statutory Agency;  
and
  - (b) the [*CEO*] is the Head of that Statutory Agency.

197 Subsection (2) taps into the definition of **Statutory Agency** in section 7 of the PS Act:

*Statutory Agency* means a body or group of persons declared by an Act to be a Statutory Agency for the purposes of this Act.

198 It also taps into the definition of **Agency Head** in that section. An **Agency Head** includes:

- (c) the Head of a Statutory Agency.

199 The effect is to apply the provisions of the PS Act to the Agency. In particular, it will ensure that the head of the statutory body has the powers of a Secretary of a Department in relation to the APS staff.

200 Part 5 of Drafting Direction 2.2 sets out the correct terminology to be used when drafting provisions dealing with public employment.

201 The following provision is designed for cases where employees of the statutory body will not be employed under the PS Act:

### **xx Staff**

- (1) The [*statutory body*] may employ such persons as it considers necessary for the performance of its functions and the exercise of its powers.
- (2) An employee is to be employed on the terms and conditions that the [*statutory body*] determines in writing.

202 In some cases it may be necessary to allow the staff of a body to include both persons engaged under the PS Act and persons not engaged under the PS Act (see for example section 88 of the *Safety, Rehabilitation and Compensation Act 1988*).

## **Consultants**

203 From time to time, we are instructed to make specific provision allowing a statutory body to engage consultants.

204 For a CAC body, the usual form for such a provision is as follows:

### **xx Consultants**

The [*statutory body*] may engage consultants to assist in the performance of its functions.

205 For an FMA body, the usual form for such a provision is as follows:

### **xx Consultants**

The [*person who is the Chief Executive for the purposes of the FMA Act*] may, on behalf of the Commonwealth, engage consultants to assist in the performance of the [*statutory body's*] functions.

206 In some cases, your instructions may require you to narrow the range of activities for which consultants can be engaged.

## **Committees**

207 Committees have been used for a wide variety of purposes under existing legislation. Examples of existing powers to use Committees are in:

- Part 4 of the *National Health and Medical Research Council Act 1992* (now expanded by the *Research Involving Human Embryos Act 2002*);
- section 30 of the *Australian Research Council Act 2001* (a case of the Minister establishing committees);
- section 7K of the *Australian Crime Commission Act 2002*;
- section 38 of the *National Blood Authority Act 2003* (a case of the General Manager establishing committees).

208 Normally, committees should not be subject to direction by the Board or CEO of a statutory body, or by the Minister, although there may be exceptions to this.

209 Chapter 6 of the Uhrig Review sets out a model for best practice in the establishment and operation of Committees. If you are asked to draft provisions empowering a governing Board to establish a Committee, you should ask your instructors to discuss the proposal with Finance early in the drafting process.

## **Charging for performance of functions**

210 A statutory body is not entitled to charge for the performance of functions which the body has a statutory obligation to perform, unless the statute authorises charging (see *Glasbrook Bros Ltd. v. Glamorgan County Council* [1925] A.C. 270).

Drafting Direction No. 3.6  
Statutory and other bodies

211 If a body is to have power to charge, you should generally confer on the body an express power to do so. This is not necessary if the other provisions of the Bill (e.g. a power to carry on a business) make it clear there is power to charge. Finance should be consulted on such provisions.

212 A standard charging provision is as follows:

- ( ) The [*statutory body*] may charge fees for [*insert relevant services*].

213 It is common to also include the following provision:

- ( ) A fee must not be such as to amount to taxation.

214 AGS has advised that it is inherent in the concept of a “fee” that the liability does not amount to taxation. However, it is quite common to put such a provision in anyway to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. AGS has expressed the view that such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.

215 Difficult questions arise if there is any possibility that the charges proposed could in fact amount to taxes (e.g. if, although ostensibly reasonable, they are not readily attributable to the costs of providing the services). This issue should be raised with instructors and AGS.

216 Other difficult questions arise if a body established in reliance on the executive power of the Commonwealth proposes to provide services to non-Commonwealth entities. These also should be discussed with AGS.

217 Note that fees charged by an incorporated body that is regulated under the FMA Act will be received on behalf of the Commonwealth.

## **Funding**

### **Special accounts**

218 The FMA Act makes provision for the establishment of Special Accounts, either by determination of the Finance Minister or by another Act (see sections 20 and 21 of the FMA Act).

219 A Special Account is not a bank account. Rather, it is essentially a ledger entry within the Consolidated Revenue Fund which is supported by a standing appropriation under section 20 or 21 of the FMA Act. That appropriation authorises expenditure for the particular purposes of a Special Account up to the balance standing to the credit of the Special Account.

220 Amounts are typically credited to a Special Account when an annual appropriation is made for the purposes for which the Special Account is established. In this context, it is best to think of the annual appropriation as an authority by the Parliament to credit an amount to a Special Account.

221 Other amounts credited to a Special Account may be amounts equal to amounts obtained by the Commonwealth from specified sources for the purposes for which the

Special Account is established. These sources might include, for example, the contributions of the States and Territories towards a particular scheme, or the levies paid by a particular industry.

222 Once amounts are credited to a Special Account, the statutory body responsible for managing the Special Account has authority to use the amounts for the purposes for which the Special Account is established. This is achieved:

- where the Special Account is established by determination of the Finance Minister—by an appropriation under subsection 20(4) of the FMA Act; and
- where the Special Account is established under another Act—by an appropriation under subsection 21(1) of the FMA Act.

223 Whenever an amount is debited against that appropriation, the amount is also debited from the Special Account:

- where the Special Account is established by determination of the Finance Minister—under subsection 20(5) of the FMA Act; and
- where the Special Account is established under another Act—under section 21(2) of the FMA Act.

224 Special Accounts are typically used where instructors wish to “ear-mark” money received by the Commonwealth from a particular source for particular purposes. However, as a Special Account provides an ongoing authority for the appropriation of the Consolidated Revenue Fund up to the balance standing to the credit of the Special Account, if you receive instructions to create a Special Account you should advise your instructors to discuss the proposal with Finance as early as possible in the drafting process.

225 If the legislation is to establish a Special Account, the following provisions should be used (although not all the credits and purposes may be relevant):

## **xx Name of Account**

- (1) The [*insert name*] Special Account is established by this section.
- (2) The Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

## **xx Credits to the Account**

There must be credited to the Account amounts equal to the following:

- (a) [*specify particular amounts that are to be credited to the Account*];
- (b) interest received by the Commonwealth from the investment of amounts debited from the Account;
- (c) amounts received by the Commonwealth in relation to property paid for with amounts debited from the Account;
- (d) amounts of any gifts given or bequests made for the purposes of the Account.

Note: An Appropriation Act may contain a provision to the effect that, if any of the purposes of a Special Account is a purpose that is covered by an item in the Appropriation Act (whether or not the item expressly refers to the Special Account), then amounts may be debited against the appropriation for that item and credited to that Special Account.

## **xx Purposes of the Account**

The purposes of the Account are as follows:

- (a) [*specify relevant purposes*];
- (b) paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in the performance of the [*statutory body's*] functions;
- (c) paying any remuneration and allowances payable to any person under this Act;
- (d) meeting the expenses of administering the Account;
- (e) [*other purposes?*].

Note: See section 21 of the *Financial Management and Accountability Act 1997* (debits from Special Accounts).

226 The name of the Account should generally end with the words “Special Account”. The credits to the Special Account and the purposes for which amounts standing to the credit of the Special Account may be debited will, of course, differ from case to case. You should discuss the requirements for the particular statutory body and its Special Account with your instructor. Your instructors should also discuss the exact credits and purposes to be included with Finance.

227 Once a Special Account has been established, there is no need to include a provision appropriating the CRF for expenditure for the purposes for which the Special Account was established (see subsection 21(1) of the FMA Act). However, a Bill establishing a new Special Account will require a Governor-General’s message as amounts will be appropriated under section 21 of the FMA Act for the purposes of the new Special Account.

## **Annual report**

228 Where a statutory body is a Commonwealth authority for the purposes of the CAC Act, that Act already contains reporting requirements.

229 Where a statutory body is not a Commonwealth authority for the purposes of that Act, the following provision can be used to require the body to give an annual report:

### **xx Annual report**

- (1) The [*statutory body*] must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report on its operations during that year.

Note: See also section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about annual reports.

- (2) The [*statutory body*] must include in the report:
  - (a) [*any particular matters to be included in the report.*]

230 Subsection 34C(2) of the AIA provides that such a periodic report must be given to the relevant Minister as soon as possible after the end of the reporting period and, in any event, within 6 months after the end of that period.

231 Subsection 34C(3) of the AIA provides that the Minister is to lay the report before each House of Parliament within 15 sitting days of that House after the day on which the Minister receives the report. (The use of the words “for presentation to the Parliament” in

the precedent in paragraph 229 are included to ensure that subsection 34C(3) of the AIA is picked up.)

232 Subsections 34C(4) to (6) of the AIA provide for the extension by the Minister of the due date for giving the report. Subsection 34C(6) requires the Minister to notify Parliament where an extension is given under subsections 34C(4) and (5).

233 Subsection 34C(7) of the AIA requires a person who has failed to give a report on time to explain why to the Minister and requires the Minister to table that statement in each House of Parliament.

234 As evidenced by section 34C, the general policy on annual reports is that they are to be prepared and furnished to the appropriate Minister within 6 months, or such extended period as is set by the Minister.

235 As a general rule, the annual report provision of an Act should not specify the period for preparing and furnishing the report nor should it provide for extensions of that period, as these matters will be covered by section 34C.

236 By way of exception to the general rule, if the period for preparing and furnishing the report is to be less than 6 months, the lesser period should be specified in the provision. A period of longer than 6 months should not be specified without consulting PM&C, but if, after such consultation, a longer period is to be set, the longer period should be specified in the provision.

### **Crown immunity**

237 OPC has established a policy of expressly stating, for both incorporated and unincorporated bodies, whether or not the body is entitled to the same privileges and immunities as the Crown (including the benefit of the presumption that legislation does not bind the Crown: see *Bropho v Western Australia* (1990) 171 CLR 1 and Part 1 of Drafting Direction No. 3.10). These privileges and immunities are often referred to as “Crown immunity” or the “shield of the Crown”. In the absence of an express provision in the statute establishing the body, the position could be unclear and courts are often reluctant to find that the body is entitled to the privileges and immunities of the Crown.

238 When establishing a new statutory body, you must include one of the provisions set out in paragraph 240 or 243. Which provision you include is a policy decision for your instructors. However, generally speaking, an FMA body should be entitled to the privileges and immunities of the Crown, while a CAC body should not. Specific policy authority is required for departures from this general approach.

239 For further discussion of Crown immunity and the effect of the provisions set out in the following paragraphs generally AGS advice 07326261 dated 6 June 2008.

### **Providing that a body has Crown immunity**

240 The following provision may be used to make it clear that a body is entitled to the same privileges and immunities as the Crown:

**@10 [Body] has privileges and immunities of the Crown**

( ) [*The body*] has the privileges and immunities of the Crown.

241 AGS has advised that this provision will generally be effective to confer on the body the non-statutory privileges and immunities of the Crown, and the benefit of the presumption that legislation does not apply to the Crown. Invariably it will not confer on the body privileges and immunities that have been conferred on the Commonwealth by statute.

242 While the general effect of the provision will be to put the body in the same position as the Commonwealth in a particular circumstance, AGS has also advised that generally conferring on a statutory body the privileges and immunities of the Crown may not produce satisfactory and predictable results in all cases. If your instructors want the body to have a specific privilege or immunity, or to be immune from a specific law, you should provide for this expressly. You should also be aware that AGS has advised that the conferral of a particular immunity may be construed as an indication that the body was not intended to have all the privileges and immunities of the Crown (see advice 05079605 dated 3 November 2005). Therefore, a provision providing for a particular immunity should be expressed to be “to avoid doubt”. See for example the precedents set out in paragraphs 280 to 283 which deal with tax exemptions for statutory corporations.

**Providing that a body does not have Crown immunity**

243 The following provision may be used to make it clear that a body is not entitled to the same privileges and immunities as the Crown:

**@10 [Body] does not have privileges and immunities of the Crown**

( ) [*The body*] does not have the privileges and immunities of the Crown.

244 AGS has advised that this provision will be effective to remove any non-statutory privileges and immunities that a statutory body might otherwise have enjoyed, as well as the benefit of the presumption that legislation does not bind the Crown. The only possible exception might be any privileges or immunities conferred on that body by the Constitution and that are defined in the Constitution (for example, the provision would probably not affect section 114 of the Constitution from preventing a State from taxing the property of the Commonwealth). The provision would not deprive the body from enjoying the benefit of derivative Crown immunity in an appropriate case.

## Part 4—Further drafting issues and precedents for incorporated bodies

### ***Establishing the incorporated body***

245 The 2 basic forms of incorporated body are:

- a body corporate with corporators (i.e., where the members of the body actually constitute the body); and
- a body corporate without corporators but with a board of management.

246 The standard provision for establishing a body corporate is as follows:

(1) The [*statutory body*]:

- (a) is a body corporate [with perpetual succession]; and
- (b) must have a seal; and
- (c) may acquire, hold and dispose of real and personal property; and  
*[see also paragraph 265 of this Drafting Direction]*
- (d) may sue and be sued [*in its corporate name*].

247 You should delete the material in square brackets if the body does not have corporators (see below).

### ***Incorporated body regulated under the FMA Act***

248 If the body is an incorporated body regulated under the FMA Act, generally the body should not be able to enter into contracts in its own right. AGS has advised (07334100 dated 4 March 2008) that it is not legally necessary to state this, because if nothing is said, the CEO of the body would have the power to enter contracts under section 44 of the FMA Act. However, AGS notes that if it is desired for policy reasons to have a body enter contracts in its own name, but only act on behalf of the Commonwealth, the following provision should be included:

- (2) Any contract entered into by the [*statutory body*] is to be entered into on behalf of the Commonwealth.

249 Although other models exist for bodies that do not have the power to enter into contracts on their own behalf (such as in subsection 173(1) of the *Water Act 2007*), you should use the model set out in the paragraph above.

250 However, on occasion, it is important that a body have the power to enter into contracts in its own right. If this is the case, you should include the following provision:

- (2) The [*statutory body*] may enter into contracts in its own right.

Note: The [*Chief Executive of body*] may also enter into contracts on behalf of the Commonwealth. See section 44 of the *Financial Management and Accountability Act 1997*.

251 You should consider (in consultation with Finance) whether the reference to a contract is wide enough or whether you should also (or instead) refer to agreements, arrangements or understandings.

252 Whether or not the body has the ability to enter into contracts in its own right, you should include the following provisions for an incorporated body regulated under the FMA Act:

- (3) Any real or personal property held by the *[statutory body]* is held for and on behalf of the Commonwealth.
- (4) Any money received by the *[statutory body]* is received for and on behalf of the Commonwealth.
- (5) The *[statutory body]* cannot hold real or personal property or money on trust.  
Note: The Commonwealth may hold real or personal property or money on trust.
- (6) To avoid doubt, a right to sue is taken not to be personal property for the purposes of subsection (3).

253 If the body has power to enter contracts in its own right, the following provision may be needed if it reflects the policy intention of the instructors.

**xx *[Statutory body's] liabilities are Commonwealth liabilities***

- (1) Any financial liabilities of the *[statutory body]* are taken to be liabilities of the Commonwealth.
- (2) In this section:

*financial liability* means a liability to pay a person an amount where the amount, or the method for working out the amount, has been determined.

254 If these provisions are included, you should consider making any express power to acquire, hold or dispose of real or personal property, or any express power to enter into contracts, subject to the relevant provisions.

255 On rare occasions (such as in the case of ASIC), it is important that an incorporated body regulated under the FMA Act, despite not being able to hold real or personal property on trust, be able to exercise the powers of a trustee on behalf of the Commonwealth. If this is the case, you should include the following provision:

- (5A) Despite any rule of equity, the *[statutory body]* may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to any real or personal property or money held on trust by the Commonwealth.

***Perpetual succession***

256 If a body is established as a body corporate with corporators, the Bill should provide that the body corporate has perpetual succession. If the body corporate is to have no corporators, there are no persons to succeed one another and the concept of perpetual succession is irrelevant.

## Seals

257 If a statutory body is established as a body corporate, the description of the body's seal as a common seal is only appropriate if the body has 2 or more corporators.

258 If the body consists of one corporator only, or does not have any corporators at all (e.g. where it is managed by a board of management), the seal should be described simply as the seal or the official seal.

259 The distinction drawn in paragraphs 257 and 258 describes a real difference in the composition of different bodies, but I do not think it is a distinction that usually needs to be drawn in legislation. Accordingly, the standard version of the seal provision, set out in paragraph 246, does not contain "common", but it may be used in the case described in paragraph 257.

260 The provision for judicial notice of seals should be as follows:

- (3) All courts, judges and persons acting judicially must:
  - (a) take judicial notice of the imprint of the seal of the [*name of body*] appearing on a document; and
  - (b) presume that the document was duly sealed.

261 Provisions relating to custody of seals may be desirable. For a statutory body managed by another body (e.g. a board of management), you should provide that both the custody of the seal and the affixing of the seal are to be controlled by the managing body.

## Capacity to sue and be sued

262 See paragraph 246 for the standard version of this provision. If the statutory body is established as a body corporate without corporators, the words "in its corporate name" should be omitted.

## Powers

### Powers—general

263 A general provision giving an incorporated statutory body power to perform its functions should be included in the section setting out the body's functions. The standard provision is as follows:

- ( ) The [*statutory body*] has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

264 If it is considered necessary to confer specific powers on the body, a separate section should be used. The standard form for such a provision is as follows:

### xx Powers

- (1) The [*statutory body*] has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
- (2) The [*statutory body's*] powers include, but are not limited to, the following powers:

265 If a subsection along these lines is included, it should set out:

- the power to enter contracts (although see also paragraph 248 and following)
- the power to acquire, hold and dispose of real and personal property (unless this power has already been included); and
- the power to do anything incidental to any of its (i.e., the body's) functions (but this power is not needed if the body has an express function of doing anything incidental to or conducive to the performance of its other functions).

266 The power to acquire, hold and dispose of real and personal property is included because of a lingering doubt that corporations can hold real property without express licence (see *Kathleen Investments* (1977) 139 CLR 117 Stephen J at 141-2). On these grounds alone, the reference to personal property is theoretically redundant. However, it is included to avoid any negative implications from a reference to real property only.

267 There are many precedents for specific powers that instructors may want set out in such a provision. A selection is set out below, and many more can be found. However, you should avoid including a list of specific powers “just in case”, if only because the more specific powers are included the greater the likelihood that the list will be interpreted as exhaustive despite the introductory words of subsection (2).

268 Care should be taken to include only specific powers that have particular relevance to the functions of the body being established. You should also consider the nature of the body and the other provisions of this Drafting Direction that apply to particular kinds of body (e.g. incorporated FMA bodies) before including a particular power mentioned below.

269 Some examples of specific powers are:

- (a) negotiate and co-operate with other Commonwealth bodies and with State, Territory and local government bodies;
- (b) enter into an agreement for the making of a grant or loan under section [x] to:
  - (i) a State; or
  - (ii) the Australian Capital Territory; or
  - (iii) the Northern Territory; or
  - (iv) an authority of a State or a Territory (including a local government body);
- (c) enter into an agreement (other than an agreement referred to in paragraph (b)) with a State or Territory;
- (d) accept gifts, grants, bequests and devises made to it;
- (e) act as trustee of money and other property vested in it on trust;
- (f) enter into agreements for the carrying out of research and development activities by other persons;
- (g) make applications, including joint applications, for patents or trade marks;
- (h) deal with patents or trade marks vested in [*the body*] or in [*the body*] and other persons;
- (i) buy and sell wool only for use in technical development projects in which [*the body*] is participating together with wool processors or manufacturers;
- (j) with the written approval of the Minister:
  - (i) form, or participate with other persons in the formation of, a company; or

- (ii) acquire, hold or dispose of shares or stock in the capital of, or debentures or other securities of, a company; or
- (iii) enter into a partnership, or arrange for the sharing of profits, with a company;
- (k) enter into contracts and agreements;
- (l) form, or participate in the formation of, companies;
- (m) enter into partnerships;
- (n) let on hire its plant, machinery, equipment or goods not immediately required by it;
- (o) raise money, by borrowing or otherwise.

## **Borrowing powers**

270 You should consider whether there is a need to include borrowing powers for an incorporated statutory body. This issue is discussed in several AGS advices (e.g. Vol. 88, p.2186 dated 16 July 1986 and Vol. 106, p.9614 dated 19 June 2003).

271 If a statutory body is to have the power to borrow, the Bill establishing the body should include the following definition:

***borrowing*** includes raising money or obtaining credit, whether by dealing in securities or otherwise, but does not include obtaining credit in a transaction forming part of the day-to-day operations of the [*statutory body*].

This is to ensure that borrowing will include the right to deal in securities.

272 Your instructors should also consider whether the *Commonwealth Borrowing Levy Act 1987* should apply to the body.

273 As a general rule, Finance is unlikely, from a policy perspective, to allow an incorporated body regulated under the FMA Act to be given borrowing powers. You should make sure that you discuss with Finance any proposal to give borrowing powers to such a body. However, if Finance have agreed that an incorporated body regulated under the FMA Act should be allowed to borrow, it should be expressed as a power to borrow “for and on behalf of the Commonwealth”.

274 The borrowing provisions for a statutory body should include some or all of the following provisions (with variations when necessary to meet special requirements):

### **X1 Borrowing from the Commonwealth**

The Finance Minister may, on behalf of the Commonwealth, out of money appropriated by the Parliament for the purpose, lend money to the [*statutory body*] on such terms and conditions as the Minister determines in writing.

### **X2 Borrowing from persons other than the Commonwealth**

- (1) The [*statutory body*] may, with the written approval of the Treasurer, borrow money from persons other than the Commonwealth on terms and conditions specified in, or consistent with, the approval.
- (2) Money may be borrowed wholly or partly in foreign currency.

### **X3 Guarantee of borrowing**

- (1) The Treasurer may, on behalf of the Commonwealth, enter into a contract guaranteeing the performance by the [*statutory body*] of obligations incurred by it under section [x2].
- (2) If the Treasurer determines in writing that obligations incurred by the [*statutory body*] under that section are guaranteed by the Commonwealth, the obligations are so guaranteed by force of this subsection.
- (3) A contract under subsection (1) may include:
  - (a) a provision agreeing that proceedings under the contract may be taken in courts of a foreign country; or
  - (b) a provision waiving the immunity of the Commonwealth from suit in courts of a foreign country.

### **X4 Borrowing not otherwise permitted**

The [*statutory body*] must not borrow money except under this [*Part/Division/Subdivision*].

### **X5 Statutory body may give security**

- The [*statutory body*] may give security over the whole or part of its assets for:
- (a) the performance by the [*statutory body*] of any obligation incurred under section [x1 or x2]; or
  - (b) the payment to the Commonwealth of amounts equal to amounts paid by the Commonwealth under a guarantee under section [x3].

## ***Application of CAC Act***

### **If CAC Act is to apply**

275 The CAC Act will apply automatically to any body corporate that meets the criteria in section 7 of that Act. If the CAC Act is to apply to the body, a note along the following lines should be included at the end of the section or subsection establishing the authority as a body corporate:

Note: The *Commonwealth Authorities and Companies Act 1997* applies to the [*statutory body*]. That Act deals with matters relating to Commonwealth authorities, including reporting and accountability, banking and investment, and the conduct of officers.

### **If CAC Act is not to apply**

276 If the CAC Act would otherwise apply to the body and, as a matter of policy, the CAC Act is not to apply to the body, a section along the following lines should be included after the section establishing the body as a body corporate:

### **xx *The Commonwealth Authorities and Companies Act 1997 does not apply to [statutory body]***

The [*statutory body*] is not a Commonwealth authority for the purposes of the *Commonwealth Authorities and Companies Act 1997*.

277 In this case, the legislation setting up the authority will also need to include the financial and accountability provisions that are to apply to the authority.

## If CAC Act is to apply but needs to be modified

278 If the CAC Act is to apply to the authority, but with some general modifications (e.g. to apply the CAC Act to a corporation sole), the note in paragraph 275 should be included as well as a general modification section, which should be located after the section establishing the authority as a body corporate. The note should be expressed to be subject to the modification section.

279 The *Audit (Transitional and Miscellaneous) Amendment Act 1997* contains many examples of these sorts of provisions.

## Tax exemptions

### General taxation exemption

280 In establishing a statutory corporation, you should consider whether the body is more generally to be exempt from taxation under a law of the Commonwealth or of a State or Territory. A general exemption provision is often in the following form:

- ( ) The [*statutory corporation*] is not subject to taxation under a law of the Commonwealth or of a State or Territory.

281 If you are instructed that a statutory corporation is to be exempted from Commonwealth taxes, you should advise your instructors to discuss the exemption with the Treasury early in the drafting process. A copy of the provision, once drafted, should be referred to the Treasury.

282 A statutory corporation that is within the shield of the Crown may be exempt from some Commonwealth, State and Territory taxes without express provision. However, if your instructors want the corporation to be exempt from taxation, you should provide for this expressly (whether or not the provision set out in paragraph 240 has been included). Your instructors may want an express provision in any case to clarify the issue. A provision along the following lines may be a useful model:

- (1) To avoid doubt, for the purposes of section 50-25 of the *Income Tax Assessment Act 1997*, the [*statutory corporation*] is taken to be a public authority constituted under an Australian law.

Note: This means that the [*statutory corporation*] is exempt from income tax.

- (2) To avoid doubt, the [*statutory corporation*] is not subject to taxation under a law of a State or Territory, if the Commonwealth is not subject to the taxation.

283 The words “To avoid doubt” clarify that the body is within the shield of the Crown (and are therefore useful to avoid any implication that the body is not within the shield of the Crown: see AGS advice 05079605 dated 3 November 2005).

### Commonwealth taxes—overriding rules of construction

284 You should be aware of existing provisions of Commonwealth Acts which provide that laws which purport to exempt a person from general liability to pay Commonwealth taxes are not to be construed as exempting the person from liability to pay certain “special” taxes unless express words are used.

## Drafting Direction No. 3.6 Statutory and other bodies

285 These are examples of such overriding rules of construction relating to “special” taxes:

- section 66 of the *Fringe Benefits Tax Assessment Act 1986*;
- section 131B of the *Customs Act 1901*;
- section 54A of the *Excise Act 1901*;
- section 177-5 of the *A New Tax System (Goods and Services Tax) Act 1999*;
- section 21-5 of the *A New Tax System (Luxury Car Tax) Act 1999*;
- section 27-25 of the *A New Tax System (Wine Equalisation Tax) Act 1999*.

286 If you are instructed to exempt a statutory body from one of these “special” taxes, you will need to specifically exempt the body from that tax. You should advise your instructors to discuss the exemption with the Treasury early in the drafting process.

287 If you want to create a general exemption from Commonwealth tax that does not include the “special” taxes, do not include a specific exception dealing with any of the “special” taxes. AGS has advised that it is strongly arguable that an exception dealing with one of those taxes, even though redundant, will have the effect of nullifying the overriding rules of construction that would otherwise apply to the others.

288 This is because the overriding rules of construction are subject to a contrary intention appearing in other legislation.

289 There may be a sufficiently clear legislative intent to exempt a statutory body from a particular tax even if express words are not used as required by the overriding rule of construction.

### **Use of regulations**

290 You should draw to your instructors’ attention the likelihood that the Senate Scrutiny of Bills Committee will object to a provision that deals with the tax-exempt status of a statutory body by relying on regulations.

### **Transaction taxes**

291 When a new statutory body is to be exempted from tax, a provision is sometimes also included exempting transactions to which the body is a party from stamp duty (see, e.g. subsection 63(2) of the *Defence Housing Australia Act 1987*).

292 A transaction tax may be imposed on the other party to the transaction (for example, a lender may be liable for stamp duty in respect of a loan to the body). For this reason, you should consider whether it is enough merely to exempt the statutory body, or whether other persons should also be exempt.

293 A provision exempting both the body and other persons from paying stamp duty is often in the following form:

- ( ) Stamp duty or any similar tax under a law of the Commonwealth or of a State or Territory is not payable by the [*statutory body*] or any other person in respect of [*specify applicable things*].

## **Part 5—Winding-up and transfer of functions of statutory bodies—vesting of moneys in the Commonwealth or other bodies**

294 If an amount of money becomes an asset of the Commonwealth or other body under legislation winding up a statutory body, you may need to include a provision allowing for an equivalent amount to be paid out of the Consolidated Revenue Fund for the purposes of the body whose asset the money has become.

295 In an opinion dated 23 September 1976 relating to the *Road Safety and Standards Authority (Repeal) Act 1976*, Mr D.J. Rose, Senior Assistant Secretary, Constitutional and Financial Branch, Attorney-General's Department, expressed the following view:

It would, I think, be desirable if legislation of this kind expressly provided that, where moneys formerly held by the relevant Authority or other body vest in the Commonwealth, an equivalent amount is appropriated for the continuing purposes of the legislation. Such a provision would make available not only the unexpended balance of Authority moneys obtained from the Commonwealth, but also the unexpended balance of Authority moneys derived from other sources. On no acceptable interpretation of the Repeal Act is there an appropriation in respect of moneys from these other moneys. It may well have been the intention to provide such an appropriation. However, any such intention has not been carried into law.

296 You should bear the above observations in mind when drafting legislation of the kind referred to. However, the appropriate provision (if any) to be made in a particular case would vary according to the circumstances and would need to be discussed with your instructors and Finance.

297 For an example of a provision addressing this issue, see subitem 720(4) of Schedule 2 to the *Human Services Legislation Amendment Act 2005*.

298 You should also be aware of section 32 of the FMA Act. That section provides that, where a function of one Agency (within the meaning of that Act) (the *old Agency*) becomes the function of another Agency (the *new Agency*), either because the old Agency is abolished or for any other reason, the Finance Minister may make determinations transferring to the new Agency some or all of an amount that has been appropriated for the performance of a function by the old Agency.

## Part 6—Privatising or corporatising statutory bodies

### *Crown immunity*

299 It is common when corporatising or privatising a body to include a provision along the lines of section 8 of the *Snowy Hydro Corporatisation Act 1997*:

- (1) A Snowy hydro-group company:
  - (a) is not, and does not represent, the Crown; and
  - (b) is not an instrumentality or agency of the Crown; and
  - (c) is not entitled to any immunity or privilege of the Crown; and
  - (d) is not a public authority for any purpose and is taken not to have been constituted or established for a public purpose or for a purpose of the Commonwealth.
- (2) This section has effect subject to any express provision to the contrary made by any law of the Commonwealth.

300 See also section 8 of the repealed *National Rail Corporation Agreement Act 1992* and section 6 of the *Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Act 1996* for similar provisions.

### **Archives Act**

#### **Section 3A of the Archives Act**

301 The effect of section 3A of the *Archives Act 1983*, in general terms, is to maintain Archives Act coverage for pre-privatisation or pre-corporatisation records of certain privatised or corporatised statutory bodies unless that Act is excluded by express reference in a legislative provision or in regulations.

#### **Section 28A of the Archives Act**

302 Section 28A of the *Archives Act 1983* ensures that pre-privatisation or pre-corporatisation records remain Commonwealth records, and provides for the Archives to make appropriate arrangements with the body about the treatment of the records.

303 However, the relationship between section 28A and provisions which transfer the assets of a statutory body out of Commonwealth control is not entirely clear. If you include a transfer of assets provision in a case where section 28A of the Archives Act will also apply, you should consider dealing expressly with the interaction of the 2 provisions. Section 27 of the *National Transmission Network Sale Act 1998* (set out below) may provide a useful precedent.

### **27 Commonwealth records**

- (1) This Act does not authorise a Commonwealth record (within the meaning of the Archives Act) to be transferred or otherwise dealt with except in accordance with the provisions of the Archives Act.

Drafting Direction No. 3.6  
Statutory and other bodies

- (2) A Commonwealth record (within the meaning of the Archives Act) must not be transferred to a person under this Act unless the Australian Archives has given permission under paragraph 24(2)(b) of the Archives Act.

**General consideration of Archives Act**

304 The effect of the Archives Act in general should be considered in drafting any legislation to privatise or corporatise a statutory body.

## Part 7—Specific matters of particular concern to Finance

305 As noted in paragraph 5, Finance should be consulted on the corporate governance structure of every statutory body. The following table lists issues of particular concern that you should draw to Finance’s notice expressly.

<b>Specific matters of particular concern to Finance</b>		
<b>Item</b>	<b>If the Bill ...</b>	<b>See also ...</b>
1	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, or is subject to both of those Acts	Paragraph 43 [see Drafting Direction 4.2]
2	creates an organisation (e.g. a company) in which the Commonwealth has an ownership interest	Paragraph 10 [see Drafting Direction 4.2]
3	authorises a Commonwealth body to borrow from the Commonwealth or from financial markets	[see Drafting Direction 4.2]
4	authorises the collection of public money by entities that are not part of the Commonwealth and are not owned by the Commonwealth	See also paragraphs 42 and 43 [see Drafting Direction 4.2]
5	exempts from all or any part of the FMA Act money that is part of the Consolidated Revenue Fund	[see Drafting Direction 4.2]
6	is a special or standing appropriation, whether or not it is affected by a sunset clause	[see Drafting Direction 4.2]
7	creates, or amends provisions creating, a Special Account or relates to the administrative arrangements applying to a Special Account	[see Drafting Direction 4.2]
8	creates a fund or account for the Commonwealth or a statutory authority or agency	[see Drafting Direction 4.2]
9	expressly prescribes a body so as to bring it within the FMA Act	Paragraph 10
10	expressly creates an administrative unit of a Department	Paragraph 10
11	expressly creates an Executive Agency for the purposes of the PS Act	Paragraph 10
12	creates an express requirement for a body to issue a statement of intentions in response to a ministerial statement of expectations	
13	winds up a statutory body and transfers its functions, assets and liabilities to the Commonwealth	Paragraph 294

Drafting Direction No. 3.6  
Statutory and other bodies

---

<b>Specific matters of particular concern to Finance</b>		
<b>Item</b>	<b>If the Bill ...</b>	<b>See also ...</b>
14	<b>for a Bill dealing with an FMA body:</b> (a) is not run by executive management; or (b) does not constitute the body as a Statutory Agency under the PS Act; or (c) constitutes the body as a body corporate (especially if the body corporate does not have corporators); or (d) confers the body's functions on the body itself (rather than on the CEO); or (e) involves decision-making by a group/ commission of which the chair is not the CEO of the body	Paragraphs 38, 44, 69 and 81
15	<b>for a Bill dealing with a CAC body:</b> (a) does not provide for a governing board; or (b) includes public servants or other public officials as members of the Board; or (c) constitutes the body as a body corporate with corporators; or (d) empowers the Board to establish a Committee	Paragraphs 38, 44, 118 and 209
16	confers specific powers on an unincorporated statutory body (rather than on an office-holder within the body)	Paragraph 82

---

Peter Quiggin  
First Parliamentary Counsel  
26 September 2008