

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.6 Commonwealth bodies

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC.

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Part 1—Preliminary

Introduction

General

1 This Drafting Direction is aimed at drafters who are drafting provisions to establish new Commonwealth bodies or to amend legislation that establishes Commonwealth bodies. However, it might also be useful for instructors of such provisions.

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

Terminology

3 This Drafting Direction uses the generic expression “body”. Parts of the Drafting Direction which only apply to a particular kind of body will use more specific terms (e.g. corporate Commonwealth entity).

4 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*.

CEO means Chief Executive Officer.

Commonwealth company has the same meaning as in the PGPA Act (i.e. means a body corporate incorporated under the *Corporations Act 2001* which the Commonwealth controls).

Commonwealth entity has the same meaning as in the PGPA Act (i.e. means a Department of State, a Parliamentary Department, a listed entity, a body corporate established by a Commonwealth law and a body corporate established under a Commonwealth law that is prescribed by an Act or the PGPA rules).

corporate Commonwealth entity has the same meaning as in the PGPA Act (i.e. means a Commonwealth entity that is a body corporate).

Finance means the Department of Finance.

finance law has the same meaning as in the PGPA Act (i.e. means the PGPA Act and any instrument made under that Act (including the PGPA rules) and the Appropriation Acts).

Finance Minister means the Minister for Finance.

listed entity has the same meaning as in the PGPA Act (i.e. a body, person, group or organisation, or combination of bodies, persons, groups or organisations, that is prescribed by an Act or the PGPA rules to be a listed entity).

non-corporate Commonwealth entity has the same meaning as in the PGPA Act (i.e. means a Commonwealth entity that is not a body corporate).

non-statutory body means a body that is not established by legislation.

OPC means the Office of Parliamentary Counsel.

PGPA Act means the *Public Governance, Performance and Accountability Act 2013*.

PGPA rules means the *Public Governance, Performance and Accountability Rule 2014*.

PM&C means the Department of the Prime Minister and Cabinet.

PS Act means the *Public Service Act 1999*.

statutory body means a body established by legislation (whether by an Act or by subordinate legislation).

Department of Finance's role

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

6 Drafters must ensure that Finance is consulted on matters relating to drafting of provisions creating, abolishing or otherwise dealing with Commonwealth bodies. In particular, this Drafting Direction specifies particular matters that Finance should be consulted about early in the drafting process and Drafting Direction 4.2 (referral of drafts to agencies) requires particular provisions in Bills to be referred to Finance for consultation.

Types of Commonwealth bodies

7 There are many different types of Commonwealth bodies (for a list of Commonwealth bodies, see Finance's flipchart of Commonwealth entities and companies¹). For example, there are:

- Departments of State (e.g. the Attorney-General's Department);
- Parliamentary Departments (e.g. the Department of the Senate);
- Commonwealth entities (e.g. Australian National Audit Office);
- Commonwealth companies (e.g. NBN Co Limited);
- corporate bodies (e.g. the National Gallery of Australia);
- non-corporate bodies that are created by legislation (e.g. OPC);
- non-corporate bodies that are not created by legislation (e.g. the Royal Australian Mint);
- listed entities (e.g. Safe Work Australia);
- Executive Agencies (e.g. the Digital Transformation Office);

¹ This is available on Finance's website at http://www.finance.gov.au/sites/default/files/pgpa_flipchart.pdf?v=2.

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- Statutory Agencies for the purposes of the PS Act (e.g. the Statutory Agency created under subsection 16A(4) of the *Australian Bureau of Statistics Act 1975*).

8 One way of categorising Commonwealth bodies is on the basis of whether or not the body is established by legislation, whether by an Act (the most common way) or by subordinate legislation such as regulations, rules or orders.

9 For the purposes of this Drafting Direction, bodies that are established by legislation are referred to as **statutory bodies** and bodies that are not established by legislation are referred to as **non-statutory bodies**.

Example: OPC is an example of a statutory body (it is established by the *Parliamentary Counsel Act 1970*) and the Attorney-General's Department is an example of a non-statutory body.

10 This Drafting Direction is primarily concerned with drafting issues that arise when creating new statutory bodies.

11 Not all Commonwealth bodies need to be established by legislation. You should be aware that government policy is not to create new statutory bodies. 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.

12 The following Commonwealth bodies can only be created by legislation:

- corporate Commonwealth entities—these may be created by an Act (the most common way) or under section 87 of the PGPA Act;
- listed entities—these may be created by an Act (the most common way) or by amending Schedule 1 to the PGPA rules;
- Statutory Agencies (for the purposes of the PS Act)—these may be created by an Act (the most common way) or by subordinate legislation.

13 However, legislation is not necessary to create a Department of State or an administrative unit of a Department.

14 Also, an Act should not be used to create an Executive Agency. Instead, an Executive Agency should be established under section 65 of the PS Act. If your instructors propose to do so, you should ensure that Finance is consulted at an early stage in the drafting process.

Application of the finance law

Commonwealth entities

15 If you are creating a new statutory body, you will need to consider the application of the finance law (i.e. the PGPA Act, the PGPA rules and other instruments, and the Appropriation Acts) to the body.

16 The PGPA Act mainly deals with Commonwealth bodies that are Commonwealth entities. Under section 10 of the PGPA Act:

- (1) A ***Commonwealth entity*** is:
 - (a) a Department of State; or
 - (b) a Parliamentary Department; or
 - (c) a listed entity; or
 - (d) a body corporate that is established by a law of the Commonwealth; or
 - (e) a body corporate that:
 - (i) is established under a law of the Commonwealth (other than a Commonwealth company); and
 - (ii) is prescribed by an Act or the rules to be a Commonwealth entity.

Note: Commonwealth companies are not Commonwealth entities because they are not covered by this subsection. Chapter 3 deals with Commonwealth companies.

- (2) However, the High Court and the Future Fund Board of Guardians are not ***Commonwealth entities***.

17 Except for some rare exceptions, all Commonwealth bodies are either a Commonwealth entity or part of another body that is a Commonwealth entity. The finance law applies to all Commonwealth entities and this has consequences for drafting provisions dealing with Commonwealth bodies that are, or are part of, a Commonwealth entity.

18 This Drafting Direction focuses primarily on statutory bodies that are Commonwealth entities.

19 Commonwealth entities can be categorised as to whether they are:

- a ***non-corporate Commonwealth entity*** (i.e. a Department of State, Parliamentary Department, or listed entity); or
- a ***corporate Commonwealth entity*** (i.e. a body corporate established by a Commonwealth law or under a Commonwealth law that is prescribed by an Act or the PGPA rules).

20 A non-corporate Commonwealth entity is part of the Commonwealth but a corporate Commonwealth entity is a legal person that is separate from the Commonwealth. This distinction is significant, both in terms of the application of the finance law and in the drafting of provisions establishing a non-corporate or corporate Commonwealth entity.

21 If you are creating a new statutory body, it is highly likely that the body will be one of following:

- a corporate Commonwealth entity;

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- a non-corporate Commonwealth entity that is a listed entity;
- a body that is either part of a listed entity or part of a Department of State.

22 Different considerations and provisions will be needed depending on which category should apply to the body.

Accountable authorities

23 The head of a Commonwealth entity is called the accountable authority. The accountable authority may be an individual or a group of individuals. The ***accountable authority*** of a Commonwealth entity is defined in subsection 12(2) of the PGPA Act as follows:

Accountable authorities		
Item	If the Commonwealth entity is:	then the accountable authority of the entity is:
1	a Department of State	the Secretary of the Department.
2	a Parliamentary Department	the Secretary of the Department.
3	a listed entity	the person or group of persons prescribed by an Act or the rules to be the accountable authority of the entity.
4	a body corporate	the governing body of the entity, unless otherwise prescribed by an Act or the rules.

24 When creating a new statutory body that is a listed entity or corporate Commonwealth entity, it will be important to consider who should be the accountable authority of the entity. Usually, the accountable authority of a listed entity will be a single individual (see paragraph 105) and the accountable authority of a corporate Commonwealth entity will be the entity's governing board.

Officials

25 Each Commonwealth entity consists of officials. Section 13 of the PGPA Act contains the definition of ***officials***.

- For Commonwealth entities (other than listed entities), the officials of the entity are persons who are in or form part of the entity (section 13 contains some additional detail about who is or is not an official). However, the Bill establishing the body or the PGPA rules can also prescribe a person to be, or not be, an official of the entity.
- For listed entities, a person is only an official of the entity if the Act establishing the body or the PGPA rules prescribes the person to be an official of the entity.

26 When creating a new statutory body that will be a Commonwealth entity (i.e. a listed entity or corporate Commonwealth entity), it will be important to consider who should be the officials of the entity (see paragraphs 107 and 306). If the new body will be part of a Commonwealth entity (and not a Commonwealth entity itself), it will be important to

consider which people in the body (e.g. members of the body) should be officials of the Commonwealth entity.

Purposes

27 The concept of the “purposes” of a Commonwealth entity plays an important role in the finance law. For example:

- the accountable authority of a Commonwealth entity must govern the entity in a way that promotes the achievement of the entity’s purposes (see paragraph 15(1)(b) of the PGPA Act);
- the accountable authority must prepare a corporate plan for the entity which sets out how the entity will achieve its purposes in a 4-year period (see section 35 of the PGPA Act and section 16E of the PGPA rules);
- the accountable authority must ensure that records are kept that explain the entity’s performance in achieving its purposes (see section 37 of the PGPA Act);
- the accountable authority must measure and assess the performance of the entity in achieving its purposes (see section 38 of the PGPA Act);
- the accountable authority must prepare annual performance statements which provide information about the entity’s performance in achieving its purposes (see section 39 of the PGPA Act).

28 For this reason it is important to know what the purposes of a Commonwealth entity are. Section 8 of the PGPA Act has an inclusive definition of *purposes* as follows:

purposes of a Commonwealth entity or Commonwealth company includes the objectives, functions or role of the entity or company.

29 When creating a new statutory body that will be a Commonwealth entity or part of a Commonwealth entity, it will be important to consider what the purposes of the body should be (e.g. when drafting a “functions” provision for the body). (For the purposes of a listed entity, see paragraphs 108 and 109).

Governance and responsibility

30 The PGPA Act gives overarching responsibility for the Commonwealth’s finances (which includes the finances of non-corporate Commonwealth entities) to the Finance Minister. For example, it is the Finance Minister who negotiates agreements for handling relevant 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 relevant money.

31 The PGPA Act also imposes a number of obligations on the accountable authorities of Commonwealth entities. These include the following:

- general duties of accountable authorities, including promoting the proper use and management of public resources (see sections 15 to 19 of the PGPA Act);

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- preparing corporate plans, budget estimates, performance records, annual performance statements, annual financial statements and annual reports (see sections 35 to 46 of the PGPA Act);
- maintaining accounts and records as required by the PGPA rules.

32 The PGPA Act also imposes duties on officials and obligations in relation to the collection, custody etc. of public resources. These include the following:

- general duties of officials (see sections 25 to 29 of the PGPA Act);
- banking or dealing with relevant money (see section 55 of the PGPA Act);
- unauthorised gifts or loss of relevant money or relevant property (see sections 66 to 70 of the PGPA Act).

Public resources, relevant money and relevant property

33 The PGPA Act (and the finance law more generally) is aimed at promoting the proper use and management of public resources. Section 8 of the PGPA Act has the following definitions:

public resources means relevant money, relevant property, or appropriations.

relevant money means:

- (a) money standing to the credit of any bank account of the Commonwealth or a corporate Commonwealth entity; or
- (b) money that is held by the Commonwealth or a corporate Commonwealth entity.

relevant property means:

- (a) property (other than relevant money) that is owned or held by the Commonwealth or a corporate Commonwealth entity; or
- (b) any other thing prescribed by the rules.

34 It is important to recognise that the concept of *relevant money* does not match the concept of the Consolidated Revenue Fund. Because *relevant money* includes money in the bank account of a corporate Commonwealth entity, not all money that is relevant money forms part of the Consolidated Revenue Fund. On the other hand, there is a kind of money that is in the Consolidated Revenue Fund that is not relevant money. This money is called “other CRF money” (see section 105 of the PGPA Act).

Application of the Public Service Act

Agencies

35 If you are creating a new statutory body, you will also need to consider the application of the PS Act to the body. The PS Act is primarily concerned with public service employment and so you will need to consider whether the PS Act should apply to some or all of the officers or employees of the new statutory body.

36 The PS Act views Commonwealth bodies from a different perspective from the PGPA Act. The Commonwealth bodies it deals with are “Agencies”. Section 7 of the PS Act provides the meaning of *Agency* (and related definitions) as follows:

Agency means:

- (a) a Department; or
- (b) an Executive Agency; or
- (c) a Statutory Agency.

Department means a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency.

Executive Agency means an Executive Agency established under section 65.

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

37 The new statutory body that you are creating should not be a Department of State or an Executive Agency (see paragraph 13).

38 The new body could be a Statutory Agency (if it were declared to be). However, the standard practice has been to declare certain officers and employees of a body, rather than the body itself, to be a Statutory Agency, and not to give the Statutory Agency a name. This practice results in the Statutory Agency being nameless and a different body from the new body.

39 For example, OPC is a body created by subsection 2(1) of the *Parliamentary Counsel Act 1970*. It consists of the First Parliamentary Counsel, the Second Parliamentary Counsel and the staff (see subsection 2(3) of that Act). A Statutory Agency is created by subsection 16(2) of that Act. The Statutory Agency consists of the First Parliamentary Counsel and the staff (i.e. the Second Parliamentary Counsel are not included).

40 For further discussion about Statutory Agencies, see paragraphs 67 to 69 and 219 to 221.

Agency Heads

41 The head of an Agency is called the Agency Head. Section 7 of the PS Act defines Agency Head as follows:

Agency Head means:

- (a) the Secretary of a Department; or
- (b) the Head of an Executive Agency; or
- (c) the Head of a Statutory Agency.

42 For Executive Agencies, the Agency Head is appointed by the Agency Minister under section 67 of the PS Act.

43 For Statutory Agencies, the provision creating the Statutory Agency specifies the person who is to be the Agency Head (see paragraphs 67 and 219). The Agency Head should always be a single individual.

APS employees

44 Each Agency has APS employees, who are individuals engaged under the PS Act.

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45 If any of the officers or employees of a new statutory body are to be APS employees, a provision will be needed to achieve that (see paragraph 216).

Public service terminology

46 See also Part 5 of Drafting Direction 2.2, which sets out the correct terminology to be used when drafting provisions dealing with public employment.

Part 2—Creating a statutory body

Introduction

47 If you are creating a new statutory body, you will need to consider the following questions:

- (a) For the PGPA Act:
 - Should the body be a Commonwealth entity?
 - If yes, should it be a corporate Commonwealth entity or a non-corporate Commonwealth entity?
 - For a non-corporate body, should it be a listed entity, part of another body that is a listed entity, or part of a Department of State?
- (b) For the PS Act:
 - Should the PS Act apply to any of the body's officers and employees?
 - Should a Statutory Agency be created?

48 This Part of the Drafting Direction discusses the issues that can arise in considering these questions.

Should the body be a Commonwealth entity?

49 Generally, a new statutory body should either be a Commonwealth entity or part of a Commonwealth entity. This is because the finance law only applies to Commonwealth entities.

If the body should be a Commonwealth entity, or part of one

50 If the body is to be a Commonwealth entity itself, it will need to be established as either:

- (a) a corporate Commonwealth entity (i.e. established as a body corporate); or
- (b) a listed entity (i.e. not established as a body corporate but prescribed to be a listed entity).

51 A non-corporate body that is not to be a Commonwealth entity itself but is to be part of a non-corporate Commonwealth entity will either need to be prescribed as being part of a listed entity or as part of a Department of State (see paragraphs 60 to 62).

If the body should *not* be a Commonwealth entity, or part of one

52 If the policy is that the body should *not* be a Commonwealth entity nor part of a Commonwealth entity, then Finance should be consulted early in the drafting process. As the finance law will not apply to the body, additional provisions may need to be drafted to deal

with matters that would otherwise have been covered by the finance law (e.g. financial reporting, funding for the body under the Appropriation Acts).

53 A corporate body that is not to be a Commonwealth entity must be specifically exempted from the finance law by an Act (see paragraph 292).

54 A non-corporate body that is not to be a Commonwealth entity itself and is not to be part of a Commonwealth entity should also be specifically exempted from the finance law by an Act. This may only be acceptable to Finance if the members of the body are not to be officials of any Commonwealth entity. The usual case in which this would occur is a committee that consists of, or includes, non-public servants.

Should the body be a corporate Commonwealth entity or non-corporate Commonwealth entity?

55 A non-corporate Commonwealth body holds money and property as the Commonwealth because it is part of the Commonwealth. A corporate Commonwealth body holds money and property on its own account because it is legally separate from the Commonwealth.

56 Finance prefers having money and property handled by a non-corporate Commonwealth body wherever possible. However, 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.

57 If the body is established as a body corporate it will be a corporate Commonwealth entity unless the legislation establishing it provides otherwise (see also paragraph 292).

58 If the body is not established as a body corporate but is to be a non-corporate Commonwealth entity (as opposed to being part of a non-corporate Commonwealth entity), it must be prescribed to be a listed entity (see paragraphs 60, 61 and 97 to 109).

59 As corporate Commonwealth entities are legally separate from the Commonwealth, different provisions will be needed depending on whether you are establishing (or otherwise dealing with) a corporate or non-corporate Commonwealth entity. For particular provisions that are needed for corporate bodies, see Part 4.

For a non-corporate body, should it be a listed entity, part of another body that is a listed entity, or part of a Department of State?

60 If the new statutory body is to be a listed entity, the body will need to be prescribed as a listed entity by the Bill establishing the body or in Schedule 1 to the PGPA rules. Generally, the Bill establishing the body should provide for the listing of the entity (see also paragraphs 97 to 109).

61 If the new statutory body is to be part of a listed entity, the body will need to be prescribed as being part of the listed entity by the Bill establishing the body or in Schedule 1 to the PGPA rules. Generally, the Bill establishing the body should provide for the listing of the entity.

62 If the new statutory body is to be part of a Department of State, the Bill establishing the body or the PGPA rules should prescribe that the body is part of a particular Department (see the definition of *Department of State* in section 8 of the PGPA Act).

Should the Public Service Act apply to the body's officers and employees?

63 You should consult with Finance and the Australian Public Service Commission in deciding whether the PS Act should apply to any of the body's officers and employees.

64 The Australian Public Service Commission's general policy position is that where a body is incorporated, the body should generally be free to employ its own staff under the body's enabling legislation. Where a body is unincorporated, the body should usually employ staff under the PS Act.

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

66 If the PS Act is to apply to some or all of the body's officers or employees, a provision needs to be included to provide that the officers or employees are engaged under the PS Act (see paragraph 216).

Should a Statutory Agency be created?

67 If the new statutory body is to be a listed entity, it is likely that a Statutory Agency will also need to be created for the purposes of the PS Act. Finance has taken the view that, as a general rule, a body run by a CEO (as opposed to a governing board) should be regulated as a Statutory Agency under the PS Act.

68 A provision will need to be included that identifies the Agency Head and the APS employees in the Agency (see paragraph 219). Usually the accountable authority of the listed entity should also be the Agency Head of the Statutory Agency. Note that there may be some officials of the listed entity who should not be part of the Statutory Agency. In particular, a statutory office-holder who is not the Agency Head (e.g. Second Parliamentary Counsel) should not be specified as being part of the Statutory Agency as he or she is not part of the Australian Public Service (see section 9 of the PS Act).

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69 If the new statutory body is to be part of a Department of State, generally a Statutory Agency will not need to be created.

Part 3—Drafting issues and precedents: corporate and non-corporate bodies

Establishment and name of statutory bodies

70 The standard provision establishing a statutory body (whether corporate or non-corporate) 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 The body should not be given the same name as another Commonwealth body. It is important to check a proposed name to help avoid a clash with existing entities or trademarks.

73 If you need to change a body’s name, see paragraphs 348 and 349 for a discussion on the consequences of doing so. 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*.

Establishment and name of statutory offices

74 The standard provision establishing a statutory office (i.e. a position occupied by a single official) is as follows:

xx [*Name of statutory office, e.g. Chief Executive Officer*]

There is to be a [*statutory office e.g. Chief Executive Officer of the [statutory body]*].

75 This provision is used when the office has functions of its own. It is not used if the office is simply a member of another statutory body (for example the Chair or a member of a board); in this case the provision dealing with the composition of the other statutory body will suffice to establish the statutory office.

76 The name of the statutory office must be unique. This can be done by:

- (a) referring to the statutory body in the name of the office, for example “Chief Executive Officer of the [*statutory body*]”; or

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- (b) using an inherently unique name, for example “Australian Statistician” or “Second Commissioner of Taxation”.

77 Do not use a generic name (such as “Chief Executive Officer”) in the provision establishing the office without also including a reference to the statutory body.

78 Do not use a defined term in the establishment provision; spell out the name in full, for example “Chief Executive Officer of the Northern Australia Infrastructure Facility”, not “Chief Executive Officer of the Facility”.

79 It will usually be helpful to include a definition referring to the office-holder, for example:

CEO means the Chief Executive Officer of the [*statutory body*].

80 Further provisions may be needed about the functions of the office-holder (see paragraphs 87 to 92).

Composition of bodies

81 Legislation establishing a non-corporate statutory body usually includes a provision setting out the composition of the body. For example, OPC (which is an unincorporated statutory body) consists of First Parliamentary Counsel, the Second Parliamentary Counsel and the staff (see subsection 2(3) of the *Parliamentary Counsel Act 1970*).

82 Legislation establishing a corporate statutory body may establish it with or without members (or corporators). For example, the Torres Strait Regional Authority (which is a corporate statutory body) does not have any members (see section 142 of the *Aboriginal and Torres Strait Islander Act 2005*). However, the Australian Pesticides and Veterinary Medicines Authority (which is also a corporate statutory body) does have a member (see sections 12 and 13 of the *Agricultural and Veterinary Chemicals (Administration) Act 1992*). Generally, corporate bodies should be established without members and so a composition provision is not needed (see paragraph 299).

83 If a provision is included setting out the composition of a body, that composition will often depend on the way that powers and functions are allocated under the legislation establishing the body, and on how the body will act. In drafting such a provision, you should consider:

- (a) whether the CEO should be included in the composition of the body; and
- (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.

84 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.

85 You should consider whether a delegate should be subject to the directions of the delegator (the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that such an instrument is not a legislative instrument (see item 1 of the table in subsection 6(1)).

CEO or governing board?

86 In general:

- (a) a non-corporate statutory body will have a CEO and not a governing board (but may in some cases have an advisory committee); and
- (b) a corporate statutory will usually have a separate governing board (and a CEO who may or may not be part of the governing board).

Allocation of functions

87 When establishing a new statutory body, a question arises about which person or body the new functions should be conferred on.

88 For a new corporate Commonwealth entity, generally the functions should be conferred on the body, rather than on the governing body or any other person (e.g. the CEO).

89 For a new non-corporate Commonwealth entity, you will need to consider whether the functions should be conferred on the body itself (the more common case) or on the CEO of the body.

90 If the primary role is to be performed by the non-corporate body, it may be more appropriate to confer the functions on the body. Some examples of this approach are as follows:

- In the *Australian Federal Police Act 1979*, the statutory body (the AFP), rather than the CEO (the Commissioner), is given the main functions (see section 8 of that Act).
- In the *Parliamentary Counsel Act 1970*, the statutory body (OPC), rather than the CEO (First Parliamentary Counsel), is given the main functions (see section 3 of that Act).
- In the *Safe Work Australia Act 2008*, the statutory body (Safe Work Australia), rather than the CEO, is given the main functions (see section 6 of that Act).

91 However, if the primary role is to be performed by the CEO of the non-corporate body, it may be more appropriate to confer the functions on the CEO (with the function of the body being to assist the CEO in the performance of those functions). Some examples of this approach are as follows:

- In the *Auditor-General Act 1997*, the CEO (the Auditor-General) is given the main functions and the statutory body (the Australian National Audit Office)

is given the function of assisting the CEO (see sections 8, 38 and 39 of that Act).

- In the *Director of Public Prosecutions Act 1983*, the CEO (the Director of Public Prosecutions) is given the main functions and not the statutory body (the Office of the Director of Public Prosecutions) (see sections 5 and 6 of that Act).
- In the *Law Enforcement Integrity Commissioner Act 2006*, the CEO (the Integrity Commissioner) is given the main functions and the statutory body (the Australian Commission for Law Enforcement Integrity) is given the function of assisting the CEO (see sections 15, 195 and 196 of that Act).

92 For a non-corporate body, irrespective of whether the main functions are conferred on the body or on the CEO of the body, the CEO (as accountable authority and Agency Head) will still have separate and independent functions conferred by the PGPA Act and the PS Act relating to governing and managing the body (see sections 15 and 23 of the PGPA Act and section 57 of the PS Act).

Powers

93 If specific powers need to be conferred on a non-corporate statutory body or an office-holder in the body and those powers are commonly exercised by a legal person (e.g. entering into a contract or charging a fee), it should be clear that the powers are to be exercised by the office-holder or body on behalf of the Commonwealth.

94 For powers of corporate bodies, see paragraphs 313 to 320.

Performance of functions and exercise of powers outside Australia

95 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.

96 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 PGPA Act extends outside Australia (see section 4 of that Act).

Listing an entity for the purposes of the finance law

General

97 For a body, person, group of persons or organisation to be a listed entity, it must be prescribed by an Act or the PGPA rules to be a listed entity (see the definition of *listed entity* in section 8 of the PGPA Act).

Where a body is to be a listed entity

98 If the body being established by the legislation is to be a listed entity or part of another body that is to be a listed entity, you will need to include a provision prescribing the listed entity.

99 If the body itself is to be a listed entity, the following provision should be used:

- (x) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
- (a) the [name of body] is a listed entity; and
 - (b) the [name of accountable authority] is the accountable authority of the [name of body]; and
 - (c) the following persons are officials of the [name of body]:
 - (i) the [name of accountable authority];
 - (ii) the staff referred to in section [x];
 - (iii) [persons assisting the [name of accountable authority] referred to in section [x]];
 - (iv) [persons whose services are made available to the [name of accountable authority] under section [x]];
 - (v) [consultants engaged under section [x]];
 - (vi) [members of the committee established under section [x]]; and
 - (d) the purposes of the [name of body] include:
 - (i) the function of the [name of body] referred to in section [x]; and
 - (ii) the function of the [name of accountable authority] referred to in section [x].

100 This provision should generally be included as a subsection in the section that establishes the body. For examples of this case, see:

- the National Archives of Australia (see section 5 of the *Archives Act 1983*); and
- the Australian National Audit Office (see section 38 of the *Auditor-General Act 1997*); and
- the Australian Aged Care Quality Agency (see section 7 of the *Australian Aged Care Quality Agency Act 2013*).

Where a body is to be part of a listed entity

101 If the body being established will not itself be a listed entity but will, in combination with other bodies or persons, be part of a listed entity, the following provision should be used:

- (x) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
- (a) the following [combination of bodies] [combination of bodies and persons] is a listed entity:
 - (i) [body A];
 - (ii) [body B];
 - (iii) [person X]; and

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- (b) the listed entity is to be known as *[name of listed entity]*; and
- (c) the *[name of accountable authority]* is the accountable authority of the listed entity; and
- (d) the following persons are officials of the listed entity:
 - (i) the *[name of accountable authority]*;
 - (ii) the staff of *[body A]*;
 - (iii) *[persons assisting the [name of accountable authority] referred to in section [x]]*;
 - (iv) *[persons whose services are made available to the [name of accountable authority] under section [x]]*;
 - (v) *[consultants engaged under section [x]]*;
 - (vi) the staff of *[body B]*;
 - (vii) *[person X]*; and
- (e) the purposes of the listed entity include:
 - (i) the function of *[body A]* referred to in section *[x]*; and
 - (ii) the function of the *[name of accountable authority]* referred to in section *[x]*;
 - (iii) the function of *[body B]* referred to in section *[x]*;
 - (iv) the function of *[person X]* referred to in section *[x]*.

102 This provision should generally be included in a new Part called “Application of the finance law” outside of the provisions establishing each of the bodies that make up the listed entity. The name given to the listed entity should not be the same as any of the names of the bodies that make up the entity (or any other Commonwealth bodies). For examples of this case, see the following:

- section 50F of the *Australian Sports Anti-Doping Authority Act 2006*;
- section 32A of the *Australian Centre for International Agricultural Research Act 1982*;
- section 53A of the *Australian Organ and Tissue Donation and Transplantation Authority Act 2008*.

Where a group of persons is to be a listed entity

103 Where the legislation is creating an office or position (e.g. the Inspector-General in Bankruptcy), generally the listed entity should not be the office-holder but instead a group of persons that includes the office-holder. The following provision should be used in this case:

- (x) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
 - (a) the following *[group of persons]* is a listed entity:
 - (i) *[office-holder]*;
 - (ii) *[the staff assisting the office-holder referred to in section [x]]*;
 - (iii) *[persons whose services are made available to the [office-holder] under section [x]]*; and
 - (b) the listed entity is to be known as *[name of listed entity]*; and
 - (c) the *[name of accountable authority]* is the accountable authority of the listed entity; and
 - (d) the persons referred to in paragraph (a) are officials of the listed entity; and

- (e) the purposes of the listed entity include the function of [*office-holder*] referred to in section [*x*].

104 Use your judgement as to where to include this provision. Examples of this case are:

- the Australian Financial Security Authority (see section 13 of the *Bankruptcy Act 1966*); and
- the Office of the Inspector-General of Intelligence and Security (see section 6AA of the *Inspector-General of Intelligence and Security Act 1986*); and
- the Office of the Commonwealth Ombudsman (see section 4A of the *Ombudsman Act 1976*).

Who should be the accountable authority of a listed entity?

105 The question of who should be the accountable authority of a listed entity is a policy question to be determined between Finance and your instructors. Usually the accountable authority for a listed entity should be a single individual.

106 Also, if there is a Statutory Agency created for the purposes of the PS Act (which is common for listed entities), the accountable authority should be the same person as the Agency Head of the Statutory Agency. This is because the accountable authority would not be able to perform his or her duties properly under the finance law if he or she were not able to exercise the employment powers of Agency Head under the PS Act in relation to the APS employees in the listed entity. (For accountable authorities, also see paragraphs 23 and 24.)

Who should be the officials of a listed entity?

107 The question of who should be the officials of a listed entity is also a policy question to be determined between Finance and your instructors. The accountable authority and the staff should always be stated to be officials of the entity. The other persons mentioned in the precedents above (e.g. consultants) are merely examples of the persons who are commonly included as officials of listed entities. (For officials, also see paragraphs 25 and 26.)

What should be the purposes of a listed entity?

108 For listed entities, the paragraph in the precedents above will assist in identifying the listed entity's purposes (for a discussion about purposes, see paragraphs 27 to 29). Note that the paragraph is not an exhaustive statement of the entity's purposes, but is merely inclusive.

109 The following is a guide to work out what to include in a listed entity's purposes:

- if the body is the listed entity—the functions of the body that are set out in the legislation;
- if the body is the listed entity and a person who is an official of the body also has functions that are set out in the legislation—those functions;
- if the listed entity consists of a combination of bodies—the functions of each of those bodies that are set out in the legislation;

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- if the listed entity consists of a combination of bodies and a person who is an official of the listed entity also has functions that are set out in the legislation—those functions;
- if the listed entity consists of a group of persons and the functions of one or more of those persons are set out in the legislation—those functions.

Decision-making by groups of people

110 If a statutory body has a governing board, or if it has a committee, council or other group of people, you will need to include provisions about how the governing board, committee, council or other group can make valid decisions. The following is a list of the basic issues that need to be addressed in drafting provisions dealing with decision-making by a group of people (such as a governing board or committee).

- 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 body need to be able to make decisions without meetings? If so, can this be by phone, fax, or other electronic communication?

111 The following is a precedent to use to set out how a significant decision-making body (such as a governing board) is to make decisions:

X1 Convening meetings

- (1) The [*decision-making body*] must hold such meetings as are necessary for the efficient performance of its functions.
- (2) The [*Chair of the decision-making body*]:
 - (a) may convene a meeting at any time; and

- (b) must convene at least [x] meetings each calendar year; and
- (c) must convene a meeting within 30 days after receiving a written request to do so from another [*member of the decision-making body*].

X2 Presiding at meetings

- (1) The [*Chair of the decision-making body*] must preside at all meetings at which he or she is present.
- (2) If the [*Chair of the decision-making body*] is not present at a meeting, the other [*members of the decision-making body*] present must appoint one of themselves to preside.

X3 Quorum

- (1) At a meeting of the [*decision-making body*], a quorum is constituted by [*a specified number of members of the decision-making body*] [*a majority of members of the decision-making body*].
- (2) However, if:
 - (a) a [*member of the decision-making body*] is required by rules made for the purposes of section 29 of the *Public Governance, Performance and Accountability Act 2013* not to be present during the deliberations, or to take part in any decision, of the [*decision-making body*] with respect to a particular matter; and
 - (b) when the [*member of the decision-making body*] leaves the meeting concerned there is no longer a quorum present;the remaining [*members of the decision-making body*] at the meeting constitute a quorum for the purpose of any deliberation or decision at that meeting with respect to that matter.

X4 Voting at meetings

- (1) A question arising at a meeting of the [*decision-making body*] is to be determined by a majority of the votes of the [*members of the decision-making body*] present and voting.
- (2) The person presiding at a meeting of the [*decision-making body*] has a deliberative vote and, if the votes are equal, a casting vote.

X5 Conduct of meetings

The [*decision-making body*] may, subject to this [*Division*], regulate proceedings at its meetings as it considers appropriate.

Note: Section 33B of the *Acts Interpretation Act 1901* contains further information about the ways in which [*members of the decision-making body*] may participate in meetings.

X6 Minutes

The [*decision-making body*] must keep minutes of its meetings.

X7 Decisions without meetings

- (1) The [*decision-making body*] is taken to have made a decision at a meeting if:
 - (a) without meeting, a majority of the [*members of the decision-making body*] 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 [*decision-making body*] under subsection (2); and

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- (c) all the [*members of the decision-making body*] were informed of the proposed decision, or reasonable efforts were made to inform all the [*members of the decision-making body*] of the proposed decision.
- (2) Subsection (1) applies only if the [*decision-making body*]:
- (a) has determined that it may make decisions of that kind without meeting; and
 - (b) has determined the method by which [*members of the decision-making body*] are to indicate agreement with proposed decisions.
- (3) For the purposes of paragraph (1)(a), a [*member of the decision-making body*] is not entitled to vote on a proposed decision if the [*member of the decision-making body*] would not have been entitled to vote on that proposal if the matter had been considered at a meeting of the [*decision-making body*].
- (4) The [*decision-making body*] must keep a record of decisions made in accordance with this section.

112 The following are some other useful examples of provisions dealing with how other types of decision-making bodies are to make decisions:

- section 145-5 of the *Australian Charities and Not-for-profits Commission Act 2012*;
- sections 44AAD and 44AAE of the *Competition and Consumer Act 2010*.

113 If you include a provision dealing with the holding of meetings, you should consider including the following note at the end of the provision:

Note: Section 33B of the *Acts Interpretation Act 1901* contains further information about the ways in which [*members of the decision-making body*] may participate in meetings.

114 For a useful precedent enabling decisions to be made without a meeting, see section X7 in paragraph 111.

Appointments

General

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

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

Note: The [*office-holder*] may be reappointed: see section 33AA of the *Acts Interpretation Act 1901*.

116 Section 33AA of the AIA provides that if an Act confers on a person or body a power to make an appointment, the power is taken to include a power of reappointment. 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.

117 Appointments should be expressed to be full-time, part-time, or either (depending on policy). It is current government policy that age limits should not be imposed for full-time or part-time office-holders.

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

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

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

120 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 182 to 185). 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:

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

121 You should be aware that if an office-holder under legislation is to be appointed or nominated by a body established by the same legislation (e.g. a CEO appointed by the Board of a corporate Commonwealth entity), section 4 of the AIA cannot be relied upon to appoint the office-holder before the legislation commences. There are 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

122 Including public servants or other public officials as members of a corporate body may give rise to conflicts of interest. Any proposal to include public servants or other public officials as members of a corporate body should be referred to Finance early in the drafting process.

Acting appointments

123 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.

124 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. However, 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).

125 A standard provision for acting appointments is as follows:

xx Acting appointments

The [appointer] may, by written instrument, appoint a [specify person] to act as the [office-holder]:

- (a) during a vacancy in the office of [office-holder] (whether or not an appointment has previously been made to the office); or
- (b) during any period, or during all periods, when the [office-holder]:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

126 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;
- section 33AB deals with the validity of things done under appointments;
- 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.

127 Occasionally it is necessary to include a provision providing for a person to act in an office by operation of law (e.g. the deputy CEO is to act in the office of the CEO while the CEO is absent from Australia). Subsections 33A(2) and (3) of the AIA provide:

Acting by operation of law

- (2) If a provision of an Act provides for a person to act in a particular office (without the need for an appointment), then, except so far as the Act otherwise provides, while the person is acting in the office:
 - (a) the person has and may exercise all the powers, and must perform all the functions and duties, of the holder of the office; and
 - (b) the Act or any other Act applies in relation to the person as if the person were the holder of the office.
- (3) Anything done by or in relation to a person purporting to act in the office mentioned in subsection (2) is not invalid merely because the occasion to act had not arisen or had ceased.

128 If you include a provision providing for a person to act in an office by operation of law, you should include the following note at the end of the provision:

Note: For rules that apply to persons acting as the *[title of office]*, see section 33A of the *Acts Interpretation Act 1901*.

Vacancies in membership

129 Subsection 33(2B) of the AIA validates acts done by a body (whether corporate or non-corporate) during vacancies in membership of the body. 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 11(5) of the *National Film and Sound Archive of Australia Act 2008*). 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

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

131 If you are amending legislation that refers to “Chairman”, then you should replace “Chairman” with “Chair”. If you are amending legislation 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 legislation that already provides for a Chairperson, you should create a new office of Deputy Chairperson.

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

133 Note that section 18B of the *Acts Interpretation Act 1901* (which applies to legislative instruments because of paragraph 13(1)(a) of the *Legislation Act 2003*) allows the occupant of an office that has the title of Chair, Chairperson, Chairman or Chairwoman to be referred to by any of those titles or any other similar title. Similar provision is made in respect of an office that has a deputy chair title.

Definitions of “member”

134 The word *member* is frequently defined in legislation 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

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

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

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

Remuneration—general

137 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.

138 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)).

139 For the time being, however, legislation 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.

140 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 149 to 152).

Remuneration—standard provision

141 The standard *Remuneration Tribunal Act 1973* remuneration provision for a Bill is as follows:

xx Remuneration

- (1) A [office-holder] 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/by the [specified instrument]/under subsection (4)].
- (2) A [office-holder] is to be paid the allowances that are prescribed [by the regulations/by the [specified instrument]/under subsection (4)].
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.
- [(4) The [appointer] may, by legislative instrument, prescribe:
 - (a) remuneration for the purposes of subsection (1); and
 - (b) allowances for the purposes of subsection (2).]

142 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.

143 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.

144 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 or other instruments made for the purposes of subsection (2).

145 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).

146 Subsection (4) should not be included if subsections (1) and (2) do not refer to it. It may also need to be adjusted if someone other than the Minister would make the legislative instrument.

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

147 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.

148 The draft will need the standard remuneration provision set out in paragraph 141 as well.

Remuneration—source of funds

149 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).

150 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 legislation establishing a statutory office need not make any specific provision for payment of the office-holder's remuneration.

151 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 entities at least, the matter is of no practical significance. The entity'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.

152 If, for policy reasons, the approach outlined in paragraph 149 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

153 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 legislation is, strictly speaking, not necessary to achieve this.

154 The position set out in paragraph 153 was the subject of an agreement reached in 1980 between OPC 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.

155 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).

156 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

157 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.

158 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] [office-holder] has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The [appropriate person (e.g. appointer or Chair)] may grant a [full-time] [office-holder] leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the [appropriate person] determines.

Leave—part-time office-holders

159 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.

- (X) The [appropriate person (e.g. appointer or Chair)] may grant leave of absence to any [other] [part-time] [office-holder] on the terms and conditions that the [appropriate person] determines.

Other paid work

160 Generally, full-time holders of statutory offices should be prohibited from engaging in other paid work 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:

xx Other paid work

- (1) The [office-holder] must not engage in paid work outside the duties of his or her office without the [appropriate person’s (e.g. appointer or Chair)] approval.

161 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:

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Commonwealth bodies

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

OR

- (1) The [*office-holder*] must not engage in any paid work that, in the [*appropriate person's* (e.g. *appointer or Chair*)] opinion, conflicts or could conflict with the proper performance of his or her duties.

162 The provisions above should be accompanied by a definition of ***paid work*** along the following lines:

paid work means work for financial gain or reward (whether as an employee, a self-employed person or otherwise).

163 You will need to ensure that an office-holder is not covered by both provisions set out in paragraphs 160 and 161. A contravention of the other paid work provision should generally (subject to your instructors' views) be included as a ground for termination (see paragraphs 168 to 177). This would not be necessary if the power of termination is unlimited.

164 There are precedents for dealing with other paid work only in the termination provision. However, since engaging in other paid work (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.

Resignation

165 The standard resignation provision is as follows:

- (X) [*The office-holder*] may resign his or her appointment by giving [*the appointer*] a written resignation.
- (X) 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.

166 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 legislation creating the office.

Termination—general

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

168 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*]:
 - (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 person's*] approval, in paid work outside the duties of his or her office (see [*other paid work provision*]).

169 The power to terminate an appointment on the grounds mentioned in subsection (2) of the provision above should generally be conferred as a discretion (“may”). If you are instructed to provide for mandatory termination of an appointment (“must”), you should raise the matter with First Parliamentary Counsel.

170 The provision above should be accompanied by a definition of ***paid work*** along the following lines:

paid work means work for financial gain or reward (whether as an employee, a self-employed person or otherwise).

171 If the office-holder is not an official of a Commonwealth entity for the purposes of the PGPA Act and it is appropriate to include a provision relating to disclosure of interests, you should include the following provision:

- (d) [*the office-holder*] fails, without reasonable excuse, to comply with [*disclosure section*].

172 If the person is an official of a Commonwealth entity for the purposes of the PGPA Act, and is not the accountable authority, or a member of the accountable authority, of a corporate Commonwealth entity, you should also include the following provision:

- (d) [*the office-holder*] fails, without reasonable excuse, to comply with section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section.

173 If the person is the accountable authority, or a member of an accountable authority, of a corporate Commonwealth entity, the following note should be inserted at the end of the termination provision:

Note: The appointment of a [*office-holder*] may also be terminated under section 30 of the *Public Governance, Performance and Accountability Act 2013* (which deals with terminating the appointment of an accountable authority, or a member of an accountable authority, for contravening general duties of officials).

174 There is no need in this case to include a paragraph along the lines referred to in paragraph 171 because the power that would be used to terminate an appointment for a contravention of section 29 of the PGPA Act (which deals with the duty to disclose interests) would be section 30 of that Act.

175 You should not use the form of “The [*appointer*] may terminate the appointment of [*the office-holder*] for misbehaviour or physical or mental incapacity”. If you are amending legislation that has this form in it, you should amend the legislation so that it is in the form of

subsection (1) in the standard provision. For Bill drafting, Ministerial approval is sufficient for such an amendment.

176 For a part-time office-holder, you will need to discuss with your instructors whether paragraph (2)(b) of the standard provision in paragraph 168 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

177 For a part-time office-holder, paragraph (2)(c) of the standard provision in paragraph 168 should be replaced with the following paragraph, the wording of which should be consistent with the applicable prohibition (see paragraph 161):

- (c) [*the office-holder*] engages in paid work that [, *in the appropriate person's opinion (e.g. appointer or Chair),*] conflicts or could conflict with the proper performance of his or her duties (see [*other paid work provision*]); or

Termination—office-holder requiring special degree of independence

178 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.

179 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.

180 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).

181 If the office-holder is the accountable authority, or a member of the accountable authority, of a corporate Commonwealth entity, you should consider including the following provision as it may be inappropriate for section 30 of the *Public Governance, Performance and Accountability Act 2013* to continue to apply in this case:

- (X) Section 30 of the *Public Governance, Performance and Accountability Act 2013* (which deals with terminating the appointment of an accountable authority, or a member of an accountable authority, for contravening general duties of officials) does not apply in relation to [*insert name*] despite subsection 30(6) of that Act.

Termination without cause

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

40 Termination of appointment

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

183 This kind of provision is likely to become more common in the future (see paragraph 120). For the time being, however, if you are asked to include such a provision in legislation 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.

184 If the office-holder is the accountable authority, or a member of the accountable authority, of a corporate Commonwealth entity for the purposes of the PGPA Act, you should also include the following provision:

- (X) Section 30 of the *Public Governance, Performance and Accountability Act 2013* (which deals with terminating the appointment of an accountable authority, or a member of an accountable authority, for contravening general duties of officials) does not apply in relation to [office-holder] despite subsection 30(6) of that Act.

185 The reason for this is that section 30 of the PGPA Act has certain procedural requirements which may be seen to narrow the termination power.

Termination for unsatisfactory performance

186 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]”.

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

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

188 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.

189 Where later legislation 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.

190 However, you may act on the Commonwealth’s 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 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

Disclosure of interests for officials

191 Section 29 of the PGPA Act requires an official of a Commonwealth entity to disclose details of material personal interests that the official has that relate to the affairs of the entity. The PGPA rules elaborate on that requirement.

192 In summary:

- (a) officials who are the accountable authority must disclose material personal interests to the responsible Minister (see section 13 of the PGPA rules);
- (b) officials who are members of the accountable authority must disclose material personal interests to each other member of the accountable authority (see section 14 of the PGPA rules, and see section 15 of the PGPA rules for the consequences of having such interests);
- (c) officials who are not the accountable authority or members of the accountable authority must disclose material personal interests in accordance with instructions given by the accountable authority (see section 16 of the PGPA rules);
- (d) officials who are otherwise appointed under a law to a committee, council or other body or the entity itself must disclose to each other member of the body or entity (see sections 16A to 16C of the PGPA rules).

193 If any of these results are not appropriate, or inadequate, then the PGPA provisions will need to be overridden or supplemented. An example of such a provision is as follows:

xx Disclosure of interests

- (1) A disclosure by the [office-holder] under section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) must be made to the [name of person to whom disclosure to be made].
- (2) Subsection (1) applies [instead of/in addition to] any rules made for the purposes of that section.
- (3) For the purposes of this Act and the *Public Governance, Performance and Accountability Act 2013*, the [office-holder] is taken not to have complied with section 29 of that Act if the [office-holder] does not comply with subsection (1) of this section.

194 In certain cases, a person may be required (in addition to or instead of section 29 of the PGPA Act) to comply with a provision of the following kind:

xx Disclosure of interests

- (1) The [office-holder] must give a written notice to [name of person to whom interest to be disclosed] of all direct or indirect pecuniary interests that the [office-holder] has or acquires in any business or in any body corporate carrying on any business.

- (2) Subsection (1) applies [*instead of/in addition to*] any rules made for the purposes of section 29 of the *Public Governance, Performance and Accountability Act 2013*.

195 The termination provision of the office-holder would also need to refer to this provision (see for example paragraph 171).

196 In rare cases, section 29 of the PGPA Act will not be appropriate for an official of a Commonwealth entity. In such a case, the following provision should be included:

- (X) Section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) does not apply to the [*office-holder*].

Statutory office-holders (whether or not members of a statutory body)

197 In many cases a 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.

198 Generally, a statutory body of a kind that has a CEO would be a Commonwealth entity and the CEO would be an official of the entity. In this case, paragraphs 191 to 196 would apply. However, it is not uncommon for a CEO who is not the accountable authority, or a member of the accountable authority, to also be required to disclose interests to the Minister. If this the case, then the precedent in paragraph 193 can be used.

Consequences of a failure to disclose

199 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.

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

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

202 See also paragraphs 167 to 174.

Other cases

203 For 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 for members of committees who are not officials

204 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. The first question is whether all the members of the committee are officials for the purposes of the PGPA Act. If the members are officials, then the PGPA Act will apply (see paragraphs 191 to 196).

205 The following discussion relates to a person on a committee (however described) who is not an official.

206 If the relevant provision of a 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 legislation itself provides for the committee, a disclosure provision should ordinarily be included.

207 Finance takes the view that the requirement in the precedents below for dealing with a disclosure of interests is not appropriate where the committee does not have a decision-making or governing function. If, for instance, the committee only has a function of providing advice, it is not necessary for the legislation to set out explicitly the procedure for dealing with a disclosure of interests.

208 However, if disclosure of interest provisions are appropriate in a particular case, you should discuss with your instructors and Finance which of the following provisions to include:

xx Disclosure of interests to the Minister

- (X) 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

- (X) 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.

209 The member should also be required to disclose the interest to the committee. 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 208*] 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.

210 There may be cases where it is not practical to exclude a member of a committee from the decision-making process. For example, excluding a particular member from that process may deny the committee 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 committee has industry representation. In that case, a high proportion of the members of the committee may have interests in the industry regulated, and so it may be difficult to get a quorum if they are excluded.

211 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 committee to determine whether the member is authorised to take part in the deliberations or decisions of the committee on a matter in which he or she has an interest. Where the circumstances require this approach, subsection (4) referred to in paragraph 209 should, subject to paragraph 210, 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*].

212 However, if the committee 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 committee 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 committee 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 209 nor any of the subsections referred to in paragraph 211 should be included).

Disclosure of interests by members of a tribunal

213 Except where there are special circumstances, section 14 of the AAT Act should be used as the model for disclosure of interest provisions for the members of a tribunal. It is worth noting that the judicial or quasi-judicial members who are appointed to courts, tribunals and other such bodies should not be officials for the purposes of the PGPA Act.

214 The consequences of the failure of a member of a tribunal to comply with a disclosure provision will depend on the terms of the legislation. In the case of the AAT Act, removal from office is based upon misbehaviour and presumably non-disclosure would constitute misbehaviour. Where the legislation 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.

215 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).

Employees

216 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*.

217 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.

218 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*).

Statutory Agencies

219 The standard provision for creating a Statutory Agency is as follows:

- (X) For the purposes of the *Public Service Act 1999*:
 - (a) the [*CEO*] and the APS employees assisting the [*CEO*] together constitute a Statutory Agency; and
 - (b) the [*CEO*] is the Head of that Statutory Agency.

220 The effect is to apply the provisions of the PS Act to the Statutory Agency. In particular, it will ensure that the Head of the Statutory Agency has the powers of a Secretary of a Department in relation to the APS employees in the Statutory Agency. (For Statutory Agencies, also see paragraphs 35 to 39.)

221 Generally, this provision should be included in the provision providing that the body's staff are to be engaged under the PS Act (see paragraph 216).

Consultants

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

223 For a corporate Commonwealth entity, 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.

224 For a non-corporate Commonwealth entity, the usual form for such a provision is as follows:

xx Consultants

The [*person who is the accountable authority*] may, on behalf of the Commonwealth, engage consultants to assist in the performance of the [*accountable authority's/ statutory body's*] functions.

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

Corporate and other plans

226 Each year a Commonwealth entity is required to produce a corporate plan (see section 35 of the PGPA Act). The plan must cover a 4-year period (see section 16E of the PGPA rules).

227 You should familiarise yourself and your instructors with the requirements in the PGPA Act and the PGPA rules for corporate plans. If additional matters are required to be included in the corporate plan, the following precedent may be used:

- (X) A corporate plan prepared by the [*accountable authority*] under section 35 of the *Public Governance, Performance and Accountability Act 2013* must include details of the following:

228 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.

229 You might also need to consider whether there should be any requirements for consultation during the preparation of the corporate plan, and any approval process for the corporate plan.

230 Some examples of provisions dealing with corporate plans and annual operational plans are as follows:

- sections 23 to 27 of the *Australian Sports Commission Act 1989*;
- sections 33 to 38 of the *Tourism Australia Act 2004*.

231 If the body is to be an interjurisdictional body (because it has members who are appointed or nominated by a State or Territory), you should discuss with Finance and your instructors whether the following provision should be inserted:

- (X) Subsection 35(3) of the *Public Governance, Performance and Accountability Act 2013* (which deals with the Australian Government’s key priorities and objectives) does not apply to a corporate plan prepared by the [accountable authority].

Annual reports

232 The accountable authority of a Commonwealth entity, and directors of a Commonwealth company, are required to produce an annual report for the entity or company (see sections 46 and 97 of the PGPA Act). However, in some cases, you might want to add extra reporting requirements to the standard requirements for provision.

233 The following form of words may be used:

xx Annual report

The annual report prepared by the [accountable authority] and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* for a period must include [x].

234 Note the use of the word “period”, rather than “financial year” in this provision, which is to pick up the “reporting period” concept from section 46 of the PGPA Act.

235 Subsection 46(2) of the PGPA Act provides that such an annual report must be given to the relevant Minister by the 15th day of the fourth month after the end of the reporting period for the entity, or any longer period granted under subsection 34C(5) of the AIA.

236 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.

237 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).

238 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.

239 As evidenced by section 46 of the PGPA Act, the general policy on annual reports is that they are to be prepared and given to the appropriate Minister by the 15th day of the fourth month after the end of an entity’s reporting period, or such extended period as is set by the Minister.

240 If the period for preparing and giving the report is to be less than this period, the lesser period should be specified in the provision. A longer period should not be specified without consulting PM&C and Finance, but if, after such consultation, a longer period is to be set, the longer period should be specified in the provision.

241 If you are abolishing a statutory body and need to provide for the final annual report for the body (or the final financial statements and annual performance statements), consider whether section 17A of the PGPA rules will appropriately deal with the issue.

Directions

Ministerial directions to the statutory body

242 A question sometimes arises about whether an express Ministerial directions power is needed to enable the Finance Minister or the body's own Minister to give directions to the body. Before including such a provision, you should consider whether the following provisions of the PGPA Act are sufficient.

- Section 19 is about the requirement for accountable authorities to keep the Finance Minister and the body's own Minister informed. In particular, it allows those Ministers to require accountable authorities to give reports, documents and information about the activities of the body.
- Section 21 requires the accountable authority of a non-corporate Commonwealth entity to govern the entity in a way that is not inconsistent with the policies of the Australian Government.
- Section 22 requires the accountable authority of a corporate Commonwealth entity to comply with orders about general policy of the Australian Government.

243 If a body (whether a corporate or non-corporate Commonwealth entity, or part of such an entity) 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.

244 Without an express provision, the Minister's ability to direct the body will be unclear (see *Mason and Wilson JJ in Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 429-430). For this reason, if the policy is to allow the Minister to give directions, you should include an express provision to provide for this.

245 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.

246 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* (4th Ed.), pages 315 and 316.

247 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 [*notifiable instrument*] [*legislative instrument*], give written directions to the [*statutory body*] about the performance of its functions.

Drafting Direction No. 3.6 Commonwealth bodies

[Note: Section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the Legislation Act 2003 do not apply to the directions (see regulations made for the purposes of paragraphs 44(2)(b) and 54(2)(b) 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).

248 You should consult the Attorney-General's Department as to whether directions given under the provision are likely to be of legislative character. (A direction given to a corporate Commonwealth entity, that is not required to be laid before the Houses of the Parliament or published in the *Gazette* or elsewhere, is not a legislative instrument: see item 3 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*.)

249 If a direction is of legislative character, the direction should be a legislative instrument (and the note under subsection (1) included) unless the Attorney-General's Department agrees to an exemption. If it is not of legislative character, the direction should be a notifiable instrument. This is because Finance prefers Ministerial directions to be on the Federal Register of Legislation.

250 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.

251 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

252 If the body is a listed entity for the purposes of the PGPA 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 accountable authority for PGPA 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.

253 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 [notifiable instrument] [legislative instrument], give written directions to the [CEO] about [specify matter e.g. the performance of his or her functions].

[Note: Section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the Legislation Act 2003 do not apply to the directions (see regulations made for the purposes of paragraphs 44(2)(b) and 54(2)(b) 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 following Acts in relation to the [statutory body]:
 - (a) the *Public Service Act 1999*;
 - (b) the *Public Governance, Performance and Accountability Act 2013*.

254 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 e.g. 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 *Public Governance, Performance and Accountability Act 2013* 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 [x].]
- (4) A direction under subsection (1) is not a legislative instrument.

255 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.

Committees

256 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).

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

258 If you are asked to draft provisions empowering the governing board of a Commonwealth entity to establish a committee, you should ask your instructors to discuss the proposal with Finance early in the drafting process.

Drafting Direction No. 3.6
Commonwealth bodies

259 You should consider whether members of committees should or should not be officials for the purposes of the PGPA Act. This will generally depend on whether the committee members will be handling public resources (see section 41F of the *Asbestos Safety and Eradication Agency Act 2013* for an example of where committee members are officials for the purposes of the PGPA Act).

260 If the members are not to be officials of a Commonwealth entity that is not a listed entity, you may consider including a provision along the following lines:

- (x) The [*members of the committee*] are not officials for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

Delegations

261 The standard provision to authorise delegations by non-corporate bodies (such as governing boards or committees) is as follows:

xx Delegation by [*non-corporate body*]

- (1) The [*non-corporate body*] may, in writing, delegate all or any of its functions or powers under this Act to [*specify person(s)*].

Note: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.

- (2) In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the [*non-corporate body*].
- (3) The delegation continues in force despite a change in the membership of the [*non-corporate body*].
- (4) The delegation may be varied or revoked by the [*non-corporate body*] (whether or not there has been a change in the membership of the [*non-corporate body*]).

262 For the body to be able to delegate any of its functions or powers, it will need to make a valid decision to delegate. For this reason, you will need to include provisions dealing with how the body is to make valid decisions (see paragraphs 110 to 114).

263 The standard provision to authorise delegations by an office-holder (such as a CEO of a body) is as follows:

xx Delegation by [*office-holder*]

- (1) The [*office-holder*] may, in writing, delegate all or any of his or her functions or powers under this Act to [*specify person(s)*].

Note: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.

- (2) In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the [*office-holder*].

Special accounts

264 The PGPA Act provides for the establishment of special accounts, either by determination of the Finance Minister or by another Act (see sections 78 and 80 of the PGPA Act).

265 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 78 or 80 of the PGPA 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.

266 The provisions establishing the special account must specify which amounts are to be credited to the account. These 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.

267 In addition, the Annual Appropriation Acts also provide for amounts to be credited to a special account if any of the purposes of the account is a purpose that is covered by an item in the Appropriation Act. 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.

268 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 78(4) of the PGPA Act; and
- where the special account is established under another Act—by an appropriation under subsection 80(1) of the PGPA Act.

269 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 78(6) of the PGPA Act; and
- where the special account is established under another Act—under subsection 80(3) of the PGPA Act.

270 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 early in the drafting process.

271 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):

X1 [*name of account*]

- (1) The [*name of account*] is established by this section.
- (2) The [*name of account*] is a special account for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

X2 Credits to the *[name of account]*

There must be credited to the *[name of account]* amounts equal to the following:

- (a) *[specify particular amounts that are to be credited to 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.

X3 Purposes of the *[name of account]*

The purposes of the *[name of account]* are as follows:

- (a) *[specify relevant purposes]*;
- (b) meeting the expenses of administering the account;
- (c) *[paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in the performance of the *[statutory body's]* functions]*;
- (d) *[paying any remuneration and allowances payable to any person engaged under this *[legislation]*]*;
- (e) *[to reduce the balance of the account (and therefore the available appropriation for the account) without making a real or notional payment]*.

Note: See section 80 of the *Public Governance, Performance and Accountability Act 2013* (which deals with special accounts).

272 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 of the account with Finance.

273 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 80(1) of the PGPA Act). However, a Bill establishing a new special account will require a Governor-General’s message as amounts will be appropriated under section 80 of the PGPA Act for the purposes of the new special account.

Charging for performance of functions

274 A statutory body is not entitled to charge fees 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).

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

276 If the body is a non-corporate body, or if it is a corporate body but providing the service on behalf of the Commonwealth, the charging provision must make it clear that the body is charging (and receiving) the fees on behalf of the Commonwealth.

277 The standard charging provision is as follows:

- (1) The [statutory body] may [, on behalf of the Commonwealth,] charge fees for [insert relevant services].
- (2) A fee must not be such as to amount to taxation.
- (3) A fee charged under subsection (1):
 - (a) is a debt due to the [statutory body] [, on behalf of the Commonwealth]; and
 - (b) is recoverable by the [statutory body] [, on behalf of the Commonwealth,] in a court of competent jurisdiction.

278 It is inherent in the concept of a “fee” that the liability does not amount to taxation. However, it is quite common to put subsection (2) in anyway to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. 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.

279 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.

280 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.

281 Any fees paid to a corporate body will be received by the body on its own behalf (unless the body is treated as a non-corporate Commonwealth entity for the purposes of the finance law or the body is providing the service on behalf of the Commonwealth, in which case it will be necessary to provide that the body receives any money on behalf of the Commonwealth.)

282 Any fees paid to a non-corporate body will be received by the body as the Commonwealth.

283 If a body (whether corporate or non-corporate) or person is authorised by a provision to collect a tax, the provision must specify that the tax is received by the body on behalf of the Commonwealth (see paragraphs 59 and 69 of Drafting Direction 3.1).

Crown immunity

Corporate bodies

284 OPC has established a policy of expressly stating for corporate 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 legislation establishing the corporate statutory 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.

285 When establishing a new corporate statutory body, you must include one of the provisions set out in paragraph 286 or 288. Which provision you include is a policy decision

for your instructors. However, generally speaking, a corporate Commonwealth entity should not be entitled to the privileges and immunities of the Crown. Specific policy authority is required for departures from this general approach.

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

xx [Statutory body] does not have privileges and immunities of the Crown

(X) [*The statutory body*] does not have the privileges and immunities of the Crown in right of the Commonwealth.

287 The Commonwealth's view is that this provision is effective in removing 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, which prevents 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.

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

xx [Statutory body] has privileges and immunities of the Crown

(X) The [*statutory body*] has the privileges and immunities of the Crown in right of the Commonwealth.

289 The Commonwealth's view is that this provision will generally be effective to confer on the body the non-legislative 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.

290 While the general effect of the provision will be to put the body in the same position as the Commonwealth in a particular circumstance, 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 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. 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 321 to 325 which deal with tax exemptions for corporate bodies.

Non-corporate bodies

291 Generally no provision is required for non-corporate bodies as it is assumed that as they form part of the Commonwealth they have the privileges and immunities of the Crown. However, in a case where a non-corporate body has members who are appointed or nominated by a State or Territory, AGS advice should be sought as to whether the body

would have Crown immunity. In such a case, it might be appropriate to include a provision clarifying whether the body has the privileges and immunities of the Crown.

Bodies that are not Commonwealth entities

292 If the PGPA Act would otherwise apply to the body or it is not clear whether the PGPA Act would apply to the body but, as a matter of policy, the PGPA Act is not to apply to the body, a section along the following lines should be included after the section establishing the body:

xx The *Public Governance, Performance and Accountability Act 2013* does not apply to [body]

For the purposes of the *Public Governance, Performance and Accountability Act 2013*, the [statutory body] is not a Commonwealth entity.

293 In this case, you should consider whether the legislation setting up the body will also need to include any financial, accountability or other provisions that are to apply to the body (for example, annual financial and performance statements, annual reports, corporate plans), as well as the body's funding arrangements (e.g. should the body be covered by the Appropriation Acts?). (See also paragraphs 52 and 54.)

Bodies corporate that are part of a Department

294 In rare cases, a body corporate is taken to be part of a Department of State. In such a case, the following precedent from the *Veterans' Entitlements Act 1986* can be used:

179A Application of the *Public Governance, Performance and Accountability Act 2013* to the Commission

Despite paragraph 10(1)(d) of the *Public Governance, Performance and Accountability Act 2013* and the definition of ***Department of State*** in section 8 of that Act, the Commission is not a Commonwealth entity for the purposes of that Act and is taken to be part of the Department for those purposes.

Note: This means that the commissioners are officials of the Department for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

Transfers of Commonwealth records

295 Provisions providing for the transfer of custody of Commonwealth records from one body to another should not be included in legislation without first consulting the National Archives of Australia. Section 24 of the *Archives Act 1983* makes general provision for Commonwealth records to be dealt with by the National Archives in an overarching and standard administrative framework.

296 Drafting Direction 4.2 provides that provisions that may result in the transfer of Commonwealth records should be referred to the National Archives.

297 Paragraphs 355 to 358 of this Drafting Direction deal with the transfer of Commonwealth records to privatised or corporatised statutory bodies.

Part 4—Drafting issues and precedents: corporate bodies only

Establishing a body corporate

298 The 2 basic forms of a body corporate are:

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

299 Finance suggest that in general:

- (a) a corporate Commonwealth entity should be incorporated without members (i.e. the members of the body should not constitute the body); and
- (b) in the exceptional case that an incorporated statutory body is treated as a non-corporate Commonwealth entity for the purposes of the finance law (see paragraphs 304 and 305), it should have members (i.e. the members of the body should actually constitute the body).

300 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
 - (d) may sue and be sued [*in its corporate name*].

301 For paragraphs (a) and (d) of the standard provision, you should delete the material in square brackets if the body does not have members (see paragraphs 303 and 312).

302 For paragraph (c) of the standard provision, 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.

Perpetual succession

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

Body corporate treated as a non-corporate Commonwealth entity

304 In the rare case where the body is a corporate body but is to be treated as a non-corporate Commonwealth entity for the purposes of the finance law, the following provision should be included after the provision establishing the body corporate:

- (2) However, [*statutory body*] is taken, for the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
- (a) to be a non-corporate Commonwealth entity, and not to be a corporate Commonwealth entity; and
 - (b) to be a part of the Commonwealth; and
 - (c) not to be a body corporate.

305 If you are asked to create a corporate statutory body that is to be treated as a non-corporate Commonwealth entity for the purposes of the finance law, you should ensure that Finance is consulted early in the drafting process.

Officials

306 For a corporate Commonwealth entity, the officials of the entity will be the persons who are in or form part of the entity (see paragraphs 25 and 26). In some cases it may not be clear which persons are in or form part of the entity. For example, if the legislation creating the entity also creates a council or committee to advise or assist the entity, the question would be whether the members of the council or committee would be officials of the entity. Generally, in cases such as these where it is not clear whether or not the person is an official of the entity, you should include a provision in the legislation clarifying the status of the person.

Seals

307 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 members.

308 If the body consists of one member only, or does not have any members at all (e.g. where it has a governing board), the seal should be described simply as the seal or the official seal.

309 The distinction drawn in paragraphs 307 and 308 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 300, does not contain "common", but it may be used in the case described in paragraph 307.

310 There should generally be no need to include a provision requiring courts, judges and persons acting judicially to take judicial notice of the seal of a body corporate. Section 150 of the *Evidence Act 1995* provides that if the imprint of a seal appears on a document and purports to be the imprint of a body corporate established by a law of the Commonwealth, a Territory or a foreign country, then it is presumed, unless the contrary is proved, that the imprint is the imprint of that seal, and the document was duly sealed as it purports to have been sealed.

311 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. The standard provision for custody of seals is as follows:

- (3) The [*statutory body's*] seal is to be kept in such custody as the [*governing body of the statutory body*] directs and must not be used except as authorised by the [*governing body*].

Capacity to sue and be sued

312 See paragraph 300 for the standard version of this provision. If the statutory body is established as a body corporate without members, the words “in its corporate name” should be omitted.

Powers

General

313 A general provision giving a corporate 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:

- (X) 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.

314 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:

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

- the power to enter contracts;
- 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).

316 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).

317 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. bodies corporate that are treated as non-corporate Commonwealth entities) before including a particular power mentioned below.

318 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.

Borrowing powers

319 The power of corporate Commonwealth entities to borrow money is dealt with in section 57 of the PGPA Act and section 21A of the PGPA rules. Finance prefers that those provisions be relied on to deal with borrowing powers of corporate bodies (rather than including specific borrowing powers). Therefore, if you are proposing to include specific borrowing powers for a corporate body, Finance should be consulted early in the drafting process. You should also consider whether the *Commonwealth Borrowing Levy Act 1987* should apply to the body.

320 If a corporate body is to have the power to borrow, the legislation establishing the body should include the following definition:

borrow includes raising money or obtaining credit, including by any of the following ways:

- (a) dealing in securities;
- (b) obtaining an advance on overdraft;
- (c) obtaining credit by way of credit card or credit voucher.

Tax exemptions

General taxation exemption

321 In establishing a corporate statutory body, a question may arise whether the body should be exempt from taxation under a law of the Commonwealth or of a State or Territory. Generally, corporate bodies should not be exempted from taxation. If you are instructed that a corporate body is to be exempted from Commonwealth taxes, you should advise your instructors to discuss the exemption with Treasury and Finance early in the drafting process. A copy of the provision, once drafted, should be referred to Treasury and Finance.

322 A general exemption provision for a Bill is often in the following form:

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

Note: However, the [*statutory body*] may be subject to taxation under certain laws (see, for example, section 177-5 of the *A New Tax System (Goods and Services Tax) Act 1999* and section 66 of the *Fringe Benefits Tax Assessment Act 1986*).

323 However, 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. Example of those provisions are the following:

- 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*.

324 These provisions mean that the standard provision in paragraph 322 will not be effective to exempt the body from those special Commonwealth taxes and specific provisions will need to be drafted to do that. 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 Treasury and Finance early in the drafting process.

325 The following is an example of a provision exempting a body from Commonwealth income tax and State and Territory taxes:

xx Exemption from taxation

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

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

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

326 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. The Commonwealth’s view is 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. This is because the overriding rules of construction are subject to a contrary intention appearing in other legislation.

327 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.

328 A corporate statutory body 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 body to be exempt from taxation, you should provide for this expressly (whether or not the provision set out in paragraph 288 has been included).

Use of subordinate instruments

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

Transaction taxes

330 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*).

331 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.

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

- (X) 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—Referring to bodies etc. in legislation

Referring to bodies and offices established by other legislation

333 At times legislation refers to a statutory body or statutory office established by other legislation. The question arises about whether it is acceptable to refer to that body or office by the name given to the body or office by the establishing legislation or whether it is necessary to include a definition for the body or office.

Bodies and offices established by Commonwealth legislation

334 Generally, if you are referring to a Commonwealth body by using the same name given to that body by its establishing legislation and there are no other Commonwealth bodies with the same name, then you should refer to the body without including a definition. For example, if in legislation you need to refer to the Office of Parliamentary Counsel, it is *not* necessary to include a definition as follows:

Office of Parliamentary Counsel means the Office of Parliamentary Counsel established by subsection 2(1) of the *Parliamentary Counsel Act 1970*.

335 However, if you are referring to the body using a name that is different from the name given by its establishing legislation, then it will be necessary to include a definition. For example, if in legislation you are referring to the Office of Parliamentary Counsel by using the term OPC, it *will* be necessary to include a definition as follows:

OPC means the Office of Parliamentary Counsel.

336 Generally, the approach in paragraphs 334 and 335 for Commonwealth bodies applies in a similar way for statutory offices established by Commonwealth legislation. That is, it is *not* necessary to include a definition for a statutory office-holder if you are referring to that office-holder by the same name given to the holder by the establishing legislation and there are no other office-holders with the same name (e.g. if you refer to the Commissioner of Taxation it is not necessary to include a definition for the Commissioner of Taxation).

337 If the approach above is not appropriate in your particular case and a definition of a Commonwealth body or office holder is needed, it should be in the form:

XYZ Agency means the XYZ Agency established by section A of the *XYZ Agency Act 2016*.

XYZ office-holder means the XYZ office-holder within the meaning of the *XYZ Act 2016*.

338 Note that you should consult Drafting Direction 1.5 if an acronym for the body or office is to be used.

339 If the statutory body that you wish to refer to is an Executive Agency, and you wish to refer to the body using the form referred to in paragraph 337, you should tell your instructors to discuss the proposed reference with the Parliamentary and Government Branch of PM&C and the Public Management Reform Agenda Implementation Branch of Finance.

Bodies and offices established by State/Territory legislation

340 While similar principles as above apply when referring to State/Territory bodies and offices, extra care needs to be taken to make it clear where the body or office is established. If there are many references to the body or office this could be achieved by using a definition. For example, if you need to refer to the Independent Commission Against Corruption (which is established under the *Commission Against Corruption Act 1988* of New South Wales), you will need to make it clear it is the Independent Commission Against Corruption of New South Wales and could include the following definition:

Independent Commission Against Corruption means the Independent Commission Against Corruption of New South Wales.

341 For other examples of references to State/Territory bodies, see subsection 6A(7) of the *Surveillance Devices Act 2004*.

Referring to funds and accounts established by Commonwealth legislation

342 Generally, the approach above for references to Commonwealth bodies and offices applies to funds or accounts that are established by Commonwealth legislation. That is, if you need to refer to a fund or account that has been established by another Act, you can refer to that fund or account by using the same name given by its establishing Act.

Referring to non-statutory bodies in legislation

343 Care needs to be taken when referring to non-statutory bodies (such as administrative units established within a Department) in legislation.

344 If your instructors want to refer to a particular non-statutory body in legislation, 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 and that this can be done administratively, without any need for legislation. If this were to happen, it would be desirable for the reference to the body still to work.

345 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).

346 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 Public Management Reform Agenda Implementation Branch of Finance (PMRA@finance.gov.au).

347 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 office in a Department, it may be possible instead to refer to APS employees in the Department whose duties include specified matters.

Effect of name changes

348 If a body (statutory or non-statutory) is referred to by name in legislation, 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.

349 If the reference is changed under a legislative 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 *Legislation Act 2003*.

Part 6—Winding-up and transfer of functions of statutory bodies—vesting of moneys in the Commonwealth or other bodies

350 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. Such a provision would make available not only the unspent balance of moneys appropriated by the Commonwealth, but also unspent money received from other sources. 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.

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

352 You should also be aware of section 75 of the PGPA Act. That section provides that, where a function of one non-corporate Commonwealth entity (within the meaning of that Act) (the *transferring entity*) is transferred to another non-corporate Commonwealth entity, either because the transferring entity is abolished or for any other reason, the Finance Minister may determine that one or more Schedules to one or more Appropriation Acts are amended in a specified way.

Part 7—Privatising or corporatising statutory bodies

Crown immunity

353 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.

354 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

355 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 made for the purpose of that section.

Section 28A of the Archives Act

356 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.

357 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.

xx 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.
- (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

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

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