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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMMONWEALTH AUTHORITIES AND COMPANIES BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Finance,
the Honourable Kim C. Beazley, MP)

COMMONWEALTH AUTHORITIES AND COMPANIES BILL 1994

OUTLINE

1. The *Commonwealth Authorities and Companies Bill 1994* (the CAC Bill) is one of three Bills that give effect to the Government's decision to replace the *Audit Act 1901* with modern legislation which deals with the financial management, accountability and audit of Commonwealth agencies, authorities and companies. The other Bills are the *Financial Management and Accountability Bill 1994* and the *Auditor-General Bill 1994*.

2. The CAC Bill will replace and enhance Part XI of the *Audit Act 1901*, which currently provides standard financial provisions for public authorities and certain other bodies. It will also replace individual financial provisions contained in the enabling legislation of authorities not subject to Part XI.

3. Broadly, the CAC Bill will provide a single set of core reporting and auditing requirements for directors of 'Commonwealth authorities' and set out standards of conduct for executive officers. Many of these requirements are modelled on comparable areas of the *Corporations Law* as well as best practice currently applying to individual authorities. The Bill will also provide a single set of requirements for ensuring that 'wholly-owned Commonwealth companies' keep Ministers and the Parliament informed of their activities.

4. The Auditor-General's mandate will be extended to all Commonwealth authorities and Commonwealth companies without exception. In so doing, the requirements for reports of the Auditor-General in relation to authorities will be made consistent with those required by the *Corporations Law*.

5. The approach adopted by the Bill will enable the accountability requirements of all Commonwealth controlled bodies to be viewed as a whole and should significantly streamline the Government's and the Parliament's interest in this area.

6. For the purposes of the Bill:

'Commonwealth authority' means either of the following kinds of body that holds money on its own account:

(a) a body corporate that is incorporated for a public purpose by an Act;

(b) a body corporate that is incorporated for a public purpose by:

(i) regulations under an Act;

(ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance;

and is prescribed by regulations;

'Commonwealth company' means a *Corporations Law* company in which the Commonwealth has a controlling interest; and

'Wholly-owned Commonwealth company' means a Commonwealth company other than a company any of the shares in which are beneficially owned by a person other than the Commonwealth.

7. Consequential upon the repeal of the *Audit Act 1901* and the coming into operation of this Bill, it will be necessary to make amendments to the enabling legislation of each Commonwealth authority and company (where the company was established by a separate Act).

FINANCIAL IMPACT STATEMENT

8. The Bill is intended to improve the quality and clarity of understanding of the Commonwealth's financial management framework and to sharpen accountability for financial management performance. These factors, in turn, are expected to translate into more efficient, effective and ethical use of the Commonwealth's resources.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

1. This clause provides for the Act to be cited as the *Commonwealth Authorities and Companies Act 1994*.

Clause 2 - Commencement

2. This clause provides that the Act shall commence on the same day as the Financial Management and Accountability Act 1994 .

Clause 3 - This Act binds the Crown

3. This clause sets out the liability of the Crown under the Act.

Clause 4 - This Act extends to things outside Australia

4. This clause provides that, unless the contrary intention appears, the Act reverses the rule of construction in sub-section 21(b) of the *Acts Interpretation Act 1901* by extending its application outside Australia.

PART 2 - GENERAL DEFINITIONS

Clause 5 - General Definitions

5. The scope and intent of the range of definitions are largely self-explanatory, but the following points should be noted:

Although a definition is included for "consolidated financial statements", the requirement to prepare such statements will be included in the Finance Minister's Orders (clause 2 of Schedule 1 to the Bill) and not in the Act. However, some of the rules (clauses 6 and 7 of Schedule 1 to the Bill) for the auditor's report refer to consolidated financial statements.

"*Corporations Law*" has the same meaning as in the *Corporations Act 1989*.

For the purposes of the definition of "executive officer", a person is concerned in, or takes part in, the management of a Commonwealth authority, if he or she has authority to act in an independent and significant manner and is not subject to the close supervision or control of others more senior in the hierarchy of the authority. The term is intended to have a meaning that is equivalent to its meaning in section 232 of the *Corporations Law*.

In general, "GBEs" or "government business enterprises" should satisfy three criteria: they are commercial, trade outside the public sector, and are not primarily regulatory bodies.

In general, "SMAs" or "statutory marketing authorities" are Commonwealth authorities whose operations are funded wholly or mainly from levies (or similar charges) paid by primary producers for whose benefit the authority performs marketing functions.

- For the purposes of the definition of "subsidiary", "control" means the capacity of an entity to dominate decision making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in pursuing the objectives of the controlling entity.

For the purposes of the definition of "subsidiary", "entity" means any legal, administrative, or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives.

Clause 6 - Effect of maximum penalty at foot of section or subsection.

6. This clause is self-explanatory.

PART 3 - REPORTING AND OTHER OBLIGATIONS FOR COMMONWEALTH AUTHORITIES

Division 1 - Preliminary

Clause 7 - Meaning of "Commonwealth Authority"

7. This clause is broadly based on sections 63B and 63C of the *Audit Act 1901*. However it does not separate the requirements for public authorities required to keep accounts in accordance with commercial practice and those not required to keep accounts in accordance with commercial practice. Any distinction will be dealt with in the Finance Minister's Orders.

8. In addition to the *Audit Act 1901* requirement that a Commonwealth Authority be a body corporate incorporated for a public purpose it is necessary for such an authority to hold money on its own account.

9. The exclusion of *Corporations Law* companies is intended to apply to Commonwealth companies that were originally established by enabling legislation and later 'converted' into companies e.g. the Commonwealth Bank.

Clause 8 - Part does not apply to certain Commonwealth authorities.

10. The effect of this clause will be to apply the Act only to authorities that are currently subject to Part XI of the *Audit Act 1901*. The clause will be repealed when the scope of the Act is extended to non-Part XI authorities by subsequent amending Acts.

Division 2 - Reporting obligations

Subdivision A - Annual report and related obligations

Clause 9 - Directors must prepare annual report

11. The intention of this clause is to bring together the separate obligations to prepare a report of operations, financial statements and an auditor's report into a single annual report. The obligations are imposed on directors whereas the Audit Act imposes them on the authorities.

12. The annual report must be given to the responsible Minister not later than the 15th day of the 5th month after the end of the authority's financial year (defined as the authority's annual accounting period). This means, in effect, that an authority must give the annual report to the responsible Minister within four and a half months of the end of its financial year and is modelled on the reporting period imposed on companies by the *Corporations Law*. Consequently, if an authority's financial year ends on 30 June, the deadline will be 15 November. Previously, pursuant to the *Acts Interpretation Act 1901*, authorities were allowed until 31 December to give the relevant documents to the Minister.

Clause 10 - Modified requirements for first year of existence

13. This clause recognises that where an authority is established during the last three months of its financial year a separate annual report for the period between the date the authority was established and the end of the financial year would have limited value. Consequently, in such circumstances, the authority's first annual report shall be in respect of the period between the date of its establishment and the end of the following financial year.

14. If, for example, an authority were established within a month of the end of its financial year, that month would be added to the next financial year for reporting purposes.

Clause 11 - Penalty for contravention of annual report rules by directors

15. Section 4AA of the *Crimes Act 1914* sets the current value of a penalty unit. (Currently this is \$100).

Clause 12 - Audit of relevant subsidiary's financial statements

16. The main purpose of this clause is to make clear that the mandate of the Auditor-General to audit financial statements extends to subsidiary companies of Commonwealth authorities. The Auditor-General must prepare a report even if another auditor is appointed as auditor of the subsidiary.

Subdivision B - Other reporting obligations

Clause 13 - Interim financial statements

17. The purpose of this clause is to provide for Commonwealth authorities to prepare interim financial statements, and for the responsible Minister to table them in the Parliament.

18. The intention is that the Finance Minister will, in the normal course, consult with the responsible Minister prior to requiring an individual authority to provide interim financial statements under this clause.

Clause 14 - Estimates of receipts and expenditure

19. The intention of this clause is to provide consistency between, and best practice in, the equivalent provisions presently included in the enabling Acts of some Commonwealth authorities.

Clause 15 - Responsible Minister to be notified of significant events

20. The purpose of the clause is to ensure that the responsible Minister is informed of proposed involvement in significant new business ventures or changes in such ventures. Such notice could highlight a change in the strategic direction of an authority and would provide the Minister with an opportunity to respond. The responsible Minister may issue guidelines on the extent of reporting he or she requires under this clause.

21. It is expected that the Finance Minister's Orders issued in accordance with clause 1 of Schedule 1 will require ex post notification of such events in the report of operations.

Clause 16 - Keeping responsible Minister and Finance Minister informed

22. This clause is based on section 47 of the *Australian Postal Corporation Act 1989* and similar provisions in enabling Acts of other authorities. It is different in that it also allows the Finance Minister, as well as the responsible Minister, to obtain reports, documents and information on the operations of an authority and its subsidiaries.

23. Where the Finance Minister requires reports, documents and information pursuant to this clause, it is intended that, in the normal course, he or she will first consult with the responsible Minister and, where appropriate, provide a copy of any report, document or information obtained to the responsible Minister. Such consultative arrangements have not been included in the Bill because it is long standing policy, affirmed by successive governments, that, as a general rule, the internal operations of government should not be reflected in legislation.

Clause 17 - Corporate plan for GBE

24. The corporate plan is a key element in the Government's accountability arrangements applying to Government Business Enterprises (GBEs). The plan is a vehicle for GBEs to inform responsible Ministers about the strategic direction proposed by the GBE, as well as providing a record of performance against previous plans. The

intention of this clause is to ensure that the directors of each GBE prepare, annually, a corporate plan for provision to the responsible Minister and that the plan includes certain minimum information specified in sub-clause (6). The clause would replace the equivalent provisions in the enabling legislation of existing GBEs. It is intended that, in the normal course, the responsible Minister will consult with the Finance Minister on such things as financial targets and dividend policies.

25. Clause 17 does not address action arising from responsible Ministers' consideration of corporate plans. Any comments or directions in relation to the contents of corporate plans would be made by responsible Ministers having regard to the provisions, where relevant, of enabling legislation.

Division 3 - Banking, investment etc.

Clause 18 - Banking and investment (authorities other than GBEs and SMAs)

26. This clause requires Commonwealth authorities which have not been prescribed as GBEs or SMAs to pay all moneys received into an approved bank. (The meaning of "approved bank" in sections 63D and 63J of the *Audit Act 1901* has been extended to include the Reserve Bank of Australia and a bank established by or under a State Act). Any moneys surplus to immediate operations may be invested in the manner specified, which includes any manner approved by the Treasurer. (The manner specified in section 63E of the *Audit Act 1901* has been extended to include securities issued by, or guaranteed by, the Commonwealth, a State or Territory).

Clause 19 - Banking and investment (GBEs and SMAs)

27. This clause requires Commonwealth authorities that have been prescribed as GBEs or SMAs to pay all money received into a bank (which may not necessarily be an approved bank). Any moneys surplus to immediate operations may be invested in the manner specified, which includes any manner that is consistent with sound commercial practice. This is consistent with the existing practice of most GBEs and SMAs.

Clause 20 - Accounting records

28. The standards that accounting records must meet are governed by the information ultimately required for the preparation and audit of financial statements and is based on that used in the *Corporations Law*. The Auditor-General must form an opinion on whether the authority has kept accounting records as required and state particulars of any contravention in the auditor's report.

Division 4 - Conduct of executive officers

Clause 21 - Directors must disclose pecuniary interests

29. This clause is broadly based on provisions currently contained in the enabling Acts of several authorities and is considered to represent current best practice. It takes account

of recommendations of the Report of the Committee of Inquiry into Public Duty and Private Interest (the "Bowen Committee"). This committee recommended that, so far as practicable, the provisions concerned be standardised.

Clause 22 - Executive officers must act honestly etc.

30. This clause is similar in principle to the corresponding provision in section 232 of the *Corporations Law*. Its purpose is to ensure that executive officers of Commonwealth authorities are subject to similar standards of conduct as executive officers of companies.

Clause 23- Improper use of inside information or position

31. This clause is similar in principle to the corresponding provisions in section 232 of the *Corporations Law*, but without reference to "employee or former employee". Employees would generally be "Commonwealth officers" for the purposes of the *Crimes Act 1914* and subject to the *Crimes Act 1914* rules concerning improper behaviour.

Clause 24 - Liability of executive officer to pay compensation or damages

32. This clause is similar in principle to the corresponding provision in section 232 of the *Corporations Law*. Its purpose is to provide comparable liabilities for payment of compensation to those faced by directors of companies.

Clause 25 - Other obligations and remedies not affected

33. This clause is similar in principle to the corresponding provision in section 232 of the *Corporations Law*.

Clause 26 - Restrictions on indemnifying executive officers

34. This clause is based on section 241 of the *Corporations Law* and provides that, subject to the exceptions below, a Commonwealth authority, or its subsidiary, is prohibited from indemnifying (either directly, or indirectly through an interposed entity), or exempting, a person who is, or has been, an executive officer of the authority, from liability incurred by the person in that capacity. The following exceptions to the prohibition are provided for:

35. An executive officer may be indemnified against a liability to another person (other than the authority or its subsidiary) provided the liability does not arise out of conduct involving a lack of good faith. Thus an authority would, for example, be able to indemnify a director in a situation where he or she was negligent and caused loss to a third party in his or her capacity as a director. However, if the director acted without good faith, the indemnity would not be permitted.

36. An authority may indemnify an executive officer against a liability for costs and expenses incurred in defending civil or criminal proceedings in which judgement is given in favour of the executive officer or in which the executive officer is acquitted. However the exception does not apply to any substantive liability which may be incurred as a result of the proceedings.

Clause 27 - Insurance premiums for indemnity insurance of executive officers

37. This clause is based on section 241A of the *Corporations Law* and provides that, subject to the exception below, a Commonwealth authority, or its subsidiary, is prohibited from paying, or agreeing to pay (either directly, or indirectly through an interposed entity) a premium in respect of a contract which insures an executive officer (or former executive officer) against a liability arising out of conduct involving a wilful breach of duty to the authority or a contravention of clause 23. Any contract of insurance which insures a person in contravention of this clause is void to the extent of such contravention. (The prohibition does not prevent a third party from paying or agreeing to pay an insurance premium for an executive officer.)

38. The clause provides for an exception to the prohibition where an authority, or its subsidiary, pays a premium in respect of a contract insuring an executive officer in respect of a liability for costs or expenses incurred by the executive officer in defending civil or criminal proceedings, whether or not such defence is successful. However, the exception does not apply to any substantive liability that may be incurred as a result of the proceedings.

Division 5 - Miscellaneous

Clause 28 - Compliance with general policies of the Government

39. This clause is based on section 48 of the *Australian Postal Corporation Act 1989* except that it requires the responsible Minister to first consult with the Board of Directors before giving them formal notification of government policies. Such policies cannot be in conflict with any statutory obligations of an authority. The clause is intended to cover such situations as, for example, trade contact with foreign countries or equal employment opportunity policy.

40. In interpreting what is a general policy of the Government, a reasonable test would be whether the policy is capable of being applied to the majority of, or all, Commonwealth authorities; if capable of being applied only to one or a very few, it would not reasonably be regarded as falling within the meaning of "general policies" and should, if necessary, be addressed in the authority's enabling legislation.

41. It is expected that the Finance Minister's Orders issued in accordance with clause 1 of Schedule 1 will require details of notifications given to directors under this clause to be included in the report of operations.

Clause 29 - Activities of subsidiaries

42. The intention of this clause is to give effect to a recommendation of the Senate Standing Committee on Finance and Public Administration in the report "Government Companies and their Reporting Requirements" that any authority be prevented from conducting through subsidiaries any operations which are beyond the powers of the authority (unless otherwise permitted by another Act).

Clause 30 - Aligning accounting periods of subsidiaries

43. This clause is based on section 290 of *Corporations Law*. It is necessary for an authority and its subsidiaries to have common financial years in order to comply with accounting standards and prepare financial statements which give a true and fair view for the group as an "economic entity".

Clause 31 - Exemption from requirement to align accounting periods of subsidiaries

44. The power of the Finance Minister to grant a written exemption in relation to the alignment of financial years of subsidiaries is based on that given to the Australian Securities Commission under Section 290 of the *Corporations Law*.

45. It is expected that the Finance Minister's Orders issued in accordance with clause 2 of Schedule 1 will require exemptions to be reported in the authority's financial statements.

Clause 32 - Audit committee

46. The establishment of audit committees is aimed at helping authorities and their directors to comply with their obligations under the Act (e.g. by providing a forum for communication between directors, senior managers and auditors). This is directed to the enhancement of internal controls and the reliability of the financial statements of an authority.

Clause 33 - Special rules for Commonwealth authorities established by regulations etc.

47. The corporate status of some existing bodies is conferred by regulation under another Act or by an Ordinance of an External Territory, e.g. the International Centre for Settlement of Investment Disputes (Regulation No. 42, 1991). This clause provides that regulations under this Act may modify the way in which the Act applies to such bodies where such application would be inappropriate.

PART 4 - REPORTING AND OTHER OBLIGATIONS FOR COMMONWEALTH COMPANIES

Division 1 - Preliminary

Clause 34 - Meaning of "Commonwealth company" and "wholly-owned Commonwealth company"

48. The purpose of the definitions in this clause is to enable the Auditor-General's mandate to be applied to all 'Commonwealth companies' and require the tabling of their annual reports in Parliament, but to limit the general application of the companies provisions in the Bill to 'wholly-owned companies'.

49. The effect is for Subdivision A to apply to all companies in which the Commonwealth has a direct controlling interest and for Subdivisions B and C to apply only to wholly-owned Commonwealth companies.

Division 2 - Reporting Obligations

Subdivision A - Annual report and related obligations

Clause 35 - Annual Report

50. The purpose of this clause is to ensure that the responsible Minister is given a Commonwealth company's annual general meeting documents at least 14 days in advance of each annual general meeting and that the responsible Minister tables the documents in the Parliament. If the auditor's report on the financial statements is prepared by an auditor other than the Auditor-General, then the Auditor-General is to also prepare a report on the financial statements using the same *Corporations Law* rules that were applicable to the other auditor's report.

Clause 36 - Audit of relevant subsidiary's financial statements

51. This clause applies provisions to Commonwealth companies that are equivalent to those applied to Commonwealth authorities by clause 12. Its purpose is to ensure that the Auditor-General audits the financial statements of all subsidiaries even though another auditor may have been appointed as auditor of the subsidiary.

Subdivision B - Other reporting obligations

Clause 37 - Interim financial statements

Clause 38 - Estimates of receipts and expenditure

Clause 39 - Responsible Minister to be notified of significant events

Clause 40 - Keeping responsible Minister and Finance Minister informed

Clause 41 - Corporate Plan for GBE

52. These clauses apply to wholly-owned Commonwealth companies provisions equivalent to those applied to Commonwealth authorities by, respectively, clauses 13, 14, 15, 16 and 17. (However, when reading paragraph 25 above in the context of companies, the reference to enabling legislation should be read as a reference to memoranda and articles of association).

Subdivision C - Miscellaneous

Clause 42 - Compliance with general policies of the Government

Clause 43 - Audit committee

53. These clauses apply to wholly-owned Commonwealth companies provisions equivalent to those applied to Commonwealth authorities by, respectively, clauses 28 and 32.

PART 5 - MISCELLANEOUS

Clause 44 - Ministers must inform Parliament of share acquisitions etc

54. This clause gives effect to the Government's response to a recommendation of the Senate Standing Committee on Finance and Public Administration in their report "Government Companies and their Reporting Requirements". It relates only to companies in which the Commonwealth has or acquires a direct interest and does not relate to interests in companies where another body corporate is interposed between the Commonwealth and the company (ie it does not apply to subsidiaries of Commonwealth authorities or companies).

Clause 45 - Companies conducted for the purposes of intelligence or security agencies

55. This clause recognises that, for certain aspects of the operations of the intelligence and security agencies, it may be neither practicable nor desirable (from an operational viewpoint) for procedures included in the range of reporting and accountability requirements applicable to Commonwealth companies to be applied to companies conducted for the purposes of the intelligence and security organisations.

Clause 46 - Finance Minister's Orders

56. Although Orders cannot create offences, the Act creates offences for failing to comply with rules whose details are in the Orders. The current 'Guidelines for Financial Statements of Public Authorities and Commercial Activities' issued by the Finance Minister are expected to form the basis of Orders relating to financial statements. Those guidelines have been reviewed annually since their inception in 1983 and reflect current accounting standards and business practices.

Clause 47 - Regulations

57. This clause permits the Governor-General to make regulations prescribing matters as required or permitted by this Bill or which are necessary or convenient for the carrying out of the provisions of the Bill. In particular, the regulations may require the provision of financial statements, estimates or other information by overseas corporations in which the Commonwealth has a controlling interest. The purpose of this clause is to take account of interests that the Commonwealth may acquire in the future.

SCHEDULE 1 - ANNUAL REPORT FOR COMMONWEALTH AUTHORITY

Division 1 - Contents of annual report

Clause 1 - Summary of contents

1. The annual report may include matters other than those specified in this clause, for example, matters that another Act, or Ministerial guidelines, require to be included. (From time to time the Prime Minister issues guidelines on certain disclosures in annual reports.)

Clause 2 - Financial statements

2. This clause inserts a quality standard requiring financial statements to give a "true and fair view" of the matters required by Orders issued by the Finance Minister. The existing "Guidelines for Financial Statements of Public Authorities and Commercial Activities" are expected to form the basis of the Orders for financial statements.

Division 2 - Auditor's report on financial statements

Clause 3 - Whether the statements comply with the Finance Minister's Orders

3. This clause is intended to have a similar effect to sub-section 331B(1) of the *Corporations Law*.

Clause 4 - Proper accounting records not kept

4. This clause is based on section 331E(1) and (2)(b) of the *Corporations Law*.

Clause 5 - Inadequate information and explanations

5. This clause is based on section 331E(1) and (2)(a) of the *Corporations Law*.

Clause 6 - Subsidiaries' financial statements

6. This clause is based on section 331C of the *Corporations Law*.

Clause 7 - Deficiencies in consolidation

7. This clause is based on section 331E(2)(d) of the *Corporations Law*.



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