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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMMONWEALTH AUTHORITIES AND COMPANIES BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Finance,  
the Honourable John Fahey, MP)



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AN ACT TO AMEND THE COMPANIES ACT, 1956.  
CHAPTER 1

## COMMONWEALTH AUTHORITIES AND COMPANIES BILL 1996

### OUTLINE

1. The *Commonwealth Authorities and Companies Bill 1996* (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 1996* and the *Auditor-General Bill 1996*.
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 establishing 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 officers. Many of these requirements are modelled on comparable areas of the *Corporations Law* and thus, to the extent practicable, apply standards and principles applicable to private sector corporations. They also draw on 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 Bill establishes a penalty regime modelled on that in the *Corporations Law*. Accordingly, a number of the Bill's provisions are identified as 'civil penalty provisions' the breach of which may attract civil or criminal sanctions depending on whether the breach is accompanied by a dishonest intent.
5. The Auditor-General's mandate will be extended to all Commonwealth authorities and Commonwealth companies. In so doing, the requirements for reports of the Auditor-General in relation to authorities will, as far as practicable, be made consistent with those required of companies by the *Corporations Law*.
6. 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.
7. 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; or
    - (ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance;

and is prescribed by regulations under the proposed Act;

"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.

8. Consequent 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 establishing legislation of each Commonwealth authority and company (where the company was established by a separate Act). These consequential amendments are contained in the Audit (Transitional and Miscellaneous) Amendment Bill 1996.

#### **FINANCIAL IMPACT STATEMENT**

9. 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 1996*.

#### **Clause 2 - Commencement**

2. This clause provides that the Act shall commence on the same day as the *Financial Management and Accountability Act 1996*.

#### **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 PROVISIONS ABOUT DEFINITIONS , OFFENCES AND CIVIL PENALTIES**

#### **Clause 5 - 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*.

The term "officer" is used in the provisions of the Bill relating to conduct. The definition of "officer" is intended to align the meaning of the term with its meaning in the provisions of the *Corporations Law* relating to conduct.

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 significantly 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 - Offences

6. Subclause (1) effectively applies the Criminal Code Act 1995 to offences against clauses 20, 30 and 36. The Criminal Code Act 1995 contains the general principles of criminal responsibility which are to apply to all criminal offences and incorporates Chapter 2 of the Model Criminal Code developed by the Standing Committee of Attorneys-General as part of the scheme to develop uniform criminal laws throughout Australia.

7. Other offences against the proposed Act are incorporated in the civil and criminal penalty regime implemented by Schedule 2.

### **PART 3 - REPORTING AND OTHER OBLIGATIONS FOR COMMONWEALTH AUTHORITIES**

#### **Division 1 - Preliminary**

##### Clause 7 - Meaning of "Commonwealth Authority"

8. This clause is self-explanatory.

##### Clause 8 - Role of Auditor-General

9. This clause is intended to state the policy of the Government, reiterated by various Parliamentary Committees, that the mandate of the Auditor-General is to extend to all Commonwealth authorities and their subsidiaries.

## **Division 2 - Reporting obligations**

### *Subdivision A - Annual report and related obligations*

#### Clause 9 - Directors must prepare annual report

10. 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 1901* imposes them on the authorities.

11. The annual report must be given to the responsible Minister not later than the 15th day of the 4th month after the end of the authority's financial year. This means, in effect, that an annual report must be given to the responsible Minister within three and a half months of the end of its financial year and is similar in effect to the principles recently adopted by the Government in relation to departmental annual reports. Consequently, if an authority's financial year ends on 30 June, the deadline will be 15 October.

12. The responsible Minister is in turn required to table the report as soon as practicable. By virtue of subclause (3) and subsection 34B(3) of the *Acts Interpretation Act 1901*, this will require the responsible Minister to table the annual report in both Houses of Parliament within 15 sitting days after he or she receives it.

13. The obligations imposed on persons by this clause are not necessarily required to be performed personally. While the clause does impose a responsibility on the persons concerned to ensure that the things required to be done are in fact done, whether those things are in fact done personally, or whether they can be delegated to others will depend on the nature of the obligation and the particular circumstances.

#### Clause 10 - Modified requirements for first year of existence

14. 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 may be in respect of the period between the date of its establishment and the end of the following financial year.

15. If, for example, an authority was 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

16. Subclause (1) is based on subsection 318(1) of the *Corporations Law* and provides, by virtue of subclause (3), that each director who causes a contravention of the annual reporting requirements set out in clause 9 and Schedule 1, or who fails to take all reasonable steps to comply with those requirements, contravenes subclause (1).

17. Subclause (1) is a civil penalty provision by virtue of item 2 of Schedule 2. Schedule 2 sets out the civil and criminal consequences of contravening a civil penalty provision.

18. Subclause (2) is unusual in that it reverses the normal onus of proof. This is consistent with subsection 318(3) of the *Corporations Law*. The purpose of this is to ensure that directors of Commonwealth authorities are not placed in a more advantageous position than the directors of companies in this regard.

#### Clause 12 - Audit of relevant subsidiary's financial statements

19. The purpose of this clause is to make clear that the mandate of the Auditor-General to audit financial statements extends to subsidiaries of Commonwealth authorities. The directors of a parent authority are obliged, subject to subclause (4), to ensure that the financial statements of a subsidiary are audited by the Auditor-General even if another auditor is appointed as the auditor of the subsidiary. However, subsection (4) recognises that this may not always be practicable in the case of overseas subsidiaries.

#### *Subdivision B - Other reporting obligations*

#### Clause 13 - Interim reports

20. This clause provides that the Finance Minister may require Commonwealth authorities, or a class of Commonwealth authorities, to prepare and give to the responsible Minister an interim report which the Minister must table in each House of the Parliament.

21. The contents of the interim report shall include a report of operations and financial statements prepared in accordance with Finance Minister's Orders together with a report prepared by the Auditor-General in accordance with regulations. It is proposed that the regulations will specify the nature of the audit report which will in turn oblige the Auditor-General to conduct a review or, where requested by the Finance Minister, an audit, of the interim financial statements.

22. The intention is that the Finance Minister will, in the normal course, consult with relevant parties prior to requiring the preparation of interim reports under this clause.

#### Clause 14 - Estimates

23. The Government has agreed in principle to a phased implementation of the National Commission of Audit's recommendation for a financial framework for the Commonwealth based on accrual accounting, subject to a scoping study to examine costs, coverage and transitional arrangements. The term "budget estimates" is intended to accommodate both the current system of cash budgets (i.e., estimates of receipts and expenditure) and any proposed system of accrual budgets.

#### Clause 15 - Responsible Minister to be notified of significant events

24. The purpose of this clause is to ensure that the responsible Minister is informed of any 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 will 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.

25. It is envisaged 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

26. 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 a 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

27. 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 subclause (6). The clause will replace the equivalent provisions in the establishing legislation of existing GBEs. It is envisaged that, in the normal course, the responsible Minister will consult with the Finance Minister on such things as financial targets and dividend policies.

28. Subclause (5) requires directors to keep the responsible Minister informed of significant changes to the corporate plan and also matters that may significantly affect the achievement of the objectives of the plan. This is consistent with current practice for a number of GBEs and will facilitate the Government's GBE accountability requirements. Subclause (8) will enable the responsible Minister to issue guidelines for use by the directors in deciding which matters are covered by subclause (5).

29. 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 will 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)

30. This clause requires Commonwealth authorities which have not been prescribed as GBEs or SMAs to pay all moneys received into a bank. Any money surplus to immediate operations may be invested in the manner specified, which includes any manner approved

by the Treasurer. (The only securities specified by section 63E of the *Audit Act 1901* were those issued by the Commonwealth. This has been extended to include securities issued by, or guaranteed by, the Commonwealth, a State or Territory).

31. Subclause (4) is directed at those Commonwealth authorities whose establishing legislation contains a provision that the authority cannot enter into a contract involving expenditure over a specified amount of money without the consent of the responsible Minister. Subclause (4) is intended to ensure that such limitations do not apply to investments unless the establishing legislation expressly provides otherwise.

#### Clause 19 - Banking and investment (GBEs and SMAs)

32. This clause requires Commonwealth authorities that have been prescribed as GBEs or SMAs to pay all money received into a bank. Any money surplus to immediate operations may be invested in the manner specified, which includes any manner that is consistent with sound commercial practice.

33. The clause is not intended to unduly hinder GBEs and SMAs in their choice of investments or mode of investing. For example, it is intended that GBEs and SMAs be able to place surplus money with a funds manager.

34. Subclause (4) is directed at those Commonwealth authorities whose establishing legislation contains a provision that the authority cannot enter into a contract involving expenditure over a specified amount of money without the consent of the responsible Minister. Subclause (4) is intended to ensure that such limitations do not apply to investments unless the establishing legislation expressly provides otherwise.

#### Clause 20 - Accounting records

35. 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*. (Clause 4 of Schedule 1 to the Bill obliges the Auditor-General to 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 officers

#### Clause 21 - Directors must disclose material personal interests

36. This clause provides for the disclosure by a director of a Commonwealth authority of any material personal interest the director may have in any matter that is being considered, or about to be considered, by the Board. It is broadly based on the equivalent provision in the *Corporations Law* relating to public companies. 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 - General obligations on officers

37. The purpose of this clause is to ensure that officers of Commonwealth authorities are subject to comparable standards of conduct as officers of companies under the *Corporations Law*.

38. Subclause (1) is based on subsection 232(2) of the *Corporations Law* and is a civil penalty provision by virtue of item 2 of Schedule 2. Schedule 2 sets out the civil and criminal consequences of contravening a civil penalty provision.

39. Subclause (2) is also a civil penalty provision by virtue of item 2 of Schedule 2 and is based on subsection 232(4) of the *Corporations Law*. The inclusion of the expression "a reasonable person" is intended to confirm that the required standard of care and diligence is to be determined objectively. The subclause obliges a Court to place the reasonable person "in a like position" with that of the relevant officer. Accordingly, the special background, qualifications and management responsibilities of the particular officer may be relevant in evaluating his or her compliance with the standard of care. At the same time, such an evaluation should recognise that decisions must be made on the basis of the circumstances at the time and without the benefit of hindsight.

40. Subclause (2) also obliges the Court to place the reasonable person in the position of an officer "in the authority's circumstances". Thus, it recognises that what constitutes the proper performance of the duties of an officer of a particular authority is influenced by matters such as the provisions of the authority's establishing legislation (including the nature of the functions and powers of the authority), the size of the authority, the composition of the Board, the state of the authority's financial affairs and the urgency and magnitude of the problem concerned

Clause 23 - Officers must not make improper use of inside information or position

41. Subclause (1) is similar in principle to the corresponding provisions in subsections 232(5) and (6) of the *Corporations Law* except that

- Paragraph (b) refers to detriment caused to another person (in addition to the authority). This recognises the interest members of the general public, or a section of the general public, as well as the Commonwealth, may have in the operations of the authority.
- There is no reference to an "employee or former employee". Employees would generally be "Commonwealth officers" for the purposes of the *Crimes Act 1914* and therefore subject to the *Crimes Act 1914* rules concerning improper behaviour.

42. Subclause (1) is a civil penalty provision by virtue of item 2 of Schedule 2. Schedule 2 sets out the civil and criminal consequences of contravening a civil penalty provision.

43. The purpose of subclause (2) is to make it clear that an officer who is also a public servant cannot be in breach of subclause (1) merely because of anything he or she may do in the normal course of his or her duties as a public servant. Such a person will not be in breach of subclause (1) if, for example, he or she discloses information, acquired by virtue

of his or her position as a director of an authority, during policy discussions with other public servants or the responsible Minister.

Clause 24 - Effect of civil penalty disqualification on being a director

44. This clause is linked to paragraph 4(3)(a) of Schedule 2. The latter provides that if a person has contravened a civil penalty provision, the Court may make an order disqualifying the person, for such period as is specified in the order, from being a director of a Commonwealth authority. Such an order by the Court constitutes a civil penalty disqualification by virtue of subclause (3) of clause 24.

45. Subclause (1) provides that the office of a director is vacated if the person holding the office becomes subject to a civil penalty disqualification. (This provision is based on paragraph 224(1)(h) of the Corporations Law).

46. Subclause (2) provides that a person whose office is vacated by virtue of subclause (1) cannot be reappointed as a director until the end of the period specified in the disqualification unless leave is granted by the Court under item 8 of Schedule 2. (This provision is based on subsection 224(6A) of the Corporations Law).

Clause 25 - Other obligations and remedies not affected

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

Clause 26 - Indemnifying officers

48. This clause is intended to clarify the power of Commonwealth authorities to indemnify a person who is or has been an officer of the authority. Essentially it places officers of Commonwealth authorities in the same position as officers of companies. (The clause is based on section 241 of the *Corporations Law*).

49. 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 officer of the authority, from liability incurred by the person in that capacity.

50. An 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.

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

52. Subject to the limitations imposed by clause 26, Commonwealth authorities have the power to indemnify a person who is or has been an officer against liabilities incurred by the person as an officer by virtue of subclause (3).

Clause 27 - Insurance premiums for indemnity insurance of executive officers

53. This clause is intended to clarify the power of Commonwealth authorities to insure a person who is or has been an officer of the authority. Essentially it places officers of Commonwealth authorities in the same position as officers of companies. (This clause is based on section 241A of the *Corporations Law*).

54. 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 officer (or former 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 officer).

55. 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 officer in respect of a liability for costs or expenses incurred by the 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.

56. Subject to the limitations imposed by clause 27, Commonwealth authorities have the power to insure a person who is or has been an officer against liabilities incurred by the person as an officer by virtue of subclause (4).

Division 5 - Miscellaneous

Clause 28 - Compliance with general policies of the Government

57. This clause is directed at Government policies that are "general" in the sense that they are applicable across the Commonwealth government sector. A reasonable test, therefore, would be whether a particular policy is capable of being applied to all or most bodies and entities that are subject to this Bill and the *Financial Management and Accountability Bill*. If the policy is capable of being applied to only one or a few such bodies and entities, it would not be reasonably regarded as being a "general" policy and should, if necessary, be addressed in an authority's establishing legislation.

58. Examples of general policies of the Government for the purposes of this clause would be those concerning equal employment opportunity or trade contact with foreign countries.

59. Directors of a Commonwealth authority are not obliged by this clause to carry out a general policy of the Government until the responsible Minister has consulted with them on the appropriateness of applying the policy to the particular authority and then notified

them in writing that the policy is to apply. (A general policy of the Government cannot apply to an authority if it conflicts with any statutory obligation of the authority).

60. Subclause (4) enables the responsible Minister to exempt the directors from compliance with the requirements of this clause in relation to specified activities. Its purpose is to recognise that it may not be appropriate for certain general Government policies to be applied to all the activities of a particular authority or its subsidiaries. For example, legal, political, cultural or other differences may make it inappropriate to require an overseas subsidiary to comply with a particular Government policy.

61. It is envisaged that the Finance Minister's Orders issued in accordance with item 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

62. 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 an 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

63. 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". The clause is based on section 290 of the *Corporations Law*.

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

64. 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*.

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

#### Clause 32 - Audit committee

66. The establishment of audit committees is aimed at helping authorities and their directors to comply with their obligations under the Act (for example it will provide a forum for communication between directors, senior managers and auditors). Audit Committees are a recognised feature of modern corporate governance (the Stock Exchange Listing Requirements convey a clear expectation that all listed companies will have an audit committee).

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

67. 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"

68. This clause provides that a "Commonwealth company" is a company in which the Commonwealth has a direct controlling interest and that a "wholly-owned Commonwealth company" is a company in which the Commonwealth not only has a direct controlling interest but which is also wholly-owned by the Commonwealth.

69. Subdivision A of Division 2 of Part 4 applies to all Commonwealth companies (whether or not wholly-owned by the Commonwealth).

70. Subdivisions B and C of Division 2 of Part 4 apply only to wholly-owned Commonwealth companies.

Clause 35 - Role of Auditor-General

71. This clause is intended to give effect to the policy of the Government, reiterated by various Parliamentary Committees, that the mandate of the Auditor-General is to extend to all Commonwealth companies and their subsidiaries.

**Division 2 - Reporting obligations**

*Subdivision A - Annual report and related obligations*

Clause 36 - Annual Report

72. The purpose of this clause is to ensure that the responsible Minister is given the annual report (ie, the annual general meeting documents) of a Commonwealth company at least 14 days in advance of each annual general meeting. If the Commonwealth company is wholly-owned the responsible Minister must table the annual report in the Parliament as soon as practicable after receiving it. If the Commonwealth company is not wholly-owned, the Minister must table the annual report as soon as practicable after the annual general meeting. The latter requirement recognises that, where there are shareholders other than the Commonwealth, it is reasonable to allow all the shareholders in general meeting the opportunity to consider the annual report before it is tabled.

73. If the auditor's report on the financial statements required by the *Corporations Law* is prepared by an auditor other than the Auditor-General, then the Auditor-General is to also prepare a report on the financial statements and both audit reports are to be given to the responsible Minister.

#### Clause 37 - Audit of relevant subsidiary's financial statements

74. The purpose of this clause is to make clear that the mandate of the Auditor-General to audit financial statements extends to subsidiaries of Commonwealth companies. The directors of a parent company are obliged, subject to subclause (4), to ensure that the financial statements of a subsidiary are audited by the Auditor-General even if another auditor is appointed as the auditor of the subsidiary. However, subsection (4) recognises that this may not always be practicable in the case of overseas subsidiaries.

#### *Subdivision B - Other reporting obligations*

#### Clause 38 - Interim reports

75. This clause provides that the Finance Minister may require Commonwealth companies, or a class of Commonwealth companies, to prepare and give to the responsible Minister an interim report which the Minister must table in each House of the Parliament.

76. The contents of the interim report shall include a report of operations and financial statements prepared in accordance with Finance Minister's Orders together with a report prepared by the Auditor-General in accordance with regulations. It is envisaged that the regulations will specify the nature of the audit report which will in turn oblige the Auditor-General to conduct a review or, where requested by the Finance Minister, an audit, of the interim financial statements.

77. The intention is that the Finance Minister will, in the normal course, consult with relevant parties prior to requiring the preparation of interim reports under this clause.

#### Clause 39 - Estimates

78. The Government has agreed in principle to a phased implementation of the National Commission of Audit's recommendation for a financial framework for the Commonwealth based on accrual accounting, subject to a scoping study to examine costs, coverage and transitional arrangements. The term "budget estimates" is intended to accommodate both the current system of cash budgets (i.e., estimates of receipts and expenditure) and any proposed system of accrual budgets.

#### Clause 40 - Responsible Minister to be notified of significant events

79. The purpose of this clause is to ensure that the responsible Minister is informed of any proposed involvement in significant new business ventures or changes in such ventures. Such notice could highlight a change in the strategic direction of a wholly-owned Commonwealth company and will 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.

#### Clause 41 - Keeping responsible Minister and Finance Minister informed

80. 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 a long standing policy, affirmed by successive Governments, that, as a general rule, the internal operations of government should not be reflected in legislation.

#### Clause 42 - Corporate plan for GBE

81. 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 subclause (6). It is envisaged that, in the normal course, the responsible Minister will consult with the Finance Minister on such things as financial targets and dividend policies.

82. Subclause (5) requires directors to keep the responsible Minister informed of significant changes to the corporate plan and also matters that may significantly affect the achievement of the objectives of the plan. This is consistent with current practice for a number of GBEs and will facilitate the Government's GBE accountability requirements. Subclause (8) will enable the responsible Minister to issue guidelines for use by the directors in deciding which matters are covered by subclause (5).

83. Clause 42 does not address action arising from responsible Ministers' consideration of corporate plans. Any comments or directions in relation to the contents of corporate plans will be made by responsible Ministers having regard to the provisions, where relevant, of the memorandum and articles of association of the companies concerned.

#### *Subdivision C - Miscellaneous*

#### Clause 43 - Compliance with general policies of the Government

84. This clause is directed at Government policies that are "general" in the sense that they are applicable across the Commonwealth government sector. A reasonable test, therefore, would be whether a particular policy is capable of being applied to all or most bodies and entities that are subject to this Bill and the *Financial Management and Accountability Bill*. If the policy is capable of being applied to only one or a few such bodies and entities, it would not be reasonably regarded as being a "general" policy and should, if necessary, be addressed in a company's memorandum and articles of association.

85. Examples of general policies of the Government for the purposes of this clause would be those concerning equal employment opportunity or trade contact with foreign countries.

86. Directors of a wholly-owned Commonwealth company are not obliged by this clause to carry out a general policy of the Government until the responsible Minister has consulted with them on the appropriateness of applying the policy to the company and then notified them in writing that the policy is to apply. (A general policy of the Government cannot apply to a company if it conflicts with any statutory obligation of the company).

87. Subclause (4) enables the responsible Minister to exempt the directors from compliance with the requirement of this clause in relation to specified activities. Its purpose is to recognise that it may not be appropriate for certain general Government policies to be applied to all the activities of a particular wholly-owned Commonwealth company or its subsidiaries. For example, legal, political, cultural or other differences may make it inappropriate to require an overseas subsidiary to comply with a particular Government policy.

#### Clause 44 - Audit committee

88. The establishment of an audit committee is aimed at helping wholly-owned Commonwealth companies and their directors to comply with their duties and responsibilities (for example it will provide a forum for communication between directors, senior managers and auditors). Audit Committees are a recognised feature of modern corporate governance (the Stock Exchange Listing Requirements convey a clear expectation that all listed companies will have an audit committee).

### PART 5 - MISCELLANEOUS

#### Clause 45 - Ministers must inform Parliament of share acquisitions etc.

89. This clause gives effect to a recommendation of the Senate Standing Committee on Finance and Public Administration in its report "Government Companies and their Reporting Requirements". The clause is directed at companies in which the Commonwealth has or acquires a direct interest. It is not concerned with 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 Commonwealth companies).

#### Clause 46 - Companies conducted for the purposes of intelligence or security agencies

90. 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 47 - Regulations may deal with how this Act applies if a body stops being a Commonwealth authority

91. In a number of recent instances where Commonwealth authorities have been wound up and it has become apparent that there is no-one responsible for preparing a final report (including financial statements) and attending to other matters. This clause provides for regulations to deal with such matters.

Clause 48 - Finance Minister's Orders

92. Although Orders cannot create offences, the Act creates offences for failing to comply with rules whose details are in the Orders.

Clause 49 - Regulations

93. 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**

### **Part 1 - Contents of annual report**

#### **Item 1 - Summary of contents**

1. The annual report may include matters other than those specified in this item, for example, matters that another Act, or Ministerial guidelines, require to be included. Normally such matters will be included in the report of operations.

#### **Item 2 - Financial statements**

2. This item 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 current guidelines entitled "Financial Statements of Commonwealth Authorities" issued by the Finance Minister are expected to form the basis of Orders relating to financial statements. Those guidelines have been reviewed regularly since their inception in 1983 and reflect current accounting standards and business practices.

### **Part 2 - Auditor's report on financial statements**

#### **Item 3 - Whether the statements comply with the Finance Minister's Orders**

3. This item is self-explanatory.

#### **Item 4 - Proper accounting records not kept**

4. This item is self-explanatory.

#### **Item 5 - Inadequate information and explanations**

5. This item is self-explanatory.

#### **Item 6 - Subsidiaries' financial statements**

6. Sub-item (1) envisages that, in the case of a Commonwealth authority which has one or more subsidiaries, the Finance Minister's Orders will not require the directors to prepare separate financial statements in respect of the authority's operations as well as consolidated financial statements for the group. The directors of the authority will only be required to prepare consolidated financial statements which will be the authority's financial statements for the purposes of the proposed Act.

7. Sub-item (2) does not distinguish between subsidiaries that have been 'consolidated' and those that have not. Provided a subsidiary satisfies the criteria specified, the Auditor-General must state its name.

8. Sub-item (3) is concerned only with those subsidiaries which

- satisfy the criteria in sub-item (2);
- have been 'consolidated'; and

- whose financial statements and audit report have not been examined by the Auditor-General; or have been examined and found to include a qualification by another auditor.

Item 7 - Deficiencies in consolidation

9. This item is self-explanatory.

## **SCHEDULE 2 - CIVIL AND CRIMINAL CONSEQUENCES OF CONTRAVENING CIVIL PENALTY PROVISIONS**

### **Part 1 - Preliminary**

#### **Item 1 - Interpretation**

1. Clause 5 is the main definitions clause of the Bill. This item adds a number of definitions that are relevant to Schedule 2. The scope and intent of the definitions are largely self-explanatory. (Sub-item (2) is based on section 73A of the *Corporations Law*).

#### **Item 2 - Civil penalty provisions**

2. This item identifies each of the following provisions of the proposed *Commonwealth Authorities and Companies Act 1996* as a "civil penalty provision": subsection 11(1); subsection 22(1); subsection 22(2) and subsection 23(1). This item is based on section 1317DA of the *Corporations Law*.

#### **Item 3 - Person involved in contravening a provision taken to have contravened the provision**

3. This item explains what constitutes a contravention of a provision of the proposed Act for the purposes of Schedule 2. (Sub-item (2) is based on section 79 of the *Corporations Law*).

### **Part 2 - Civil penalty orders**

#### **Item 4 - Court may make civil penalty orders**

4. This item enables the Court to make a 'civil penalty order' in relation to a person who contravenes, or is involved in a contravention of, a 'civil penalty provision'. It is based on section 1317EA of the *Corporations Law*.

#### **Item 5 - Who may apply for civil penalty order**

5. This item provides that an application for a civil penalty order may be made by the Finance Minister or some other person authorised in writing by the Minister. It is intended that, in the normal course, he or she will first consult with the responsible Minister and such other Ministers as may be appropriate in the particular circumstances. (The equivalent provision in the *Corporations Law* is section 1317EB).

#### **Item 6 - Time limit for application**

6. This item is self-explanatory and is based on section 1317EC of the *Corporations Law*.

Item 7 - Application for civil penalty order is a civil proceeding

7. This item is self-explanatory and is based on section 1317ED of the *Corporations Law*.

Item 8 - Person must comply with order not to be a director of a Commonwealth authority

8. This item provides that a person subject to a disqualification under paragraph 4(3)(a) may not be a director of a Commonwealth authority unless given leave by the Court. The Finance Minister must be given notice of any application for such leave of the Court. This item is based on section 1317EF of the *Corporations Law*.

Item 9 - Enforcement of order to pay pecuniary penalty

9. This item provides that a pecuniary penalty payable pursuant a civil penalty order must be paid to the Commonwealth. (The equivalent provision in the *Corporations Law* is section 1317EG).

Item 10 - Finance Minister may require a person to give assistance in connection with application for civil penalty order

10. The powers conferred on the Australian Securities Commission by section 1317EH of the *Corporations Law* are, for the purposes of this Bill, conferred under this item on the Finance Minister.

**Part 3 - Criminal proceedings**

Item 11 - When contravention of civil penalty provision is an offence

11. This item provides for criminal sanctions where a civil penalty provision is contravened with a dishonest intent. It is based on section 1317FA of the *Corporations Law*.

Item 12 - Person convicted of clause 11 offence not to be a director of a Commonwealth authority

12. This item provides that a person convicted of an offence established by item 11 is prohibited from being a director of a Commonwealth authority, without leave of the Court, during the 5 years after conviction or release from prison, whichever is the later. The Finance Minister must be given notice of any application for the leave of the Court. (The equivalent provision in the *Corporations Law* is section 229).

Item 13 - Application for civil penalty order precludes later criminal proceedings

13. This item prevents criminal proceedings being commenced if an application for a civil penalty order has already been made in respect of the contravention. This item is based on section 1317FB of the *Corporations Law*.

**Part 4 - Effect of criminal proceedings on application for civil penalty order**

14. This Part comprises items 14 to 24 and provides that where criminal proceedings have commenced in relation to a contravention of civil penalty provisions, and the defendant is not convicted at the trial because the Court is not satisfied that the element of dishonesty required by item 11 has been proved beyond a reasonable doubt, the Court will be able to go on to consider whether a civil penalty order (which requires no element of dishonesty) should be made. This will generally avoid the need for a separate proceeding to deal with the civil penalty issue. (The equivalent provisions in the *Corporations Law* are sections 1317GA to 1317GL).

**Part 5 - Compensation for loss suffered by Commonwealth authority**

15. This Part comprises items 25 to 30 and enables the Court to order a person who has contravened a civil penalty provision to compensate the authority for any profits made by the person (or any other person) or loss to the authority. (The equivalent provisions in the *Corporations Law* are sections 1317HA to 1317HF).

**Part 6 - Miscellaneous**

**Item 31 - Relief from liability for contravention of civil penalty provision**

16. This item enables the Court to relieve a person from liability arising out of certain contraventions of a civil penalty provision where the person has acted honestly and, having regard to all the circumstances, ought fairly be excused for the contravention. (The equivalent provision in the *Corporations Law* is section 1317JA).

**Item 32 - Schedule does not limit power to award punitive damages**

17. This item provides that nothing in Schedule 2 limits a court's power to order someone to pay damages in the nature of punitive damages because of an act or omission constituting a contravention of a civil penalty provision. It is necessary because of sub-item 4(6) of the Schedule which provides that the Court may not make an order under paragraph 4(3)(b) that a person pay a pecuniary penalty if an Australian court has already made an order that the person pay punitive damages in respect of the contravention. (The equivalent provision in the *Corporations Law* is section 1317JC).