

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Public Governance, Performance and Accountability Rule 2014

*Public Governance, Performance and Accountability Amendment
(2020 Measures No. 1) Rules 2020*

The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) set out a framework for regulating resource management by Commonwealth entities and companies. Section 101 of the PGPA Act provides that the Finance Minister may make rules by legislative instrument to prescribe matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The *Public Governance, Performance and Accountability Amendment (2020 Measures No. 1) Rules 2020* (the Amending Rule) amends the PGPA Rule to implement several recommendations following from the Independent Review into the operation of the *Public Governance Performance and Accountability Act 2013* and Rule, conducted by Elizabeth Alexander AM and David Thodey AO (the Review). Specifically the Amending Rule:

- allows an accountable authority or former accountable authority of a corporate Commonwealth entity to inspect the books of the entity for the purpose of an eligible legal proceeding;
- prescribes requirements for the preparation of corporate plans for Commonwealth entities under the PGPA Act;
- prescribes requirements that the performance measures of Commonwealth entities must meet for the purposes of the preparation of corporate plans;
- prescribes all of the audit committee members of a non-corporate Commonwealth entity must not be officials of the entity and a majority must not be officials of any Commonwealth entity; and for a corporate Commonwealth entity, all of the audit committee members must not be employees of the entity;
- requires the disclosure in Commonwealth entities' and companies' annual reports of a direct electronic address for the audit committee charter, the membership, the qualifications, skills, knowledge or experience of each committee member, the details of each members attendance at meetings and the remuneration of each audit committee member; and
- prescribes requirements about the granting of indemnities and exemptions by corporate Commonwealth entities.

Under subsection 46(4) of the PGPA Act, the Joint Committee of Public Accounts and Audit (JCPAA) must approve the rules prescribing annual report requirements. The Amending Rule was approved by the JCPAA on 7 February 2020.

Details of the Amending Rule are set out at Attachment A. A statement of compatibility with human rights is at Attachment B.

The Amending Rule is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and is a disallowable instrument.

Consultation

The Amending Rule was developed in consultation with all Commonwealth entities and companies. The Office of Parliamentary Counsel and the Australian Government Solicitor advised on elements of the Amending Rule. The Review sought submissions broadly, including from the public, Commonwealth entities and companies, in making its recommendations into the operation of the PGPA Act and PGPA Rule.

Details of the Public Governance, Performance and Accountability Amendment (2020 Measures No. 1) Rules 2020

Section 1—Name of rule

This section provides that the title of the instrument is the *Public Governance, Performance and Accountability Amendment (2020 Measures No. 1) Rules 2020* (the Amending Rule).

Section 2—Commencement

This section provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.

The entire instrument commences on the day after the Amending Rule is registered.

Section 3—Authority

This section states that the Amending Rule is made under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Section 4—Schedules

This section provides that each legislative instrument that is specified in a Schedule to the Amending Rule is amended or repealed as set out, and that any item in a Schedule to this instrument operates or is applied as specified in the Schedule.

Schedule 1 – Amendments

Public Governance, Performance and Accountability Rule 2014

Item 1 – Section 4

The definition inserted by item 1 is a technical amendment defining a key term used in amendments to the PGPA Rule contained at item 3. This definition clarifies the use of the term in item 3. This definition is not currently provided in the PGPA Rule or PGPA Act.

Item 2 – Subsection 12(1) (table item 3, column headed “Circumstances”)

Item 2 makes a technical amendment to section 12 of the PGPA Rule. Section 12 of the PGPA Rule prescribes circumstances when an official’s duty to disclose a material personal interest under section 29 of the PGPA Act does not apply. Item 2 amends subsection 12(1), to omit the existing reference to any requirements relating to the granting of indemnities prescribed by the rules made for purposes of section 61 of the Act and substitutes a new reference that recognises the amendment made by item 11 of the Amending Rule.

Item 3 – At the end of Part 2-2

Item 3 inserts and creates a new *Division 3 – Inspection of books of corporate Commonwealth entities* at the end of Part 2-2. Division 3 contains a new section, section

16DA, which establishes a right for a person who is the accountable authority, or a member of the accountable authority (including former accountable authorities), of a corporate Commonwealth entity to inspect the books of the entity for the purposes of an eligible legal proceeding. An eligible legal proceeding for the purposes of this section is defined as a legal proceeding:

- to which the person is a party; or
- that the person proposes in good faith to bring; or
- that the person has reason to believe will be brought against him or her.

That person may also make copies of the books for the purposes of the eligible legal proceeding. This right is subject to any Commonwealth law that prohibits disclosure of particular information.

This right is available to a person who is, or is a member of, the accountable authority of a corporate Commonwealth entity. The right continues for a period of 7 years beginning when the person ceases to be the accountable authority or a member of the accountable authority. In accordance with item 15 of the Amending Rule, this right applies in relation to a person who ceases to be the accountable authority, or a member of the accountable authority, of a corporate Commonwealth entity on or after the commencement of the Amending Rule.

Section 16DA is designed to ensure that accountable authorities (and former accountable authorities) have a right of access to an entity's books under the prescribed conditions. This is appropriate as it provides certainty to accountable authorities of their rights under the framework, and aligns the framework with similar provision in the *Corporations Act 2001*.

A corporate Commonwealth entity must comply with a valid request by a person, to exercise his or her right to inspect or take copies of the books under this section.

Item 4 – Subsection 16E(2) (table items 3 to 6)

Item 4 repeals the existing table items 3 to 6 in subsection 16E(2) and substitutes several new table items. Subsection 16E(2) prescribes requirements for the preparation of corporate plans by Commonwealth entities.

Activities

Item 3 in the table introduces a new requirement, and requires the corporate plan for a Commonwealth entity to include the key activities that the entity will undertake in order to achieve its purposes. A key activity is a distinct significant program or area of work undertaken by an entity to assist in achieving the entity's purposes. Not every activity undertaken by an entity should be included in the corporate plan. The focus of the corporate plan is on those key activities that make a significant contribution to the achievement of the purposes by the entity.

The intent of this amendment is that the corporate plan include a discussion of the key activities over the entire period of the plan. For example, for a corporate plan covering four reporting periods, the corporate plan should provide a discussion of the key activities over the entire four year period. Entities do not need to specify the relevant activities to be undertaken in each reporting period.

Operating context

Item 4 in the table requires the corporate plan to describe the operating context for the Commonwealth entity. Item 4 in the table amends and consolidates the previous table items 3 (“Environment”), 5 (“Capability”) and 6 (“Risk oversight and management”), and the requirement to discuss subsidiaries (within previous table item 4) into one table item. Item 4 introduces a requirement for entities to include their key risks and how those risks will be managed and a requirement to discuss cooperation as part of the entity’s operating context.

There are five elements that must be included in the discussion of an entity’s operating context: environment, capability, risk, cooperation, and subsidiaries. The intent of this amendment is that the corporate plan include a discussion of the five elements over the entire period of the plan. For example, for a corporate plan covering four reporting periods, the corporate plan should provide a discussion of the elements over the four reporting periods. Entities do not need to outline these elements for each reporting period.

Under item 4(a) in the table, the corporate plan must discuss the environment in which the entity will operate. As part of a discussion of the environment, an entity could discuss the main external and internal factors that affect or influence the achievement of its purposes. An entity could also describe the conditions, circumstances and trends that may affect its capacity to achieve its purposes or the demand for, or supply of, its goods or services.

Item 4(b) in the table requires the corporate plan to set out the strategies and plans that the entity will implement to have the capability it needs to undertake its key activities and achieve its purposes over the period of the plan. For example, the corporate plan could set out the strategies and plans the entity will put in place to build the capability it needs over the entire period covered by the plan in areas such as workforce planning, infrastructure or information and communication technology. The corporate plan could also identify how the entity’s capability needs may change over the entire period of the corporate plan.

Item 4(c) in the table requires that the corporate plan include a summary of the risk oversight and management systems of the entity, and the key risks that the entity will manage and how those risks will be managed. As an entity’s primary planning document, the corporate plan should demonstrate that effective risk management arrangements are in place which support the management of the key risks associated with achieving the entity’s purposes. This is consistent with section 16 of the PGPA Act which provides that accountable authorities of all Commonwealth entities must establish and maintain appropriate systems of risk oversight, management and internal control for the entity.

Item 4(d) in the table requires the corporate plan to include details of any organisation or body that will make a significant contribution towards achieving the entity’s purposes through cooperation with the entity, including how that cooperation will help achieve those purposes. This requirement can be met if entities include details of the kinds or types of organisations or bodies that the entity cooperates with. A discussion of cooperation in the corporate plan is consistent with section 17 of the PGPA Act which provides that accountable authorities of all Commonwealth entities must encourage officials of their entities to cooperate with others to achieve common objectives, where practicable.

Item 4(e) in the table requires the corporate plan to set out how any subsidiary, as defined in section 8 of the PGPA Act, of the entity will contribute to achieving the entity’s purposes. Entities should describe the contribution their subsidiaries are expected to make to the

achievement of the entity's purposes. For example, an entity could outline the main functions of their subsidiary in the context of the entity's purposes and key activities.

Performance

Item 5 in the table is an amendment of previous table item 4, and requires the corporate plan to set out the details of how the entity's performance in achieving the entity's purposes will be measured and assessed. Entities must develop performance measures to measure and assess their performance in achieving their purposes, and the performance measures must meet the requirements of the new section 16EA.

Item 5(b) in the table requires entities to provide targets for each of those performance measures where it is reasonably practicable to set a target. These measures and targets will be used in the entity's annual performance statement, prepared under section 16F, to report on the entity's performance and achievement of its purposes.

In contrast to activities and operating context, the corporate plan must include this information for each reporting period covered by the plan. For example, for a corporate plan covering four reporting periods, entities must specify the relevant details for each reporting period.

Item 5 – At the end of Division 1 of Part 2-3

Item 5 inserts a new section, section 16EA, which sets out the requirements of performance measures for the purpose of satisfying item 5(a) in the table in section 16E(2). The requirements set out at subsections 16EA (a) to (f) are to be met in the context of the entity's purposes or key activities.

Under paragraph 16EA(a), the performance measures for an entity must relate directly to one or more of the entity's purposes or key activities.

Under paragraph 16EA(b), the performance measures must use sources of information and methodologies that are reliable and verifiable.

Under paragraph 16EA(c), the performance measures must provide an unbiased basis for the measurement and assessment of the entity's performance.

Under paragraph 16EA(d), the performance measures, where reasonably practicable, must comprise a mix of qualitative and quantitative measures.

Under paragraph 16EA(e), the performance measures must include measures of the entity's outputs, efficiency and effectiveness if those things are appropriate measures of the entity's performance. For example, it would generally be appropriate for an entity with one or more key activities that are transactional in nature to have performance measures that assess the efficiency of those key activities.

Under paragraph 16EA(f), the performance measures must provide a basis for an assessment of the entity's performance over time.

Item 6 – Subsection 17(4)

Item 6 amends subsection 17(4) of the PGPA Rule to prescribe that if the entity is a non-corporate Commonwealth entity:

- all of the members of the audit committee must be persons who are not officials of the entity; and
- a majority of the members must be persons who are not officials of any Commonwealth entity.

Subsection 17(4AA) prescribes that if the entity is a corporate Commonwealth entity, all of the members of the audit committee must be persons who are not employees of the entity. This means that audit committees of corporate Commonwealth entities may be officials of other Commonwealth entities.

This change to existing legislative requirements, is intended to strengthen the capacity of audit committees to provide an independent perspective to entity management that draws on the broader knowledge and experience of committee members.

Section 17 of the PGPA Rule applies to both non-corporate and corporate Commonwealth entities. Under section 28 of the PGPA Rule, these requirements apply to a wholly owned Commonwealth Company in the same way as they apply to a corporate Commonwealth entity.

In accordance with item 15 of the Amending Rule, these new requirements apply in relation to an audit committee for a Commonwealth entity on and after 1 July 2021. This delayed commencement period is to allow sufficient time to transition from current audit committee membership requirements.

Items 7 and 8 – Subsection 17(4A) and subsection 17(5)

These items contains technical amendments to reflect amendments made by item 6.

Items 9, 10 and 14 – After subsection 17AG(2), after paragraph 17BE(t), and after paragraph 28E(oa)

Items 9, 10 and 14 insert new subsection 17AG(2A), paragraph 17BE(taa) and paragraph 28E(ob), respectively, prescribing requirements for the annual report of a Commonwealth entity and a Commonwealth company to enhance disclosure about the activities of audit committees.

The following information must be included in an annual report of a Commonwealth entity or Commonwealth company for the reporting period:

- a direct electronic address of the charter determining the functions of the audit committee;
- the name of each member of the audit committee during the period;
- the qualifications, knowledge, skills or experience of those members;
- information about each of those members' attendance at meetings of the audit committee during the period; and
- the remuneration of each of those members.

The PGPA Rule at section 17 provides requirements in relation to the charter, functions, qualifications and membership of the audit committee.

Information about each member's attendance at meetings of the audit committee should be expressed in comparison to the total number of audit committee meetings conducted during the reporting period.

The total remuneration of each of those members is defined by section 4 of the PGPA Rule to mean the sum of the following (calculated on an accrual basis):

- base salary;
- bonuses;
- other benefits and allowances;
- superannuation contributions (made by the employer);
- long service leave;
- other long-term benefits; and
- termination benefits.

The purpose of items 9, 10 and 14 is to align the disclosure of Commonwealth public sector audit committee member's information in relation to names, qualifications, skills, attendance at meetings and remuneration with better practice in the corporate sector. For example, the ASX Corporate Governance Principles and Recommendations (4th edn, recommendation 4.1) recommends that listed companies disclose much of the information included in these items. Therefore, these amendments ensure that Commonwealth practice matches recommended better practice in the private sector and the Commonwealth continues to demonstrate a high standard of governance of Commonwealth entities and companies.

In accordance item 15 of the Amending Rule, these requirements apply in relation to an annual report for a reporting period that begins on or after 1 July 2019.

Item 11 – After Division 4 of Part 2-4

Item 11 inserts a new *Division 4A – Indemnities and exemptions by corporate Commonwealth entities* after Division 4 of Part 2-4. Division 4A contains a new section, section 22B, which prescribes requirements about the granting of indemnities by corporate Commonwealth entities. Section 22B is made for the purposes of Section 61 of the PGPA Act.

Section 22B is not a source of power for corporate Commonwealth entities to grant indemnities. Generally, corporate Commonwealth entities have the power to grant indemnities by virtue of their body corporate status and/or their enabling legislation. However, section 22B does regulate the granting of indemnities by corporate Commonwealth entities in certain circumstances, by providing that in certain circumstances corporate Commonwealth entities, or their subsidiaries, are not allowed to grant indemnities to a person if liabilities are incurred as an official of the entity. Under subsection 22B(1) the circumstances are:

- liabilities for pecuniary penalties for the contravention of/offence against a Commonwealth/State/Territory law;
- liability that arises out of conduct not in good faith and owed to someone other than the entity/a subsidiary of the entity; and
- a liability to the entity/subsidiary.

Subsection 22B(2) prescribes the circumstances where indemnities for legal costs are not allowed where the costs are incurred in defending an action for a liability incurred as an official of the entity:

- defending in a proceeding in which the person is found to have a liability for which they could not be indemnified under subsection 22B(1); and
- the costs are incurred in defending criminal proceedings where the outcome is guilty.

Indemnities in these circumstances are prohibited whether it occurs through an agreement or by making a payment and whether directly or through an interposed entity.

Section 22B also prescribes that a corporate Commonwealth entity, or a subsidiary of a corporate Commonwealth entity, must not exempt a person from a liability to the entity incurred as an official of the entity. An exemption of this type will be prohibited whether it occurs directly or through an interposed entity.

A corporate Commonwealth entity must ensure that the risk management arrangements are appropriate to the complexity and, potential costs of the indemnity are in place before entering, after entering and for the duration of the arrangement.

The new provision mirrors the substance of the former section 27M of the *Commonwealth Authorities and Companies Act 1997* as well as section 199A of the *Corporations Act 2001*. However, it has been updated and modified to reflect the PGPA Act framework. The lack of a provision of this sort in the PGPA Act framework resulted in the arrangements for accountable authorities of corporate Commonwealth entities in respect of indemnification being out of step with the requirements under the Corporations Act. The inclusion of this section also better reflects expectations around the regulation of the proper use of public resources by entities.

In accordance with item 15 of the Amending Rule, this section applies in relation to a liability incurred on or after the commencement of that instrument.

Item 12 – Section 27A

Item 12 repeals section 27A and substitutes a new section.

Subsection 27A(1) provides that the requirements in section 16E (other than item 5 of the table in subsection 16E(2)) apply to a Commonwealth company in the same way as they apply to a Commonwealth entity. This ensures that the requirements for the corporate plans of Commonwealth companies are generally consistent with the requirements for the corporate plans of Commonwealth entities.

Subsection 27A(2) provides that a reference in section 16E to the accountable authority of the entity is taken to be a reference to the directors of the Commonwealth company. This subsection is intended to ensure that the person, or group of persons, in a Commonwealth

company with equivalent responsibility as the accountable authority for a Commonwealth entity, has the same powers in relation to the preparation of the company's corporate plan.

Subsection 27A(3) provides that the corporate plan of a Commonwealth company must include, for each reporting period covered by the plan, a summary of how the company will achieve its purposes, and how the company's performance will be measured and assessed, including any performance measures and any targets that will be used in the measurement and assessment.

The amendment is required as a consequence of the amendments made to section 16E and 27A.

Item 13 – After paragraph 28E(a)

Item 13 inserts a new paragraph (aa) into section 28E. Paragraph 28E(aa) requires Commonwealth companies, in their annual report, to include the results of a measurement and assessment of the company's performance against the performance measures, and any targets for those performance measures, included in the company's corporate plan for the period. Subsection 27A(3) sets out the requirement for the corporate plans of Commonwealth companies to include any performance measures and any targets against which the company will measure and assess its performance.

The amendment is required as a consequence of the amendments made to section 16E and 27A. The amendment is intended to clarify the existing requirement for Commonwealth companies to report, in their annual report, the actual performance of companies in the annual report against the planned performance information outlined in their corporate plans.

Item 15 – In the appropriate position in Chapter 5

Item 15 inserts and creates a new *Part 6 – Amendments made by the Public Governance, Performance and Accountability Amendments (2020 Measures No. 1) Rules 2020* to reflect the amendments to the PGPA Rule, ensure the PGPA Rule sequencing aligns with the PGPA Act and address the transitional arrangements required for the implementation of the amendments to the PGPA rule.

Subsection 36(1) provides that the insertion of subsection 16DA(2), made by the Amending Rule applies in relation to a person who ceases to be the accountable authority, or a member of the accountable authority, of a corporate Commonwealth entity on or after the commencement of the Amending Rule.

Subsection 36(2) provides that the amendments of section 16E, and the insertion of 16EA, made by the Amending Rule applies in relation to a corporate plan that is prepared under paragraph 35(1)(a) of the Act for a reporting period that begins on or after 1 July 2020. For entities with reporting periods that align with financial years, this means that the amendments will apply from their corporate plan prepared for the 1 July 2020 to 30 June 2021 reporting period. For entities with reporting periods aligned to calendar years, this means that the amendments will apply from their corporate plan prepared for the 1 January 2021 to 31 December 2021 reporting period.

Subsection 36(3) provides that the amendments to section 17 made by the Amending Rule applied in relation to an audit committee for a Commonwealth entity on or after 1 July 2021.

Subsection 36(4) provides that the amendments to sections 17AG, 17BE and 28E and Schedules 2, 2A and 2B, made by the Amending Rule applies in relation to an annual report for a reporting period that begins on or after 1 July 2019. For entities with reporting periods that align with financial years, this means that the amendments will apply from their annual report prepared for the 1 July 2019 to 30 June 2020 reporting period. For entities with reporting periods aligned to calendar years, this means that the amendments will apply from their annual report prepared for the 1 January 2020 to 31 December 2020 reporting period.

Subsection 36(5) provides that the insertion of section 22B, made by the Amending Rule applied in relation to a liability incurred on or after the commencement of the Amending Rule.

Subsection 36(6) provides that the repeal and substitution of section 27A applies in relation to a corporate plan that is prepared for a reporting period that begins on or after 1 July 2020. For Commonwealth companies with reporting periods that align with financial years, this means that the amendments will commence for corporate plans prepared for the 1 July 2020 to 30 June 2021 reporting period.

Subsection 36(7) provides that the insertion of paragraph 28E(aa) and the corresponding amendment of Schedule 2B, made by the Amending Rule applies in relation to an annual report that is prepared under paragraph 97(1)(a) of the Act for a reporting period that begins on or after 1 July 2020. For Commonwealth companies with reporting periods that align with financial years, this means that the amendments will commence for annual reports prepared for the 1 July 2020 to 30 June 2021 reporting period.

Item 16 – Schedule 2

Item 16 inserts a new provision in Schedule 2 that provides the mandatory content requirements for non-corporate Commonwealth entities to report information about audit committees.

Item 17 – Schedule 2A

Item 17 inserts a new provision in Schedule 2A that provides the mandatory content requirements for corporate Commonwealth entities to report information about audit committees.

Item 18 – Schedule 2B

Item 18 inserts a new provision in Schedule 2B that provides the mandatory content requirements for Commonwealth companies to include the results of a measurement and assessment of the company's performance against the performance measures, and any targets for those performance measures, included in the company's corporate plan for the period.

Item 19 – Schedule 2B

Item 19 inserts a new provision in Schedule 2B that provides the mandatory content requirements for Commonwealth companies to report information about audit committees.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Public Governance, Performance and Accountability Amendment (2020 Measures No. 1) Rules 2020

The *Public Governance, Performance and Accountability Amendment (2020 Measures No. 1) Rules 2020* (the Amending Rule) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Amending Rule

The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) establishes a framework for regulating resource management by the Commonwealth and relevant entities. Section 101 of the PGPA Act provides that the Finance Minister may make rules by legislative instrument to prescribe matters giving effect to the Act.

The Amending Rule amends the PGPA Rule to implement several recommendations following from the Review. Specifically the Amending Rule:

- allows an accountable authority or former accountable authority of a corporate Commonwealth entity to inspect the books of the entity for the purpose of an eligible legal proceeding;
- prescribes requirements for the preparation of corporate plans for Commonwealth entities under the PGPA Act;
- prescribes requirements that the performance measures of Commonwealth entities must meet for the purposes of the preparation of corporate plans;
- prescribes all of the audit committee members of a non-corporate Commonwealth entity must not be officials of the entity and a majority must not be officials of any Commonwealth entity; and for a corporate Commonwealth entity, all of the audit committee members must not be employees of the entity;
- requires the disclosure in Commonwealth entities and companies' annual reports of a direct electronic address for the audit committee charter, the membership, the qualifications, skills, knowledge or experience of each committee member, the details of each members attendance at meetings and the remuneration of each audit committee member; and
- prescribes requirements about the granting of indemnities and exemptions by corporate Commonwealth entities.

The items 1 to 8, 11 to 13, 15 and 18 of the Amending Rule do not engage any of the applicable rights or freedoms. Items 9, 10, 14, 16, 17 and 19 of the Amending Rule are compatible with human rights because, to the extent that they may limit the right to privacy, those limitations are reasonable, necessary and proportionate.

Items 9, 10 and 14 of the Amending Rule amends the annual report requirements at 17AG, 17BE and 28E of the *Public Governance, Performance and Accountability Rule 2014*

(PGPA Rule) made under the PGPA Act, to require Commonwealth entities to disclose in its annual reports;

- a direct electronic address of the charter determining the functions of the audit committee;
- the name of each member of the audit committee during the period;
- the qualifications, knowledge, skills or experience of those members;
- information about each of those members' attendance at meetings of the audit committee during the period; and
- the remuneration of each of those members.

The amendments intend to match Commonwealth government reporting and accountability practice to the corporate sector.

Human rights implications

The Amending Rule engages the right to privacy as contained in Article 17 of the International Covenant on Civil and Political Rights (the ICCPR). Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. The right to privacy is not absolute. However, limitations on the right must be authorised by law and must not be arbitrary.

The Amending Rule engages the right to privacy, as it requires publication, in Commonwealth entities' annual reports, of the name of each member of the audit committee, the qualifications, skills and experience of each audit committee member, information about each member's attendance at meetings of the audit committee and the remuneration of each member of the entity's audit committee.

Authorised by law

To the extent that the right to privacy is limited by the reporting of names, qualifications, skills, attendance at meetings and remuneration information of audit committee members, this is provided for in the Amending Rule and is therefore authorised by law.

Sections 17AG, 17BE and 28E of the Amending Rule sets out the information requirements about audit committee members to be published in the annual report of a Commonwealth entity and Commonwealth company. Commonwealth entities and Commonwealth companies are subject to the *Privacy Act 1988* and any collection, use, or disclosure of personal information will be in accordance with that Act and the applicable Australian Privacy Principles. Furthermore, the ability of Commonwealth entities to publish individual audit committee members' information is limited to the extent required by the Amending Rule.

Not arbitrary

Interference with privacy will be arbitrary where the relevant provisions of the Amending Rule are not in accordance with the provisions, aims and objectives of the ICCPR and are not 'reasonable in the particular circumstances'.¹ The Human Rights Committee interprets the requirement of reasonableness to 'imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.²

¹ See Human Rights Committee, General Comment No. 16, at paragraph 4.

² See *Toonen v. Australia* (CCPR/C/50/D/488/1992), at paragraph 8.3.

The purpose of the relevant provisions in the Amending Rule is to promote public transparency and scrutiny relating to the use of public resources through the disclosure of audit committee members names, qualifications, skills, attendance at meetings and remuneration information of audit committee members.

Increased transparency ensures that Commonwealth entities are more accountable to the Parliament and the Australian public. Furthermore, it aligns the disclosure of Commonwealth public sector audit committee members' information in relation to names, qualifications, skills, attendance at meetings and remuneration with better practice in the private sector, ensuring that the Commonwealth continues to demonstrate the high standards of governance that the Parliament and public come to expect. This objective is legitimate and is in accordance with the provisions, aims and objectives of the ICCPR.

The interference permitted by the provisions is necessary in the circumstances because there is a strong interest from the Parliament and the public in ensuring there is sufficient transparency regarding the governance of Commonwealth entities. This public interest is detailed by the PGPA Review³, which notes that:

There are currently no disclosure requirements in relation to the audit committee activities of entities. This is out of step with the practice of listed companies. It is our consistent view that Commonwealth government reporting and accountability practice should match better practice in the corporate sector. Currently, the extent of disclosure of audit committee arrangements by entities is voluntary and inconsistent.

The Australian Securities Exchange corporate governance principles and recommendations⁴ include a recommendation that listed companies disclose the charter of their audit committee, the qualifications and experience of audit committee members, the number of times the committee met through a reporting period, and individual attendances of committee members at those meetings.⁵ The remuneration of audit committee members for performing their audit committee role is also disclosed in company remuneration reports. Entities should be required to disclose similar information about their audit committees in their annual reports to improve transparency and accountability.

This reporting of audit committee information is consistent with the objects of the PGPA Act. The objects include establishing a coherent system of governance and accountability across Commonwealth entities and, that the Commonwealth and Commonwealth entities meet high standards of governance, performance and accountability. The objects also require that the Commonwealth and Commonwealth entities provide meaningful information to the Parliament and public, and use and manage public resources properly.

The potential interference with privacy occasioned by the publication of names, qualifications, skills, attendance at meetings and remuneration information for audit

³ See Independent Review into the Operation of the Public Governance, Performance and Accountability Act 2013 and Rule (p. 31).

⁴ In its submission on the draft report, the Australian Securities and Investments Commission noted that these principles are not mandatory and perhaps a better approach might be to adapt an 'if not, why not' approach to their application (p. 2).

⁵ See ASX Corporate Governance Council, Corporate Governance Principles and Recommendations (3rd edn), Recommendation 4.1 (p. 21).

committee members in annual reports is also proportionate to the end sought, and could not be achieved in a less rights restrictive way.

Less detailed reporting of this information would not be consistent with the principle that Commonwealth entities should be held to high standards of accountability, as reflected in relevant recommendations of the PGPA Review, and would not fully address the concerns relating to transparency and accountability to the Parliament and the public discussed in the PGPA Review report.

Conclusion

The Amending Rule is compatible with human rights because to the extent that it may limit or restrict the right to privacy, those limitations are reasonable, necessary and proportionate to the objective of ensuring transparency and accountability in the use of public resources.

Senator the Hon Mathias Cormann