

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Public Governance, Performance and Accountability Rule 2014

*Public Governance, Performance and Accountability Amendment
(Consultancy and Non-Consultancy Contract Expenditure Reporting) 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 (Consultancy and Non-Consultancy Contract Expenditure Reporting) Rules 2020* (the Amendment Rules) amends the PGPA Rule to implement Recommendation 38 of the Independent Review into the operation of the PGPA Act and Rule (the Review) undertaken by Ms Elizabeth Alexander AM and Mr David Thodey AO. Specifically the Amendment Rules **require** the disclosure in non-corporate Commonwealth entities' annual reports of:

- the number of and expenditure on new reportable non-consultancy contracts, the number of and expenditure on ongoing reportable non-consultancy contracts;
- the number of and expenditure on new reportable consultancy contracts, the number of and expenditure on ongoing reportable consultancy contracts; and
- organisations receiving amounts under reportable consultancy contracts or reportable non-consultancy contracts.

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 Amendment Rules were approved by the JCPAA on 14 May 2020.

Details of the Amendment Rules are set out at [Attachment A](#). A statement of compatibility with human rights is at [Attachment B](#).

The Amendment Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and is a disallowable instrument.

Consultation

The Amendment Rules were developed in consultation with all non-corporate Commonwealth entities and the Office of Parliamentary Counsel. The Review sought submissions broadly, including from Commonwealth entities and companies.

Details of the *Public Governance, Performance and Accountability Amendment (Consultancy and Non-Consultancy Contract Expenditure Reporting) Rules 2020*

Section 1—Name of rule

This section provides that the title of the instrument is the *Public Governance, Performance and Accountability Amendment (Consultancy and Non-Consultancy Contract Expenditure Reporting) Rules 2020* (the Amendment Rules).

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 Amendment Rules are registered.

Section 3—Authority

This section states that the Amendment Rules are 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 Amendment Rules are 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

This item inserts a definition of “*Commonwealth Procurement Rules*”, “*reportable consultancy contracts*” and “*reportable non-consultancy contract*” in section 4 of the PGPA Rule.

The Commonwealth Procurement Rules are the basic rule set for all Commonwealth procurements and govern the way in which entities undertake their own processes. The Commonwealth Procurement Rules are freely available on the Australian Government Department of Finance’s website:

www.finance.gov.au/government/procurement/commonwealth-procurement-rules.

The Commonwealth Procurement Rules are applied as at 20 April 2019.

Item 2 – After paragraph 17AD(d)

Item 2 inserts a technical amendment to add additional information about organisations receiving amounts under reportable consultancy contracts or reportable non-consultancy contracts in accordance with section 17AGA, as a mandatory content requirement item for non-corporate Commonwealth entities annual reports.

Item 3 – Subsection 17AG(6)

Item 3 omits “*Commonwealth Procurement Rules*”, and substitutes “Commonwealth Procurement Rules” to align the reference with the new definition in section 4 of the PGPA Rule, inserted by item 1 of the Amending Rule.

Item 4 – Subsection 17AG(7) (heading)

Item 4 repeals the heading and substitutes *Reportable consultancy contracts*. This is a technical amendment.

Items 5, 6, 7 and 8 – Subparagraphs 17AG(7)(a)(i) and (iii), Paragraph 17AG(7)(b), Paragraph 17AG(7)(d) and Paragraph 17AG(7)(d)

Items 5, 7 and 8 omit the term “contracts engaging consultants” and substitutes the term “reportable consultancy contracts” in subparagraphs 17AG(7)(a)(i) and (iii), paragraph 17AG(7)(d) and paragraph 17AG(7)(d) respectively. Item 6 inserts “reportable” before “consultancy” whenever this term occurs in paragraph 17AG (7)(b).

This is a change to current legislative requirements. Currently, the PGPA Rule does not define “contracts for consultancies”. The term is therefore taken by its ordinary meaning to include any contract engaging a consultant. Replacing this term with “reportable consultancy contracts”, as inserted by item 1 of the Amending Rule, defines the type of contract that an entity must report on.

Item 9 – After subsection 17AG(7)

Item 9 inserts a new subsection, subsection 17AG(7A) which establishes a requirement for the annual report of a non-corporate Commonwealth entity to include information on the entities use of reportable non-consultancy contracts during the reporting period.

Paragraph 17AG(7A)(a) prescribes that the annual report must include a statement summarising the entity’s use of reportable non-consultancy contracts during the reporting period; this summary must include:

- the number of new reportable non-consultancy contracts that were entered into during the period;
- the total actual expenditure during the period on all such contracts (inclusive of GST);
- the number of ongoing reportable non-consultancy contracts that were entered into during a previous reporting period; and
- the total actual expenditure during the period on those ongoing contracts (inclusive of GST).

Paragraph 17AG(7A)(b) also requires the annual report include a statement indicating that the reported contract information provided in the annual report is done so on an ‘actual’

expenditure basis. The statement must also include directions to www.tenders.gov.au where information on the ‘value’ of reportable non-consultancy contracts is published.

There are currently no reporting requirements for reportable non-consultancy contracts in the PGPA Rule.

Non-corporate Commonwealth entities will be required to report the information in the digital form prescribed by the Department of Finance.

Item 10 – Subsection 17AG(10) (note)

Item 10 omits “Paragraph 5.4 of the *Commonwealth Procurement Rules* deals with” and substitutes “Paragraphs 5.5 to 5.7 of the *Commonwealth Procurement Rules* deal with”.

The amendment updates the reference to the correct paragraph of the *Commonwealth Procurement Rules* which deals with Small and Medium Enterprises, and aligns the term “*Commonwealth Procurement Rules*” with the definition in section 4 of the PGPA Rule, which refers to the *Commonwealth Procurement Rules* as in force on 20 April 2019.

Item 11 – After section 17AG

Item 11 inserts a new section, section 17AGA, which establishes a requirement for the annual report of a non-corporate Commonwealth entity to include information about organisations receiving amounts under reportable consultancy or reportable non-consultancy contracts.

The following information about organisations receiving amounts under reportable consultancy contracts must be included in an annual report:

- if 5 or more organisations received amounts under reportable consultancy contracts during the period:
 - the names of the organisations who received the 5 largest shares of the entity’s total expenditure on such contracts during the period, and the total amounts they received; and
 - the name of any organisation that, during the period, received one or more amounts under one or more such contracts equal in total to at least 5% of the entity’s total expenditure on such contracts during the period, and the total amount the organisation received.
- otherwise, the name of any organisation who, during the period, received one or more amounts under one or more such contracts, and the total amount the organisation received.

The following information about organisations receiving amounts under reportable non-consultancy contracts must be included in an annual report:

- if 5 or more organisations received amounts under reportable non-consultancy contracts during the period:
 - the names of the organisations who received the 5 largest shares of the entity’s total expenditure on such contracts during the period, and the total amounts they received;
 - the name of any organisation that, during the period, received one or more amounts under one or more such contracts equal in total to at least 5% of the

entity's total expenditure on such contracts during the period, and the total amount the organisation received.

- otherwise, the name of any organisation who, during the period, received one or more amounts under one or more such contracts, and the total amount the organisation received.

The additional reporting requirements seek to improve transparency and accountability without duplicating information already available on AusTender and provided in annual reports. AusTender only captures the contract value of contracts over \$10,000, it does not capture financial year expenditure of those contracts.

Detailed reporting in annual reports on actual spending on consultancy contracts in a reporting period, as well as information on spending on non-consultancy contracts more broadly, will improve transparency of government spending.

Non-corporate Commonwealth entities will be required to report the information in the digital form prescribed by the Department of Finance.

Items 12 and 13 – Section 29AA

Items 12 and 13 omit “the *Commonwealth Procurement Rules* for” and the “*Commonwealth Procurement Rules* apply” and substitutes “the Commonwealth Procurement Rules for” and “the Commonwealth Procurement Rules apply” respectively. These items align the reference to the Commonwealth Procurement Rules with the new definition in section 4 of the PGPA Rule, inserted by item 1 of the Amending Rule.

Items 14 – Subsection 29AA(2)

Item 14 omits “*Commonwealth Procurement Rules* (as in force from time to time for the purposes of section 105B of the Act)” and substitutes “Commonwealth Procurement Rules”. This item aligns the reference to the Commonwealth Procurement Rules with the new definition in section 4 of the PGPA Rule, inserted by item 1 of the Amending Rule.

Item 15 – Paragraph 29AA(3)(a)

Item 15 omits “rules 4.7 and 4.8” wherever occurring, and substitutes “rules 4.9 and 4.10”. The amendment updates the reference to the correct paragraph of the Commonwealth Procurement Rules which deals with Procurement-connected policies.

Item 16 – Paragraph 29AA(3)(b)

Item 16 omits “rules 4.9 and 4.10” and substitutes “rules 4.11 and 4.12”. The amendment updates the reference to the correct paragraph of the Commonwealth Procurement Rules which deals with Coordinated procurement.

Item 17 – In the appropriate position in Chapter 5

Item 17 inserts and creates a new *Part 7 – Amendments made by the Public Governance, Performance and Accountability Amendment (Consultancy and Non-Consultancy Contract Expenditure Reporting) 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.

Section 39 provides that the amendments of this rule apply in relation to any 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 annual report 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 annual report prepared for the 1 January 2021 to 31 December 2021 reporting period.

Item 18 – Schedule 2 (table item dealing with PGPA Rule Reference 17AG(6))

Item 18 omits “*Commonwealth Procurement Rules*” and substitutes “Commonwealth Procurement Rules”. This item aligns the reference to the Commonwealth Procurement Rules with the new definition in section 4 of the PGPA Rule, inserted by item 1 of the Amending Rule.

Item 19 – Schedule 2 (table items dealing with PGPA Rule Reference 17AG(7)(a), 17AG(7)(b), 17AG(7)(c) and 17AG(7)(d))

Item 19 repeals and substitutes the table in Schedule 2 to reflect the changes made by the Amending Rule.

Statement of Compatibility with Human Rights

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

Public Governance, Accountability Amendment (Consultancy and Non-Consultancy Contract Expenditure Reporting) Rules 2020

The *Public Governance, Accountability Amendment (Consultancy and Non-Consultancy Contract Expenditure Reporting) Rules 2020* (the Amendment Rules) are 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 Amendment Rules amend the PGPA Rule to implement Recommendation 38 of the Independent Review into the operation of the PGPA Act and Rule. The amendments are in relation to:

- the number of and expenditure on new reportable non-consultancy contracts, the number of and expenditure on ongoing reportable non-consultancy contracts;
- the number of and expenditure on new reportable consultancy contracts, the number of and expenditure on ongoing reportable consultancy contracts; and
- organisations receiving amounts under reportable consultancy contracts or reportable non-consultancy contracts.

Human rights implications

The Amendment Rules do not engage any of the applicable rights or freedoms.

Conclusion

The Amendment Rules are compatible with human rights as they do not raise any human rights issues.

Senator the Hon Mathias Cormann