

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**COMMONWEALTH AUTHORITIES AND  
COMPANIES AMENDMENT BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Finance and Deregulation,  
The Hon Lindsay Tanner MP)



## Table of Contents

I. GENERAL OUTLINE .....	1
Financial Impact Statement.....	2
II. NOTES ON CLAUSES .....	3
Clause 1: Short Title .....	3
Clause 2: Commencement .....	3
Clause 3: Schedules .....	3
III. THEMATIC OVERVIEW OF AMENDMENTS IN SCHEDULE 1 .....	5
General Policy Orders (sections 28, 43 and 48A).....	5
Existing process .....	5
Proposed changes.....	5
Notification and consultation process.....	6
Preserve existing exemptions.....	6
Interaction with the Legislative Instruments Act.....	6
Transitional arrangements.....	7
Simplifying annual reporting by Commonwealth authorities (section 9).....	7
Submission of annual reports by Commonwealth companies (section 36) .....	8
Additional reporting by wholly-owned Commonwealth companies (section 36) ...	8
Credit cards and credit vouchers (sections 28A and 28B).....	9
Improved definition of “Commonwealth company” (section 34) .....	9
Increasing consistency with Corporations Act terminology (section 5).....	10
Increasing consistency with Corporations Act offences and penalties .....	11
Annual reporting rules (section 11) .....	11
Accounting records (section 20) .....	11
Duties of directors, other officers and employees (section 26) .....	12
Disclosure of material personal interests (section 27F).....	12
Restrictions on voting (section 27J).....	12
Insurance for certain liabilities of officers (section 27N) .....	13
Aligning accounting periods of subsidiaries (section 30).....	13
Submission of annual reports by Commonwealth companies (section 36) .....	13
Civil penalty regime (Schedule 2) .....	14
Increasing consistency with the Corporations Act reliance on advice rule (section 27D).....	14
Consistency of use of “enabling legislation” (section 5).....	14
Transfer of obligation to provide report about subsidiaries from the Auditor-General (subsections 12(3) and 37(3)).....	15
Clarifying requirements for compliance with statutory and other duties (section 27A).....	15
General law duties.....	16
Removing the exemption from criminal penalties.....	16
Definition of “public servant” .....	16
Inserting notes referring to section 27A.....	16
IV. NOTES ON SCHEDULE 1 .....	17
Items 1-10 – Definitions (section 5) .....	17
Item 1 – Agency .....	17
Item 2 – Agency Head .....	17
Item 3 – APS employee .....	17
Item 4 .....	17
Items 5 and 7 .....	17

Item 6 .....	18
Item 8 .....	18
Item 9 – Senior manager .....	18
Item 10 – Statutory Agency .....	18
Items 11-13 – Offences and civil penalties (section 6) .....	18
Item 11 .....	18
Item 12 .....	18
Item 13 .....	18
Items 14-17– Annual reporting by Commonwealth authorities (section 9) .....	19
Items 14 .....	19
Items 15 and 17 .....	19
Item 16 .....	19
Items 18-20 – Annual reporting rules (section 11) .....	19
Item 18 .....	20
Item 19 .....	20
Item 20 .....	20
Item 21 – Transfer of obligation to provide report about subsidiaries (subsection 12(3)) .....	20
Items 22-23 – Minor drafting amendments (sections 18 and 19) .....	20
Item 24 – Accounting records (section 20) .....	20
Item 25 – Minor drafting amendment (section 21) .....	21
Items 26-39 – Officers’ duties (sections 23, 24, 25, 26, 27A, 27C, 27D, 27F, 27J and 27N) .....	21
Items 26-28 .....	21
Item 29 .....	21
Item 30 .....	21
Item 31 .....	21
Item 32 .....	21
Item 33 .....	21
Item 34 .....	22
Item 35 .....	22
Item 36 .....	22
Item 37 .....	22
Item 38 .....	22
Item 39 .....	22
Item 40 – General Policy Orders (section 28) .....	22
Item 41 – Credit cards and credit vouchers (section 28A) .....	23
Item 42 – Misuse of credit cards or credit vouchers (section 28B) .....	23
Item 43 – Aligning accounting periods of subsidiaries (section 30) .....	23
Items 44-45 – Definition of “Commonwealth company” (section 34) .....	23
Item 44 .....	23
Item 45 .....	23
Items 46-48 – Submission of annual reports by Commonwealth companies (section 36) .....	23
Item 49 – Transfer of obligation to provide report about subsidiaries (subsection 37(3)) .....	24
Item 50 – General Policy Orders (section 43) .....	24
Items 51-52 – Minor amendments to section 48 .....	24
Item 51 .....	24
Item 52 .....	25

Item 53 – General Policy Orders (section 48A).....	25
Item 54 – Minor drafting amendment (subsection 49(2)).....	25
Items 55-68 – Civil penalty regime (Schedule 2) .....	25
Item 55 .....	25
Item 56 .....	25
Item 57 .....	25
Items 58-66 and 68.....	26
Item 67 .....	26
Item 69 – Minor drafting amendment (Schedule 3).....	26
Item 70 – Certain items to take effect at the start of the new financial year .....	26
Items 71-74 – Transitional clauses for General Policy Orders .....	26
Items 71-73 .....	26
Items 74.....	26
V. NOTES ON SCHEDULE 2 .....	27
Item 1 .....	27
Item 2 .....	27
Item 3 .....	27
Item 4 .....	27
Item 5 .....	27
Item 6 .....	28
Item 7 .....	28
Item 8 .....	28



## Table of Abbreviations and Common Terms

Abbreviation or common term	Full term or description
ABC	Australian Broadcasting Corporation
ABC Act	<i>Australian Broadcasting Corporation Act 1983</i>
AIDC	Australian Industry Development Corporation
AIDC Act	<i>Australian Industry Development Corporation Act 1970</i>
ANAO	Australian National Audit Office
ANU	Australian National University
ANU Act	<i>Australian National University Act 1991</i>
APS	Australian Public Service
Bill	<i>Commonwealth Authorities and Companies Amendment Bill 2008</i>
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
Commonwealth authority	Bodies corporate that are established by Commonwealth legislation for a public purpose, and which hold money on their own account.
Commonwealth company	Companies registered under the Corporations Act in which (before the Bill is enacted) the Commonwealth has a controlling interest.
Corporations Act	<i>Corporations Act 2001</i>
Corporations Act equivalent	An equivalent provision or provisions to those in the CAC Act
Drafting Direction 3.5	Parliamentary Counsel Drafting Direction No. 3.5 Offences, penalties, self-incrimination, secrecy provisions and enforcement powers
Finance	Department of Finance and Deregulation
Finance Minister	Minister for Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMA Act agencies	Agencies that are subject to the FMA Act. These agencies are Departments of State, Departments of the Parliament, and prescribed Agencies.
FMOs	Finance Minister's Orders
FRLI	Federal Register of Legislative Instruments
Interpretation Act	<i>Acts Interpretation Act 1901</i>
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Public Service Act	<i>Public Service Act 1999</i>
SBS	Special Broadcasting Service

<b>Abbreviation or common term</b>	<b>Full term or description</b>
SBS Act	<i>Special Broadcasting Services Act 1991</i>



# Commonwealth Authorities and Companies Amendment Bill 2008

## I. GENERAL OUTLINE

1. The *Commonwealth Authorities and Companies Amendment Bill 2008* (Bill) proposes substantive amendments to the *Commonwealth Authorities and Companies Act 1997* (CAC Act).
2. The proposed amendments to the CAC Act seek to:
  - Amend the process for applying general policies of the Australian Government to make it more efficient and transparent through the introduction of General Policy Orders to replace the current process under sections 28 and 43 of the CAC Act;
  - Require all Commonwealth companies to provide a base level of reporting to their responsible Minister;
  - Better align the CAC Act with the *Corporations Act 2001* (Corporations Act), particularly in relation to offences, penalties and terminology;
  - Clarify the use of credit cards and credit vouchers by Commonwealth authorities and introduce penalties for the misuse of these credit cards and credit vouchers;
  - Include a more comprehensive test to determine whether the Commonwealth controls a company, and hence better define which companies are Commonwealth companies;
  - Provide that the directors of a Commonwealth authority or Commonwealth company, not the Auditor-General, must provide the financial statements and audit reports of subsidiaries to their responsible Minister;
  - Clarify clauses about compliance with statutory and other duties by amending the protection of directors and public servants offered by section 27A of the CAC Act, to ensure it protects the persons intended to be covered; and
  - Introduce other less significant proposals, including amending the process for tabling annual reports and clarifying terminology in the CAC Act.
3. The objectives of the Bill are to improve accountability and governance arrangements for CAC Act bodies through amending the CAC Act, including through introducing more efficient and transparent administrative arrangements, aligning clauses and penalties with the Corporations Act and clarifying clauses to avoid inappropriate or unintended governance practices. The Bill also proposes minor consequential amendments to the *Australian Broadcasting Corporation Act 1983* (ABC Act), *Australian Industry Development Corporation Act 1970* (AIDC Act), *Australian National University Act 1991* (ANU Act), *Legislative Instruments Act 2003* (Legislative Instruments Act) and *Special Broadcasting Services Act 1991* (SBS Act).
4. The proposed consequential amendments to the ABC Act, AIDC Act, ANU Act and SBS Act seek to preserve the current exemptions the authorities, operating under those Acts, have from complying with the general policies of the Australian Government issued under section 28 of the CAC Act.

5. The proposed consequential amendments to the Legislative Instruments Act seek to remove references to old policy notifications under sections 28 and 43 of the CAC Act including in relation to whether they are subject to disallowance or sunseting.

6. The CAC Act was introduced as part of a suite of legislation aimed at improving governance and accountability in the Commonwealth. It was enacted in tandem with two other key pieces of legislation: the *Financial Management and Accountability Act 1997* (FMA Act) and the *Auditor-General Act 1997*. These three Acts replaced the *Audit Act 1901* and together they form an integral part of the legal framework for the financial management, accountability and audit of Commonwealth departments, agencies, authorities and companies.

7. The CAC Act primarily regulates Commonwealth authorities and Commonwealth companies. For Commonwealth authorities, the CAC Act contains detailed rules about reporting and accountability, and deals with other matters such as banking and investments, and the conduct of officers, including directors. For Commonwealth companies, the CAC Act contains reporting and other requirements that apply in addition to the requirements of the Corporations Act. The CAC Act also regulates some other areas of the Australian Government. For example, it requires Ministers to inform Parliament about certain company acquisitions and other dealings by the Commonwealth (section 45). Some other parts of the CAC Act have been applied to certain other bodies corporate, not otherwise under the CAC Act, such as the National Transport Commission, which must produce an annual report that includes:

- A report on operations in accordance with the Finance Minister's Orders (FMOs); and
- Prepare financial statements that are to be audited by the Auditor-General in accordance with Schedule 1 of the CAC Act.

8. The Bill represents the most significant set of amendments to the CAC Act since it commenced on 1 January 1998, and it is the first bill designed primarily to amend the CAC Act. The Bill is required to realign clauses of the CAC Act with the Corporations Act, improve governance and accountability arrangements contained in the CAC Act, and update the CAC Act based on experience from ten years of operation.

Formatted: Tabs: Not at 7.32 cm + 14.65 cm

## Financial Impact Statement

9. The proposed amendments have no financial impact. The amendments are aimed at improving governance and accountability arrangements for bodies within the Australian Government (i.e. under the CAC Act).

## II. NOTES ON CLAUSES

10. The structure of the Bill comprises three clauses that refer to two schedules containing the amendments to the CAC Act, ABC Act, AIDC Act, ANU Act, Legislative Instruments Act and SBS Act. These notes describe the three clauses and their effect.

### Clause 1: Short Title

11. This clause provides that if the Bill is passed it may be cited as the *Commonwealth Authorities and Companies Amendment Act 2008*.

### Clause 2: Commencement

12. This clause provides that, except for items 42, 51 and 52 in Schedule 1, the amendments to the CAC Act will, if passed, commence the later of the day on which this Act receives Royal Assent and 1 July 2008.

13. The amendments in item 42 will commence, if passed, on a date to be fixed by Proclamation (which needs to occur within 12 months from the date of Royal Assent, otherwise the provision will be repealed). Item 42, relating to credit cards and associated criminal penalties, effectively becomes operational when a regulation under the Act also commences. Through item 42 commencing on Proclamation, which can be linked to the commencement of the regulation, sufficient time is provided for the regulation to be developed and detailed consultations to occur with Commonwealth authorities.

14. The amendments to the Legislative Instruments Act in items 51 and 52 have a commencement date of 1 January 2005 and implement a reference to the Legislative Instruments Act, rather than the *Acts Interpretation Act 1901* (Interpretation Act). While the reference to the Legislative Instruments Act was deemed to apply already, the text needs to be clarified reading back to the commencement of the Legislative Instruments Act, from 1 January 2005.

### Clause 3: Schedules

15. This clause provides for the Acts mentioned in the schedules to be amended or repealed, as set out in the two schedules. Schedule 1 contains amendments to the CAC Act, and Schedule 2 contains amendments to the ABC Act, AIDC Act, ANU Act, Legislative Instruments Act and SBS Act.



### III. THEMATIC OVERVIEW OF AMENDMENTS IN SCHEDULE 1

16. The following overview of amendments proposed in Schedule 1 of the Bill is organised thematically rather than by item number. Section IV of this Explanatory Memorandum contains a description of the Bill organised by item number.

#### **General Policy Orders (sections 28, 43 and 48A)**

##### **Existing process**

17. A general policy of the Australian government is a policy that is made by the government, usually by Cabinet or senior ministers, that applies to all or most bodies subject to the FMA Act and CAC Act. A policy Minister oversees the development and administration of the policy.

18. The CAC Act currently provides a means for responsible Ministers to notify directors of Commonwealth authorities (section 28) and wholly-owned Commonwealth companies (section 43) of general policies of the Australian government that are to apply to the body. Under the CAC Act, responsible Ministers must consult with directors prior to notifying them of new general policies in writing. The policy Minister co-ordinates the consultation and notification process with responsible Ministers across government. The responsible Minister may, in writing, exempt the directors from the application of the policies in relation to specified activities. Where relevant, before granting an exemption, the responsible Minister has the opportunity to consult with the policy Minister.

##### **Proposed changes**

19. Items 6, 40, 50 and 53 of the Bill replace sections 28 and 43 and make the existing process more accountable and transparent. Under the proposed changes, the Finance Minister would be able to issue a General Policy Order, which would be a legislative instrument. Accordingly, the General Policy Order would be listed on the Federal Register of Legislative Instruments (FRLI) and therefore be more readily identifiable to Parliament, the public and Commonwealth authorities and wholly-owned Commonwealth companies.

20. This proposal does not change the way a general policy is developed or how consultation with Commonwealth authorities and wholly-owned Commonwealth companies occurs. Under the proposal, the policy Minister would continue to oversee consultation between responsible Ministers and relevant bodies on the proposed application of the general policy. The significant change to this process is that all policies would be notified in a transparent way, issued by the Finance Minister through a General Policy Order, and listed on FRLI.

21. General Policy Orders could be expressed to apply to all Commonwealth authorities and wholly-owned Commonwealth companies, or a particular class, or to specified Commonwealth authorities or wholly-owned Commonwealth companies.

Under the new process, a comprehensive list of policies issued, and the bodies to which they apply, may be readily accessed on FRLI.

### **Notification and consultation process**

22. Before issuing an Order, the Finance Minister must be satisfied that the responsible Ministers, for the Commonwealth authorities and wholly-owned Commonwealth companies to which the order will apply, have consulted those authorities and companies on the application of the policy. One approach would be for the policy Minister to request that responsible Ministers consult with Commonwealth authorities and wholly-owned Commonwealth companies in writing and advise him/her once consultations have occurred regarding the outcome of consultations, including any requests for exemptions.

23. Once details have been settled on what exemptions, if any are to apply, the policy Minister could then write to the Finance Minister confirming that responsible Ministers have conducted consultations and provide details of the bodies and the extent to which the policy is to apply to them.

24. These changes to the notification of general policies of the Australian government are aimed at improving efficiency and transparency in the way general policies are notified, through reducing the number of letters involved in the process and making it easier to identify what policies have been applied to Commonwealth authorities and wholly-owned Commonwealth companies. The amendments only change the notification process and would not affect the underlying general policies of government.

### **Preserving existing exemptions**

25. Items 1, 2, 3 and 8 in Schedule 2 of the Bill preserve existing exemptions from the application of section 28 that apply to the Australian Broadcasting Corporation (ABC), Australian Industry Development Corporation (AIDC), Australian National University (ANU) and Special Broadcasting Service (SBS). The amendments would ensure that the existing level of exemptions from general policies continue in relation to the General Policy Orders under proposed sections 28 and 48A.

### **Interaction with the Legislative Instruments Act**

26. At present, the instruments made under sections 28 and 43 are covered by the Legislative Instruments Act but are exempt from the disallowance and sunset provisions of the Legislative Instruments Act. The exemption from the Legislative Instruments Act for general policies from the disallowance and sunset provisions in the Legislative Instruments Act is retained for the General Policy Orders, promoting continued policy and financial certainty for CAC Act bodies subject to these Orders. It is also proposed that the status quo be maintained, that the General Policy Orders are exempt from disallowance and sunset, because the instruments will be internal management tools of the Executive Government and intended to be within the control of the Executive.

27. Consequential amendments to the Legislative Instruments Act are also proposed in Schedule 2 of the Bill. These amendments will remove from the Legislative Instruments Act references to sections 28 and 43 of the CAC Act contained in section 7 (exemptions from the whole of the Legislative Instruments Act), section 44 (exemptions from disallowance) and section 54 (exemptions from sunseting). The current references are not being replaced with a reference to proposed section 48A as the exemption will instead be included in proposed subsection 48A(5).

### **Transitional arrangements**

28. The proposed amendments will also provide for a savings provision, so that general policies previously notified retain force as though they were issued as General Policy Orders. All amendments are intended to preserve the status quo in relation to the Legislative Instruments Act and do not effect any policy change in that regard.

29. As was previously the case, the General Policy Orders under sections 28 and 43 do not relate to the existing section 47A which deals with government procurement requirements.

### **Simplifying annual reporting by Commonwealth authorities (section 9)**

30. Section 9 of the CAC Act currently requires the directors of an authority to submit an annual report to the responsible Minister by the deadline (normally by 15 October, if the authority's financial year is from 1 July to 30 June). Subsection 9(2) provides that the responsible Minister may grant an extension of time in special circumstances. Subsection 9(3) provides that the responsible Minister must table the report in each House of the Parliament as soon as practicable.

31. These arrangements differ from the processes for submission of periodic reports to Parliament, set out in section 34C of the Interpretation Act. In particular, section 34C(3) of the Interpretation Act provides that when an Act requires a person to furnish a periodic report to a Minister for presentation to Parliament, the Minister shall cause the report to be presented to Parliament within 15 sitting days of receiving the report. Subsection 34C(5) provides for extensions of time for providing reports to Ministers (at the discretion of the responsible Minister). Under subsection 34C(6), the extension notice must also be tabled in Parliament.

32. There has been some uncertainty as to whether or not section 34C of the Interpretation Act applies to Commonwealth authorities' annual reports. To remove ambiguity, Item 15 removes the deadline for submitting reports and information from subsection 9(1) and, through Item 17 of the Bill, inserts the deadline in proposed subsection 9(2) of the CAC Act. Item 17 will also include in subsection 9(2) that the process for submitting late reports and their tabling in Parliament is as set out in section 34C of the Interpretation Act.

## **Submission of annual reports by Commonwealth companies (section 36)**

33. Section 36 of the CAC Act currently requires a Commonwealth company to give the responsible Minister a copy of the annual report required under the Corporations Act.

34. However, the Corporations Act has been amended since the enactment of the CAC Act, such that certain classes of proprietary company are no longer required to prepare annual reports.<sup>1</sup>

35. Commonwealth companies should, however, have a consistent basic level of reporting and accountability, through the responsible Minister, to the Australian Government and the Parliament. In order to ensure consistent basic reporting, Items 46, 47 and 48 of the Bill enhance the reporting and accountability of proprietary Commonwealth companies by amending section 36. All Commonwealth companies would be treated as public companies for the purposes of section 36, thus requiring all Commonwealth companies to give their financial statements, directors' report and auditor's report (collectively, the 'annual report') to their responsible Minister.

36. Proposed subsection 36(1A) stipulates the time limits for Commonwealth companies to submit reports and information to their responsible Minister. The subsection also provides that the process for submitting late reports and their tabling in Parliament is as set out in section 34C of the Interpretation Act.

## **Additional reporting by wholly-owned Commonwealth companies (section 36)**

37. Commonwealth companies are required to give the annual report to their responsible Minister for tabling in Parliament. For Commonwealth authorities, the Finance Minister can make Orders to specify the form and content of information in the annual report (the Finance Minister makes FMOs for the preparation of the annual report of operations of a Commonwealth authority). However, there is currently no means of imposing equivalent and relevant public sector accountability obligations on Commonwealth companies.

38. For wholly-owned Commonwealth companies, there may be additional matters that are appropriate to be included in their annual reports with a view to ensuring consistent reporting of public sector governance and accountability obligations. Accordingly, Item 46 of the Bill would amend section 36 to also require that wholly-owned Commonwealth companies give their responsible Minister any additional information or report required by the FMOs.

---

<sup>1</sup> Section 292 of the Corporations Act specifies which types of companies must prepare a financial report and a directors' report for a financial year. "Proprietary company" is defined in section 45A of the Corporations Act.



## **Credit cards and credit vouchers (sections 28A and 28B)**

39. The CAC Act does not currently provide Commonwealth authorities with a general borrowing power. Unless the enabling legislation of an authority contains a clear clause about borrowing, there may be uncertainty about the power of some authorities to use credit cards or credit vouchers to obtain cash, goods or services, such as taxi vouchers.

40. The use of credit cards and credit vouchers is a commonplace method of transacting business and it would be a significant simplification measure to clarify that all authorities have the ability to use these facilities. The FMA Act and its subordinate legislation contain clear clauses for borrowing by FMA Act agencies through the use of credit cards and credit vouchers.<sup>2</sup> Accordingly, Item 41 of the Bill would insert a new section 28A in the CAC Act to provide that authorities may obtain:

- Cash, goods or services on credit from any person by the use of a credit card; and
- Goods or services on credit from any person by the use of a credit voucher.

41. Some authorities already have a power to borrow or to use credit cards in their enabling legislation.<sup>3</sup> Section 28A will only apply to the extent that the enabling legislation of an authority does not already provide this power; that is, it would not override any power or condition provided for by the enabling legislation of an authority.

42. The new section 28A will also allow the Finance Minister to make regulations to set exclusions or conditions on the use of the credit card facility by those authorities that do not already have an explicit borrowing power. Some authorities have an implied capacity to use credit cards, but this amendment will provide an express capacity.

43. Item 42 of the Bill will introduce a new section 28B which contains a criminal offence for the misuse of Commonwealth authority credit cards, credit card numbers and credit vouchers, with a penalty of imprisonment for 7 years. The offence and the penalty have been drafted so as to be consistent with the FMA Act for a comparable offence.<sup>4</sup> However, section 28B will apply to all authorities that use credit cards or credit vouchers regardless of whether or not section 28A applies to them.

## **Improved definition of “Commonwealth company” (section 34)**

44. Subsection 34(1) of the CAC Act currently defines a Commonwealth company as “a Corporations Act company in which the Commonwealth has a controlling interest”. The definition expressly excludes companies in which the Commonwealth

---

<sup>2</sup> Subsection 38(2) of the FMA Act and regulation 21 of the *Financial Management and Accountability Regulations 1997*.

<sup>3</sup> For example, section 70B of the *Australian Broadcasting Corporation Act 1983* and section 37 of the *Defence Housing Australia Act 1987*.

<sup>4</sup> FMA Act section 60.

has a controlling interest through one or more interposed authorities or Commonwealth companies. The expression “controlling interest” has been interpreted at common law to mean the ability of the Commonwealth to control a majority of votes at a meeting of members (in particular, at an annual general meeting).

45. The current definition is not consistent with the Corporations Act test in section 46 of that Act, which determines what is a subsidiary, as explained below.

46. “Control” is defined in the Corporations Act, for the purpose of determining what a subsidiary is, using an exhaustive three limb test.<sup>5</sup> Item 44 of the Bill would align the test in the CAC Act for determining Commonwealth companies under the CAC Act with the subsidiary test in the Corporations Act, by inserting a definition of “control” that includes the following Corporations Act three limb test:

- Control of the composition of the company’s board; or
- Being in a position to cast, or control the casting of, the majority of votes that may be cast at a meeting of members; or
- Holding a majority of the share capital in the company (excluding any part of the issued share capital that carries no right to participate, beyond a specified amount, in a distribution of either profits or capital).

47. The meaning of the first limb is clarified in the Bill and covers the situation where, for example, the Commonwealth is not a member of a company, but has the power to appoint and remove a majority of its directors. The second limb is the traditional common law test for control, and the third limb applies where the Commonwealth holds a majority of shares in the company.

48. The proposed provision would broaden coverage for determining control of companies under the CAC Act. This would allow for greater accountability to the Australian Government and the Parliament. It will also improve the alignment between the CAC Act test for control and the tests in the Corporations Act.

49. As a consequence of the new “control” test, Item 54 of the Bill will amend section 49 of the CAC Act to refer to the new test in the context of allowing regulations to be made to require the provision of financial statements by overseas corporations which the Commonwealth controls.

### **Increasing consistency with Corporations Act terminology (section 5)**

50. The Corporations Act defines “senior manager”,<sup>6</sup> an expression inserted as part of the reforms contained in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*. This definition is intended to refer to senior managerial employees of the body, other than directors.

51. The CAC Act currently uses the expression “senior manager” in sections 32 and 44, relating to audit committees, but the term is not defined. Item 9 of the Bill would adopt the Corporations Act definition of “senior manager” for consistency with

---

<sup>5</sup> Corporations Act section 46.

<sup>6</sup> Corporations Act section 9.

the Corporations Act and to assist users to interpret the relevant sections of the CAC Act. This definition will specifically exclude directors and company secretaries, Ministers, and Australian Public Service (APS) employees engaged by another Agency (that is, APS employees engaged outside the relevant Commonwealth body, such as the particular Department of State that oversees the body under the Administrative Arrangements Order).

52. The definition of “officer” in section 5 of the CAC Act currently provides that an officer, in relation to a Commonwealth authority, means “a director of the authority or any other person who is concerned in, or takes part in, the management of the authority.” Item 8 of the Bill would modify the definition of officer to specify that an officer is a director or a senior manager of the authority. Additionally, Item 25 of the Bill would remove a corresponding reference to the existing definition of “officer” that appears in subsection 21(2).

## **Increasing consistency with Corporations Act offences and penalties**

53. Officers’ duties in the CAC Act are modelled on comparable provisions in the Corporations Act. Accordingly, where relevant, Commonwealth authorities and their officers have similar obligations and responsibilities to those imposed by the Corporations Act on Commonwealth companies (and by the Corporations Act on companies generally). The following items in the Bill will more closely align offences and penalties in the CAC Act with their equivalents in the Corporations Act.

### **Annual reporting rules (section 11)**

54. The CAC Act does not currently contain a criminal penalty where the breach of a directors’ reporting rule is dishonest. For consistency with the Corporations Act,<sup>7</sup> Item 18 of the Bill inserts a criminal penalty where a director contravenes a reporting rule dishonestly, with a penalty of 2,000 penalty units,<sup>8</sup> imprisonment for 5 years, or both.

### **Accounting records (section 20)**

55. The CAC Act currently provides for a criminal offence for failing to keep proper accounting records. The equivalent provision in the Corporations Act<sup>9</sup> is a civil penalty provision, with a criminal penalty applying if the contravention is dishonest. Adopting a similar approach for the CAC Act would also provide greater consistency with other reporting offences in the CAC Act. Accordingly, Item 24 of the Bill would:

- Make section 20 a civil penalty clause;
- Specify that the criminal sanction is for a dishonest breach; and
- Make the criminal penalty 2,000 penalty units, imprisonment for 5 years, or both.

---

<sup>7</sup> Corporations Act sections 292, 314, 344 and Item 117 of Schedule 3.

<sup>8</sup> Each penalty unit is equivalent to \$110 (s 4AA of the *Crimes Act 1914* (Cth)).

<sup>9</sup> Corporations Act subsection 344(2) and Item 117 of Schedule 3.

## **Duties of directors, other officers and employees (section 26)**

56. The CAC Act provides for a criminal offence where the duties in sections 23, 24 and 25 of the CAC Act are breached with dishonesty or recklessness. The penalty currently specified in the CAC Act is imprisonment for 5 years. Item 29 of the Bill would align the penalty with the Corporations Act equivalent<sup>10</sup> by making the penalty 2,000 penalty units, imprisonment for 5 years, or both.

## **Disclosure of material personal interests (section 27F)**

57. The CAC Act does not currently provide a penalty for a failure to disclose material personal interests. The equivalent section of the Corporations Act provides for a penalty of 10 penalty units or imprisonment for 3 months, or both.<sup>11</sup> In 2001, the Corporations Act was amended to provide that strict liability applies to the circumstance where a director of a company has a material personal interest in a matter that relates to the affairs of the company.

58. In March 2007, the Department of the Treasury released a paper entitled *Review of Sanctions in Corporate Law*. This paper raised the appropriateness of the use of imprisonment as a punishment for strict liability offences<sup>12</sup> and the appropriateness of imprisonment for terms less than 6 months.<sup>13</sup>

59. An objective of this Bill is increased consistency with the Corporations Act. The issues discussed in the paper concerning the imposition of penalties raised questions concerning the appropriateness of imprisonment for terms less than 6 months. Therefore, Items 34 and 35 of the Bill would respectively:

- Provide for a penalty of 10 penalty units for breach of section 27F; and
- Specify that strict liability applies to the circumstance where a director of the Commonwealth authority has a material personal interest in a matter that relates to the affairs of the authority.<sup>14</sup>

60. If ultimately penalties for these provisions under the CAC Act differ from their Corporations Act equivalent, further consideration may be given to amending those penalty provisions.

## **Restrictions on voting (section 27J)**

61. Section 27J prevents directors from being present or voting on matters in which they have a material personal interest. The Corporations Act contains an equivalent provision to section 27J of the CAC Act, but also includes an associated offence for failure to comply.<sup>15</sup> In amendments made in 2001, a strict liability element

---

<sup>10</sup> Corporations Act section 184 and Item 30 of Schedule 3.

<sup>11</sup> Corporations Act section 191 and Item 32 of Schedule 3.

<sup>12</sup> Review of Sanctions in Corporate Law at 2.13.

<sup>13</sup> Review of Sanctions in Corporate Law at 2.17.

<sup>14</sup> This change would have the effect that, in legal proceedings for a breach of subsection 27F(1) of the CAC Act, the prosecution would not have to prove that the director was at fault in holding the material personal interest. A defence of mistake of fact would still be available to directors in this circumstance.

<sup>15</sup> Corporations Act section 195 and item 33 of Schedule 3.

was introduced to the Corporations Act equivalent. Accordingly, for consistency with the Corporations Act, Item 37 of the Bill would:

- Provide a penalty of 5 penalty units for an offence for breach of section 27J; and
- Introduce a strict liability element that applies to the circumstance where a director of an authority has a material personal interest in a matter that is considered at a meeting of the board of the authority, at which meeting he or she is present while the matter is considered or voted upon.

#### **Insurance for certain liabilities of officers (section 27N)**

62. Section 27N prohibits a Commonwealth authority from insuring its officers against wilful breach of duty, misuse of position or misuse of information. The Corporations Act contains an equivalent provision to section 27N of the CAC Act, but also includes a penalty for failing to comply.<sup>16</sup> In amendments made in 2001, a strict liability element was introduced to the Corporations Act equivalent. Accordingly, for consistency with the Corporations Act, Items 38 and 39 of the Bill will, respectively:

- Provide for a penalty of 5 penalty units for breach of section 27N; and
- Introduce a strict liability element that applies to circumstances where a Commonwealth authority insures an officer against liability arising out of wilful breach of duty in relation to the authority or contravention of sections 24 or 25 of the CAC Act.

#### **Aligning accounting periods of subsidiaries (section 30)**

63. The existing obligation to ensure that the financial year of a subsidiary of a Commonwealth authority is the same as that of the Commonwealth authority carries a criminal penalty under the CAC Act, but does not provide for a civil penalty. For consistency with the Corporations Act, Item 43 of the Bill would:

- Align the sanction for breach of section 30 with the Corporations Act,<sup>17</sup> by establishing it as a civil penalty provision; and
- Align the criminal penalty with the Corporations Act equivalent so that it applies where a breach of section 30 is dishonest, with a penalty of 2,000 penalty units, or imprisonment for 5 years, or both.<sup>18</sup>

#### **Submission of annual reports by Commonwealth companies (section 36)**

64. Section 36 of the CAC Act makes it an offence for a Commonwealth company to fail to give the responsible Minister the appropriate annual report documents within the specified deadline. Section 36 is designed to utilise the same reporting structure as, and build upon, section 319 of the Corporations Act, which deals with lodgement of annual reports by companies with Australian Securities and Investments Commission.<sup>19</sup> Items 46, 47 and 48 of the Bill would amend section 36 in the following manner:

---

<sup>16</sup> Corporations Act section 199B and Item 34 of Schedule 3.

<sup>17</sup> Corporations Act section 323D, operating with subsection 344(1).

<sup>18</sup> Corporations Act section 323D, subsection 344(2) and Item 117 of Schedule 3.

<sup>19</sup> The Corporations Act does not contain a direct equivalent to the obligation imposed in section 36 of the CAC Act because the Corporations Act does not deal with reporting by Commonwealth companies to their responsible Ministers.

- Make section 36 a civil penalty provision, for consistency with the Corporations Act equivalent;<sup>20</sup> and
- Align the criminal penalty with the Corporations Act equivalent so that it applies where a breach of section 36 is dishonest, with a penalty of 2,000 penalty units, or imprisonment for 5 years, or both.<sup>21</sup>

### **Civil penalty regime (Schedule 2)**

65. Schedule 2 of the CAC Act provides for the process for enforcement of breaches of the civil penalty provisions of the CAC Act. It also sets out the pecuniary penalties available and provides for compensation orders for a breach of civil penalty provisions.

66. Consequential to the above changes, Items 58 to 66 and Item 68 would amend the civil penalty regime in Schedule 2 of the CAC Act to refer to the new civil penalty provisions (sections 20, 30 and 36, as discussed above) and apply the civil penalty regime to officers of Commonwealth companies and Commonwealth authorities, since the Bill will introduce a civil penalty provision relating to Commonwealth companies (see paragraphs 55, 63 and 64 above).

### **Increasing consistency with the Corporations Act reliance on advice rule (section 27D)**

67. Currently, under section 27D of the CAC Act, a director of an authority may rely on information or advice provided by others in specified circumstances. Subparagraph 27D(b)(ii) currently states that the reliance must be made “after making proper inquiry if the circumstances indicated the need for inquiry”. The wording of the Corporations Act equivalent of section 27D was amended by the *Corporate Law Economic Reform Program Act 1999* to take into account the director’s knowledge of the body and the complexity of its structure and operations.<sup>22</sup>

68. Item 33 of the Bill would adopt the Corporations Act phrasing of this requirement for greater consistency. This will replace subparagraph 27D(b)(ii) to require that the director’s reliance is made “after making an independent assessment of the information or advice, having regard to the director’s knowledge of the authority and the complexity of the structure and operations of the authority”.

### **Consistency of use of “enabling legislation” (section 5)**

69. The CAC Act defines the terms “incorporating law” and “enabling legislation”, but these two terms effectively have the same meaning under the CAC Act. The former is used in three provisions and the latter is used in three provisions. “Incorporating law” was the original term used in the CAC Act, with “enabling legislation” being added by the *Corporate Law Economic Reform Program*

---

<sup>20</sup> Corporations Act section 319, operating with subsection 344(1). Section 11 of the CAC Act, which deals with the annual reporting by directors of Commonwealth authorities, is also a civil penalty provision.

<sup>21</sup> Corporations Act section 319, subsection 344(2) and Item 117 of Schedule 3.

<sup>22</sup> Corporations Act subparagraph 189(b)(ii).

*Act 2001*. Item 7 of the Bill would remove the term “incorporating law” for simplicity (and in accordance with current common usage), and Items 5, 22 and 23 would replace references to “incorporating law” with references to “enabling legislation”. To avoid doubt, Item 4 would amend the definition of “enabling legislation” by adding the words, “by or”, to ensure it captures the same meaning as “incorporating law”.

### **Transfer of obligation to provide report about subsidiaries from the Auditor-General (subsections 12(3) and 37(3))**

70. Subsections 12(3) and 37(3) of the CAC Act currently require the Auditor-General to give copies to the responsible Minister of the financial statements and audit report of a subsidiary of a Commonwealth authority, or a Commonwealth company, respectively.

71. The Australian National Audit Office (ANAO) requested, in a submission to the Joint Committee of Public Accounts and Audit in 2000,<sup>23</sup> that the CAC Act be amended to transfer the responsibility under subsections 12(3) and 37(3) of the CAC Act to directors of the relevant body.

72. Transferring this responsibility would also be consistent with the Corporations Act, where directors of a holding company are responsible for annual reporting on a consolidated basis. Consistent with the ANAO’s submission, Items 21 and 49 of the Bill would amend subsections 12(3) and 37(3), to provide that the directors of the parent body must give the statements and report to the responsible Minister.

### **Clarifying requirements for compliance with statutory and other duties (section 27A)**

73. Section 27A currently protects all officers of Commonwealth authorities, in specified situations, from a contravention of the civil penalty provisions in sections 23 to 25 of the CAC Act (covering duties on good faith, use of position and use of information) and from breaching the corresponding criminal offence in section 26.<sup>24</sup>

74. Subsection 27A(1) generally, covers an officer who does something he or she is required to do under a section of the CAC Act. Subsection 27A(2) currently protects APS employees, in the limited circumstances, where they are appointed to the board of a Commonwealth authority, in cases where their duties as an officer of the authority and as a public servant may conflict. As discussed below, the Bill will amend section 27A to clarify the requirements for compliance with statutory and other duties.

---

<sup>23</sup> Joint Committee of Public Accounts and Audit, “Review of the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*”, Australian National Audit Office submission at page S57.

<sup>24</sup> Sections 23 to 26 of the CAC Act establish civil obligations relating to: good faith (section 23), use of position (section 24), use of information (section 25), and the corresponding criminal offence (section 26).

## **General law duties**

75. Item 30 of the Bill will amend section 27A to specify that the protection extends to both general law duties and statutory duties. This improves clarity on whether the statutory duties in sections 23 to 25 of the CAC Act displace the equivalent duties that could potentially be imposed on an officer at common law and in equity (collectively, “general law”).

## **Removing the exemption from criminal penalties**

76. A breach of the offence in section 26 would involve an officer contravening the duties to act in good faith and for a proper purpose, or use of position or information, with recklessness or intentional dishonesty. It is unclear in what circumstances an officer could commit an offence against this clause while merely acting in their role as a public servant or in accordance with the requirements of another clause of the CAC Act.

77. Accordingly, Item 30 of the Bill will remove the exemption in section 27A to the criminal penalty under section 26 of the CAC Act, and restrict it to protection against contravention of the civil penalty clauses.

## **Definition of “public servant”**

78. Subsection 27A(2) currently applies to “a person appointed or engaged under the *Public Service Act 1999* (Public Service Act)”. To improve alignment with the Public Service Act, Item 30 of the Bill specifies that subsection 27A(2) applies to Agency Heads and APS employees, as defined in the Public Service Act.

79. Item 30 will also clarify that this protection is intended to apply only in the limited circumstances where directors or officers of Commonwealth authorities are APS employees or Agency Heads who are not employed within the same Commonwealth authority. That is, the exemption will only apply to public servants who are appointed from within Departments of State, Executive Agencies or Statutory Agencies other than the Commonwealth authority itself, to provide for protection where there is a conflict between a person’s duty as an APS employee and as an officer of the authority. It is not intended to apply to APS employees employed by the authority, or to the Agency Head of the authority.

80. Item 30 also amends section 27A to clarify that subsection 27A(1) provides a defence for a contravention of section 23, 24 or 25, or their equivalent duties at common law or in equity.

## **Inserting notes referring to section 27A**

81. For clarity, Items 26, 27 and 28 of the Bill would insert notes in sections 23, 24 and 25 to refer to the exemption applying to these sections from section 27A.



## IV. NOTES ON SCHEDULE 1

82. A general explanation of the amendments proposed in Part 1 of Schedule 1 is provided under Section III of this Explanatory Memorandum, “Thematic Overview of Amendments in Schedule 1”. This section provides a brief explanation of the amendments in sequential order.

### Items 1-10 – Definitions (section 5)

83. Items 1 to 10 amend section 5 of the CAC Act to alter particular definitions, as follows.

#### Item 1 – Agency

84. Item 1 inserts “Agency” into section 5, as this term will be used in the section 5 definition of senior manager. It is defined to have the same meaning as in the Public Service Act.

#### Item 2 – Agency Head

85. Item 2 inserts “Agency Head” into section 5, as this term will be used in sections 27A and 34 of the CAC Act. It is defined to have the same meaning as in the Public Service Act.

#### Item 3 – APS employee

86. Item 3 inserts “APS employee” into section 5, as this term will be used in section 27A and in the notes to sections 23, 24 and 25 of the CAC Act. It is defined to have the same meaning as in the Public Service Act, where it is shorthand for an Australian Public Service employee.

#### Item 4

87. Item 4 broadens the language used to define “enabling legislation” for clarity, and to help ensure that there are no unintended consequences from removing the equivalent term, “incorporating law”.

#### Items 5 and 7

88. Item 7 removes the definition of “incorporating law” in order to avoid duplication of definitions, given the better phrase “enabling legislation” that was introduced to the CAC Act in 2000. Item 5 replaces a reference to “incorporating law” in the definition of “financial year” with “enabling legislation”. For further detail about simplification of these terms, refer paragraph 69 above.

## **Item 6**

89. Item 6 inserts a definition of “General Policy Order” into section 5, which will be the new term used to describe policies notified under sections 28 and 43. For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

## **Item 8**

90. Item 8 modifies the definition of “officer” such that an officer is either a director or a senior manager of a Commonwealth authority. For further detail about the new definitions of “officer” and “senior manager”, refer paragraphs 50 to 52 above.

## **Item 9 – Senior manager**

91. Item 9 inserts a definition of “senior manager” into section 5, which refers to persons within senior management of the body other than directors, company secretaries, Ministers or APS employees not directly employed by the body. For further detail about the new definitions of “officer” and “senior manager”, refer paragraphs 50 to 52 above.

## **Item 10 – Statutory Agency**

92. Item 10 inserts a definition of “Statutory Agency” into section 5, as this term will be used in section 27A of the CAC Act. It is defined to have the same meaning as in the Public Service Act. Although this definition is only used in section 27A, it has been added to section 5 rather than section 27A. This is to ensure consistency in the format of the CAC Act as section 5 contains a list of definitions used.

## **Items 11-13 – Offences and civil penalties (section 6)**

### **Item 11**

93. Item 11 is a minor drafting amendment to repeal subsection 6(1) which is no longer required, due to amendments to the *Criminal Code Act 1995* which applies the Code to all offences (irrespective of how the offences have been created).<sup>25</sup>

### **Item 12**

94. Item 12 is a minor drafting amendment consequential to Items 11 and 13 which renumbers subsection 6(2) as section 6.

### **Item 13**

95. Item 13 is a minor drafting amendment to repeal subsections 6(3) and 6(4) which are no longer required as they deal with maximum penalties. Parliamentary Counsel Drafting Direction No. 3.5 Offences, penalties, self-incrimination, secrecy

---

<sup>25</sup> *Criminal Code Act 1995*, subsection 2.2.

provisions and enforcement powers (Drafting Direction 3.5) requires that references to “Maximum Penalty” are replaced with references to “Penalty”.

### **Items 14-17– Annual reporting by Commonwealth authorities (section 9)**

96. Section 9 of the CAC Act currently requires that the directors of a Commonwealth authority submit an annual report to the responsible Minister by the deadline for the financial year, being the 15<sup>th</sup> day of the 4<sup>th</sup> month after the end of the financial year (i.e. 15 October if the financial year ends on 30 June). Subsection 9(2) provides that the responsible Minister may grant an extension of time in special circumstances.

97. This process differs from the process for tabling by Ministers of late reports to Parliament under section 34C(3) and seeking extensions of time from Ministers under section 34C(5) of the Interpretation Act. For further detail about the submission of annual reports by Commonwealth authorities, refer paragraphs 30 to 32 above.

#### **Items 14**

98. Item 14 is a minor drafting amendment consequential to Items 15, 16 and 17 which add “for presentation to the Parliament” at the end of paragraph 9(1)(b).

#### **Items 15 and 17**

99. Item 15 removes from subsection 9(1) the deadline for Commonwealth authorities to prepare and present an annual report to the responsible Minister. Item 17 removes subsections 9(2) and 9(3) and inserts a new subsection 9(2) that provides the deadline for a Commonwealth authority to prepare and present its annual report including making it clear that a responsible Minister can grant an extension to present the report under subsection 34C(5) of the Interpretation Act.

#### **Item 16**

100. Item 16 replaces the Note for subsection 9(1), drawing attention to section 34C of the Interpretation Act.

### **Items 18-20 – Annual reporting rules (section 11)**

101. Section 11 of the CAC Act currently provides for a civil penalty where any of the directors’ reporting rules are breached (that is, section 9 or any of the requirements of Schedule 1 of the CAC Act). For further detail about the changes to section 11, refer paragraph 54 above, regarding a change to improve consistency with the Corporations Act.

## **Item 18**

102. For consistency with the Corporations Act<sup>26</sup> and with other offence clauses in the CAC Act, Item 18 repeals and replaces subsection 11(1) to make an offence under the subsection a civil penalty provision and inserts new subsection 11(1A), which provides for the inclusion of a criminal offence where a breach of any of the directors' reporting rules is dishonest.

## **Item 19**

103. Item 19 corrects a minor grammatical error in section 11 by replacing "directors reporting rule" with "directors' reporting rule".

## **Item 20**

104. Item 20 corrects the same grammatical error as in Item 19, and amends a reference to subsection 9(1) as a consequence of amendments to section 9 in Items 14 to 17.

## **Item 21 – Transfer of obligation to provide report about subsidiaries (subsection 12(3))**

105. Section 12(3) of the CAC Act currently requires the Auditor-General to provide a copy of the annual report, financial statements and audit report of a subsidiary of a Commonwealth authority to the responsible Minister. Item 21 amends this section to transfer this responsibility from the Auditor-General to the directors of the Commonwealth authority. For further detail about the changes to section 12, refer paragraphs 70 to 72 above.

## **Items 22-23 – Minor drafting amendments (sections 18 and 19)**

106. Items 22 and 23 replace references to a Commonwealth authority's "incorporating law" (in subsections 18(4) and 19(4) respectively), to refer to "enabling legislation". This amendment is consequential to Item 7. For further detail about simplification of these terms, refer paragraph 69 above.

## **Item 24 – Accounting records (section 20)**

107. Item 24 amends section 20 to make it consistent with the Corporations Act<sup>27</sup> by clarifying that the section is a civil penalty provision and, if the contravention is dishonest, the criminal offence will apply. For further detail about the changes to section 20, refer paragraph 55 above.

---

<sup>26</sup> Corporations Act sections 292, 314, 344 and Item 117 of Schedule 3.

<sup>27</sup> Corporations Act section 286, subsection 344 and Item 117 of Schedule 3

## **Item 25 – Minor drafting amendment (section 21)**

108. Item 25 removes the second sentence of subsection 21(2), which relates to the previous definition of “officer”. For further detail about the new definitions of “officer” and “senior manager”, refer paragraphs 50 to 52 above.

## **Items 26-39 – Officers’ duties (sections 23, 24, 25, 26, 27A, 27C, 27D, 27F, 27J and 27N)**

### **Items 26-28**

109. Items 26 to 28 provide for a Note to each of the civil obligations in sections 23, 24 and 25, drawing readers’ attention to the exemption in section 27A for APS employees and Agency Heads. For further detail about the changes to section 27A, refer paragraphs 73 to 81 above.

### **Item 29**

110. Item 29 amends section 26 to align the penalty for a criminal breach of the officers’ duties with the Corporations Act.<sup>28</sup> For further detail about the changes to section 26, refer paragraph 56 above.

### **Item 30**

111. Item 30 amends section 27A to help ensure more appropriate protection against the application of certain directors’ duties for certain officers and employees in specific valid circumstances. For further detail about the changes to section 27A, refer paragraphs 73 to 81 above.

### **Item 31**

112. Item 31 is a minor drafting amendment to section 27C to reflect Drafting Direction 3.5 which requires that references to “Maximum Penalty” are replaced with references to “Penalty”.

### **Item 32**

113. Item 32 corrects a minor typographical error by amending subsection 27C(8) to refer to subsection 27C(4A) rather than subsection 27C(4).

### **Item 33**

114. Item 33 amends paragraph 27D(b)(ii) to make it consistent with the equivalent clause of the Corporations Act.<sup>29</sup> For further detail about the changes to section 27D, refer paragraphs 67 to 68 above.

---

<sup>28</sup> Corporations Act section 323D operating with subsection 344(2).

<sup>29</sup> Corporations Act subparagraph 189(b)(ii).

### **Item 34**

115. Item 34 amends the penalty for contravention of section 27F, to make it consistent with the Corporations Act.<sup>30</sup> For further detail about the changes to section 27F, refer paragraphs 57 to 60 above.

### **Item 35**

116. Item 35 applies strict liability to a breach of subsection 27F(1), to improve the alignment with the Corporations Act.<sup>31</sup> For further detail about the changes to subsection 27F(1), refer paragraphs 57 to 60 above.

### **Item 36**

117. Item 36 is a minor drafting amendment to correct a typographical error, given that subparagraphs 27F(2)(b)(i) and (ii) require a semi-colon at the end of them.

### **Item 37**

118. Item 37 amends section 27J to make it consistent with the Corporations Act by applying strict liability to a breach in relation to restrictions on directors voting.<sup>32</sup> For further detail about the changes to section 27J, refer paragraph 61 above.

### **Item 38**

119. Item 38 amends the penalty for contravention of section 27N, to make it consistent with the Corporations Act.<sup>33</sup> For further detail about the changes to section 27N, refer paragraph 62 above.

### **Item 39**

120. Item 39 amends section 27N to make it consistent with the Corporations Act by applying strict liability to a breach in relation to insurance for certain liabilities of officers.<sup>34</sup> For further detail about the changes to section 27N, refer paragraph 62 above.

## **Item 40 – General Policy Orders (section 28)**

121. Item 40 introduces a more streamlined, efficient and transparent process to replace aspects of the existing notification process of general government policies in section 28. For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

---

<sup>30</sup> Corporations Act section 191 and Item 32 of Schedule 3.

<sup>31</sup> Corporations Act section 191 and Item 32 of Schedule 3.

<sup>32</sup> Corporations Act section 195.

<sup>33</sup> Corporations Act section 199B and Item 34 of Schedule 3.

<sup>34</sup> Corporations Act section 195 and item 33 of Schedule 3.

## **Item 41 – Credit cards and credit vouchers (section 28A)**

122. Item 41 inserts new section 28A, providing Commonwealth authorities with the ability to use credit cards and credit vouchers. For further detail about new section 28A, refer paragraphs 39 to 43 above.

## **Item 42 – Misuse of credit cards or credit vouchers (section 28B)**

123. Item 42 inserts the new section 28B, introducing a criminal offence (consistent with the FMA Act) for misuse of credit cards and credit vouchers under section 28A.<sup>35</sup> For further detail about new section 28B, refer paragraphs 39 to 43 above.

## **Item 43 – Aligning accounting periods of subsidiaries (section 30)**

124. Item 43 amends the criminal penalty for contravention of section 30 and introduces a civil penalty, to make it consistent with the Corporations Act.<sup>36</sup> For further detail about the changes to section 30, refer paragraph 63 above.

## **Items 44-45 – Definition of “Commonwealth company” (section 34)**

### **Item 44**

125. Item 44 would align the test in the CAC Act for determining Commonwealth companies under the CAC Act with the subsidiary test in the Corporations Act, by inserting a definition of “control”.<sup>37</sup> Item 44 is considered in more detail in paragraphs 44 to 49 above.

### **Item 45**

126. Item 45 is a minor drafting amendment to insert a note which clarifies that a Commonwealth company that is limited by guarantee is a wholly-owned Commonwealth company. This does not change the current law, but explains a relatively important point that might not have been otherwise clear to a general reader of the CAC Act.

## **Items 46-48 – Submission of annual reports by Commonwealth companies (section 36)**

127. Items 46, 47 and 48 make the following amendments to section 36.

---

<sup>35</sup> FMA Act section 60.

<sup>36</sup> Corporations Act section 323D, section 344 and Item 117 of Schedule 3.

<sup>37</sup> Corporations Act section 46.

128. Firstly, the amendments to section 36 would help ensure consistency with a similar provision in the Corporations Act, by including a civil penalty and amending the criminal penalty.<sup>38</sup> For further detail about this change to section 36, refer paragraph 64 above.

129. The amendments to section 36 would require reporting by all Commonwealth companies including certain classes of proprietary company which are no longer required to prepare annual reports under the Corporations Act. For further detail about this change to section 36, refer paragraphs 33 to 36 above.

130. Item 46 would amend section 36 so that it requires wholly-owned Commonwealth companies to give their responsible Minister any additional information or reports required by the FMOs. For further detail about this change to section 36, refer paragraphs 37 to 38 above.

131. Finally, Item 46 provides the deadline for a Commonwealth company to prepare and present its annual report including making clear that a responsible Minister can grant an extension to present the report under subsection 34C(5) of the Interpretation Act. For further detail about this change to section 36, refer paragraphs 33 to 36 above.

### **Item 49 – Transfer of obligation to provide report about subsidiaries (subsection 37(3))**

132. Subsection 37(3) of the CAC Act currently requires the Auditor-General to provide a copy of the annual report, financial statements and audit report of a subsidiary of a Commonwealth company to the responsible Minister. Item 49 amends this section to transfer this responsibility from the Auditor-General to the directors of the Commonwealth company. For further detail about the changes to section 37, refer paragraphs 70 to 72 above.

### **Item 50 – General Policy Orders (section 43)**

133. Item 50 amends section 43 to introduce a more streamlined, efficient and transparent process to replace aspects of the existing notification process of general government policies. For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

### **Items 51-52 – Minor amendments to section 48**

#### **Item 51**

134. Item 51 is a minor amendment to clarify that the FMOs are legislative instruments, as this is not currently stated in the CAC Act itself.<sup>39</sup>

---

<sup>38</sup> Section 36 is designed to utilise the same reporting structure as section 319 of the Corporations Act although there is no direct equivalent to section 36 of the CAC Act because the Corporations Act does not deal with reporting by Commonwealth companies to their responsible Ministers.

<sup>39</sup> The FMOs are registered on the Federal Register of Legislative Instruments.



## **Item 52**

135. Item 52 is a minor drafting amendment to remove an outdated reference to the Interpretation Act, given that Item 51 refers instead to the phrase “legislative instrument” from the Legislative Instruments Act.

## **Item 53 – General Policy Orders (section 48A)**

136. Item 53 of the Bill inserts a new section 48A which introduces a more streamlined, efficient and transparent process to replace aspects of the existing notification of general government policies in sections 28 and 43. For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

## **Item 54 – Minor drafting amendment (subsection 49(2))**

137. Item 54 is a minor drafting amendment which applies the new definition of “control” in section 34 to overseas corporations which are, in certain respects, subject to regulations under the CAC Act. For further detail about the change to section 49(2), refer paragraphs 46 to 49 above.

## **Items 55-68 – Civil penalty regime (Schedule 2)**

138. Schedule 2 of the CAC Act provides for the process for enforcement of breaches of the civil penalties in the CAC Act. It also sets out the pecuniary penalties available and provides for compensation orders for breach of civil penalty clauses.

139. Items 55 through 68 amend the civil penalty regime in Schedule 2 of the CAC Act to refer to the new civil penalties (sections 20, 30 and 36), including new penalties relating to officers of Commonwealth companies. For further detail about changes to Schedule 2, refer paragraphs 65 to 66 above.

## **Item 55**

140. Item 55 is a minor drafting amendment to correct a typographical error, where a paragraph in Schedule 2 requires a semi-colon at its end.

## **Item 56**

141. Item 56 is a drafting amendment to increase clarity by making it clear that paragraph 1(1)(b) of Schedule 2 of the CAC Act refers to the rules in Part 3 Division 2 of the CAC Act that apply to Commonwealth authorities rather than the rules in Part 4 Division 2 of the CAC Act which apply to Commonwealth companies.

## **Item 57**

142. Item 57 is a drafting amendment to add the new civil penalties created by Items 24, 43 and 46 of the Bill (affecting sections 20, 30 and 36 respectively) to the list of civil penalties in the CAC Act.

### **Items 58-66 and 68**

143. These items are minor drafting amendments to ensure that Schedule 2 applies to Commonwealth companies in addition to Commonwealth authorities. This is necessary because the Bill will introduce a civil penalty clause relating to Commonwealth companies (see paragraphs 65 to 66 above).

### **Item 67**

144. Item 67 is a minor drafting amendment to reflect Drafting Direction 3.5 which requires that references to “Maximum Penalty” are replaced with references to “Penalty”.

### **Item 69 – Minor drafting amendment (Schedule 3)**

145. Item 69 is a minor drafting amendment to rectify a typographical error by omitting “27C(4)” and substituting “27C(4A)”.

### **Item 70 – Certain items to take effect at the start of the new financial year**

146. Item 70 provides that the substantive changes to the CAC Act in Items 14 to 21, 24, 43, 46 to 49, 54, and 57 to 68 of Schedule 1 of the Bill take effect from the start of the financial year on or after the commencement of Item 70 in line with the commencement provisions in clause 2 of the Bill.

### **Items 71-74 – Transitional clauses for General Policy Orders**

#### **Items 71-73**

147. Items 71-73 of the Bill introduce transitional clauses to ensure a smooth transition between the existing process of notification of general policies of the Government under sections 28 and 43 and the proposed General Policy Orders (see paragraphs 28 to 29 above).

#### **Items 74**

148. Item 74 provides that the new section 48A applies to consultation on a general policy of the Australian Government occurring on or before the commencement of this item.

## V. NOTES ON SCHEDULE 2

### Item 1

149. Item 1 amends subsection 78(7) of the ABC Act to preserve the exemption that the ABC currently has from complying with section 28 of the CAC Act. Proposed section 48A provides when General Policy Orders will apply to a body. The amendment adds proposed section 48A of the CAC Act to ensure that the ABC is not required to apply General Policy Orders. For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

### Item 2

150. Item 2 amends subsection 5A(1) of the AIDC Act to preserve the partial exemption that the AIDC currently has from complying with section 28 of the CAC Act. The amendment replaces the reference to section 28 of the CAC Act with proposed subsection 28(2) of the CAC Act to ensure that the directors of the AIDC are only required to apply General Policy Orders to an eligible subsidiary of the AIDC.<sup>40</sup> For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

### Item 3

151. Item 3 amends subsection 4A(1) of the ANU Act to preserve the exemption that the ANU currently has from complying with section 28 of the CAC Act. Proposed section 48A provides when General Policy Orders will apply to a body. The amendment adds proposed section 48A of the CAC Act to ensure that the ANU is not required to apply General Policy Orders. For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

### Item 4

152. Item 4 removes notifications under sections 28 and 43 from the table in subsection 7(1) of the Legislative Instruments Act, which lists instruments declared to not be legislative instruments. Section 28 and 43 notifications are being replaced by General Policy Orders which will be legislative instruments, therefore the reference to section 28 and 43 notifications in subsection 7(1) of the Legislative Instruments Act can be removed.

### Item 5

153. Item 5 removes notifications under sections 28 and 43 from the table in subsection 44(2) of the Legislative Instruments Act, which lists instruments not subject to disallowance. New subsection 48A(5) includes the exemption for General Policy Orders from disallowance within section 48, so a replacement for the current

---

<sup>40</sup> For the purposes of the AIDC, section 4 of the AIDC Act defines eligible subsidiary.

reference to section 28 and 43 notifications in subsection 44(2) of the Legislative Instruments Act is not required.

#### **Item 6**

154. Item 6 removes notifications under sections 28 and 43 from the table in subsection 54(2) of the Legislative Instruments Act, which lists instruments not subject to sunset. New subsection 48A(5) includes the exemption for General Policy Orders from sunset, within section 48, so a replacement for current reference to section 28 and 43 notifications in subsection 54(2) of the Legislative Instruments Act is not required.

#### **Item 7**

155. Item 7 states that despite the amendments made to sections 44 and 54 of the Legislative Instruments Act by items 5 and 6, those sections continue in force, after the commencement of this item, in relation to section 28 notifications and section 43 notifications. This ensures that notifications that occurred prior to the proposed new General Policy Order process continue to be exempt from disallowance and sunset.

#### **Item 8**

156. Item 8 amends subsection 13(2) of the SBS Act to preserve the partial exemption that the SBS currently has from complying with section 28 of the CAC Act. Proposed section 48A provides when General Policy Orders will apply to a body. The amendment ensures that the SBS is not required to comply with a General Policy Order referred to in sections 28 and 48A if it affects the content or scheduling of programs. For further detail about General Policy Orders, refer paragraphs 17 to 29 above.

