

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**AUSTRALIAN CURRICULUM, ASSESSMENT AND REPORTING AUTHORITY BILL
2008**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Education,
the Honourable Julia Gillard MP)

AUSTRALIAN CURRICULUM, ASSESSMENT AND REPORTING AUTHORITY BILL 2008

OUTLINE

The Australian Curriculum, Assessment and Reporting Authority Bill 2008 (the Bill) will give effect to the Council of Australian Governments' (COAG's) historic decision of 2 October 2008, to establish a new national education authority that will bring together for the first time the functions of curriculum, assessment and reporting at the national level.

The Bill establishes the Australian Curriculum, Assessment and Reporting Authority (the Authority), as an independent statutory authority under the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). This governance model is consistent with the agreement reached by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) on 12 September 2008.

The Authority's functions incorporate the management of national curriculum, assessment and data management, and analysis and reporting for schools education. The Authority's functions will also incorporate the functions currently overseen by the interim National Curriculum Board relating to the development of the national curriculum and the functions of the National Schools Assessment Data Centre announced by the Australian Government in the 2008/09 Budget.

The Bill includes provisions ensuring that accountability for the Authority is shared between the Commonwealth and the States and Territories through MCEETYA. The Bill outlines the Authority's core functions across the areas of curriculum, assessment and reporting as well as the Authority's ability to operate commercially with regard to educational services. The Bill sets out that MCEETYA will be responsible for setting the Authority's work program (in line with its functions defined in the enabling legislation) through a Charter. The Authority must perform its functions and exercise its powers in accordance with its functions within the Bill and its Charter.

The Bill provides that the Authority will be lead by an expert Board of Directors. Board membership will include a Chair and Deputy Chair as well as a member nominated by each State and Territory education minister, the National Catholic Education Commission (NCEC), the Independent Schools Council of Australia (ISCA) and the Commonwealth Minister. MCEETYA must agree to all Board appointments.

The Bill provides that the Authority will have a Chief Executive Officer (CEO). The CEO will be appointed by the Board and will be responsible for overseeing the day-to-day work of the Authority.

The Bill also provides that a review of the Authority's role and functions must have commenced within six years of the Authority's establishment.

FINANCIAL IMPACT STATEMENT

The estimated financial impact of this Bill over the four year period from 2008-09 to 2011-12 is \$37.2 million. This figure includes:

- \$20 million committed to support the work of the National Curriculum Board; and
- \$17.2 million initially committed to establish an independent National Schools Assessment Data Centre.

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NOTES ON CLAUSES

PART 1 – PRELIMINARY

Clause 1 – Short title

This clause provides for the Bill, when passed, to be cited as the *Australian Curriculum, Assessment and Reporting Authority Act 2008*.

Clause 2 – Commencement

This clause provides that this Act commences on the day on which it receives the Royal Assent.

Clause 3 – Definitions

This clause is an interpretation provision which contains definitions of the terms and expressions used in the Bill.

Significant terms include:

Charter which refers to the charter of the Australian Curriculum, Assessment and Reporting Authority as determined from time to time by the Ministerial Council. The Charter will set out the annual work program for the Authority and will provide details about the type and level of activity the Authority is expected to undertake. For example, the Charter would include information about the national assessment program (which school years should be assessed nationally, how frequently and in which subjects) and reporting (which results should be reported, to whom and on what basis). The Charter will also specify the school subjects for which a national curriculum is to be developed.

Ministerial Council which refers to the council of Commonwealth, State and Territory Ministers that is known as the Ministerial Council on Education, Employment, Training and Youth Affairs on the day on which the definition commences.

Clause 4 – Constitutional operation of this Act

This clause invokes certain heads of Commonwealth constitutional power in relation to the Australian Curriculum, Assessment and Reporting Authority's powers and functions to ensure the legislation would continue to have effect if the powers and functions of the Authority were confined to those constitutional powers.

PART 2 – AUSTRALIAN CURRICULUM, ASSESSMENT AND REPORTING AUTHORITY

Clause 5 – Establishment

This clause provides for the establishment of the Australian Curriculum, Assessment and Reporting Authority as a body corporate with a seal. The *Commonwealth Authorities and Companies Act 1997* applies to the Authority.

Clause 6 – Functions

This clause sets out the Australian Curriculum, Assessment and Reporting Authority's functions and how it may perform them.

The functions include:

- developing and administering a national school curriculum, including content of the curriculum and achievement standards, for school subjects specified in the Charter (paragraph 6(a));
- developing and administering national assessments (paragraph 6(b));
- collecting, managing and analysing student assessment data and other data relating to schools and comparative school performance (paragraph 6(c));
- facilitating information sharing arrangements between Australian government bodies in relation to the collection, management and analysis of school data (paragraph 6(d));
- publishing information relating to school education, including information relating to comparative school performance (paragraph 6(e));
- providing school curriculum resource services, educational research services and other related services (paragraph 6(f));
- providing information, resources, support and guidance to the teaching profession (paragraph 6(g));
- performing such other functions that are conferred on it by, or under, this Bill or any other Commonwealth Act (paragraph 6(h)); and
- performing such other functions that are ancillary or incidental to the functions mentioned in clause 6 (paragraph 6(i)).

Explanation of the functions

Paragraph 6(a): Outlines the Authority's function in relation to developing and administering the national curriculum, including content of the curriculum and achievement standards, for school subjects specified in the Charter.

The Authority's functions would incorporate the functions currently overseen by the Interim National Curriculum Board relating to the development of national curriculum from kindergarten to Year 12 in the key learning areas of English, mathematics, the sciences and history. A second phase of work would involve the development of national curriculum in languages and geography. The Authority would also be required to develop national curriculum in any other learning areas that are specified in the Charter.

The use of the term ‘administer’ in this paragraph refers to the Authority’s role in supporting the States and Territories in the administration and future implementation of a national curriculum for any learning area once it is developed.

The Authority would also be responsible for the ongoing monitoring and maintenance of national curriculum once it is developed.

Paragraph 6(b): Outlines the Authority’s function in relation to national assessment, which would be determined by the Ministerial Council through the Authority’s Charter.

The Authority would develop and administer national assessments. This would include the design, development and management of national assessments consistent with the national curriculum. It would also include the ability for the Authority to undertake research and analysis on assessment methods to develop any new national assessment program.

The use of the term ‘administer’ in this paragraph refers to the Authority’s role in the management of national assessment programs and supporting the States and Territories in the administration and implementation of national assessments.

The Authority would also be responsible for the ongoing monitoring, maintenance and management of national assessments once developed.

Paragraph 6(c): Outlines the Authority’s functions relating to its role in collecting, managing and analysing data and the type of data this includes. This function would enable school level information to be collected by the Authority in order to obtain nationally comparable data.

Possible types of data to be collected would include information on key performance measures and targets agreed by the Council of Australian Governments (COAG), student outcomes on national assessments including literacy and numeracy testing, details on the composition of the student body (Socio-Economic Status, Indigeneity, Language Background Other Than English and Disabilities) and other school details. This detail would be outlined in the Authority’s Charter.

In relation to the collection of the data it is envisaged that it would be provided by States, Territories, non-government education systems and individual schools and other bodies, as necessary. The management of the data would include secure storage and access of the information. The analysis of the data would be for the purposes of supplying particular information to the COAG Reform Council and for the compilation of reports for governments or the public as agreed. Approved researchers would also have access to the data for analysis and publication purposes as agreed.

National data handling protocols, definitions and standards would form part of the Authority’s Charter.

Paragraph 6(d): Outlines the Authority’s functions relating to information sharing arrangements between Australian government bodies in relation to the collection, management and analysis of school data as outlined above.

The Authority’s role in the facilitation of information sharing would be to ensure that States and Territories are collecting data in a format that will enable national comparisons. This would

include gaining agreement on the definitions and standards for national information collections including factors such as the quality and completeness of contributed data so that information is capable of national comparison.

Paragraph 6(e): Outlines the Authority's functions relating to the publication of a range of information about schools. This would include, for example, results of national literacy and numeracy testing and the National Report on Schooling. Accurate information on student and school performance informs teachers, principals, parents and governments to assist them in identifying the capacities and needs of students and schools. Publication of such information will provide comparative information on like schools within defined localities to parents and communities.

Paragraph 6(f): Outlines the Authority's functions relating to the provision of a range of school curriculum resource services, educational research services and other services, which would be consistent with activities outlined in its Charter. Services the Authority may provide include:

- educational research and management services in the domestic and international market;
- the development of curriculum resources and materials that relate to national curriculum and assessment;
- the provision of advice on curriculum, assessment and reporting programs; and
- the engagement by different jurisdictions to undertake specific projects or provide specific services.

Paragraph 6(g): Outlines the Authority's functions relating to the creation of resources and materials, and provision of learning activities and networks that support the teaching profession in the delivery of national curriculum and assessment. The reason for this function is the importance of support for teachers in the development and delivery of the new national curriculum and national assessment(s), and because the development of national teaching standards are linked to the national curriculum and assessment regime. The Authority may develop exemplar curriculum documents and resources for teachers or teacher guides for the national curriculum and assessment program.

Paragraphs 6(h) and (i) ensure the Authority can undertake any other ancillary or incidental functions necessary to perform the specified functions.

Clause 7 – considerations governing the performance of functions

This clause specifies that the Australian Curriculum, Assessment and Reporting Authority must perform its functions in accordance with any directions given to it by the Ministerial Council in writing. The directions must be consistent with this Act, the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) or regulations or orders made under the CAC Act. The Authority must also perform its functions in accordance with its Charter.

Subclause 7(4) clarifies that directions by the Ministerial Council are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. The directions would be administrative, not legislative in character, and relate only to the operation of the Authority in the performance of its functions.

Subclause 7(5) clarifies that if the Charter is determined by the Ministerial Council in writing it is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. The Charter would be administrative, not legislative in character (see Clause 3).

A note at subclause 7(1) refers readers to clause 42 and subclause 43(3) which indicate how directions are to be given.

Clause 8 – Powers

The Australian Curriculum, Assessment and Reporting Authority would have the power to do all things necessary or convenient to be done for or in connection with the performance of its functions as described in clause 6. For the avoidance of doubt, subclause 8(2) contains a non-exhaustive list of specific powers of the Authority. These include the power to:

- enter into contracts (paragraph 8(2)(a));
- accept various forms of gifts, whether on trust or otherwise (paragraph 8(2)(b)); and
- do anything incidental to any of its functions (paragraph 8(2)(c)).

Clause 9 – Charging of fees

This clause specifies that the Australian Curriculum, Assessment and Reporting Authority may charge fees for things done in performing its functions. A fee must not be such as to amount to taxation.

Clause 10 – Privileges and immunities of the Crown

This clause provides that the Australian Curriculum, Assessment and Reporting Authority does not have the privileges and immunities of the Crown. This means that the Authority does not fall within the ‘shield of the Crown’. The effect of this clause is to clarify that the Authority may be liable for an offence for which the Commonwealth could not be prosecuted.

PART 3 – THE BOARD OF THE AUSTRALIAN CURRICULUM, ASSESSMENT AND REPORTING AUTHORITY

Division 1 – The Board

Clause 11 – Establishment

This clause provides for the establishment of the Board of the Australian Curriculum, Assessment and Reporting Authority.

Clause 12 – Role

This clause sets out the role of the Board. Subclause 12(1) provides that the Board is responsible for the proper and efficient performance of the Australian Curriculum, Assessment and Reporting Authority's functions. The Authority acts through the Board, which has the capacity to conduct the ordinary business of a board, including setting policies, procedures and directions for the agency.

Subclause 12(2) provides that the Board has power to do all things necessary or convenient to be done for or in connection with the performance of its duties. In this regard, the Board is also able to authorise the CEO or other staff of the Authority to carry out specified activities in relation to the day to day administration of the Authority under the direction of the Board. A formal delegation power is not necessary, as the fundamental role of the Board, which is to be responsible for the proper and efficient performance of the Authority's functions, should not be delegated.

Subclause 12(3) provides that all acts and things done in the name of, or on behalf of, the Authority by the Board, or with the authority of the Board, are taken to have been done by the Authority. An authorisation given by the Board under subclause 12(2) would not be a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

Subclause 12(4) allows all things done in the name of, or on behalf of, the Authority by the Board, or with the authority of the Board, to be done on the basis of the subjective opinion, belief or state of mind of the person or body doing them.

Clause 13 – Membership

This clause provides for the membership of the Board. The Board shall consist of the Chair, the Deputy Chair, one member nominated by the Minister, one member nominated by the National Catholic Education Commission (or if the Commission ceases to exist, a similar body prescribed by the regulations), one member nominated by the Independent Schools Council of Australia (or if the Council ceases to exist, a similar body prescribed by the regulations), and 8 members each nominated by a different State or Territory Minister.

Clause 14 – Appointment of members

Subclause 14(1) provides for the appointment of members by the Minister by written instrument.

An instrument of appointment would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*. A note to subclause 14(1) assists the reader by clarifying that a member of the Board is eligible for re-appointment pursuant to subsection 33(4A) of the *Acts Interpretation Act 1901*, which states that in any Act, appointment includes re-appointment.

Subclause 14(2) provides that the Minister can only make the appointment if:

- the Ministerial Council has agreed to the appointment (paragraph 14 (2)(a)); and
- the Ministerial Council has agreed that the appointment of the person would ensure that the members of the Board collectively possess an appropriate balance of professional expertise in matters relating to school curriculum, school assessment and data management, analysis and reporting in relation to school performance, financial and commercial matters in relation to the management of educational organisations, and corporate governance (paragraph 14(2)(b)); and
- the person has been nominated for the appointment, if required to be so nominated, pursuant to subclauses 13(c),(d), (e) or (f) (paragraph 14(2)(c)).

Subclauses 14(3) and (4) provide that a member holds office on a part-time basis and for the period specified in the instrument of appointment, which must not exceed 3 years.

Subclause 14(5) provides that a person must not be appointed for a period if the sum of that period and any periods of previous appointment exceed 6 years. This subclause has the effect that a member is not eligible for re-appointment after 6 years.

Clause 15 – Acting in positions

Subclause 15(1) provides that the Deputy Chair is to act as the Chair during a vacancy in that position or when the Chair is absent from duty, overseas or unable to perform his or her duties.

Subclause 15(2) provides that while acting as the Chair the Deputy Chair has, and may exercise all the Chair's powers and must perform all the Chair's functions and duties, and that this Act applies to the Deputy Chair as if he or she were the Chair.

Subclause 15(3) provides that the actions of an acting Chair would not be invalid merely because of technical or other grounds relating to the person's appointment. This will provide certainty and stability and will ensure that an acting Chair is accountable for his or her actions.

Subclause 15(4) permits the Minister to appoint a member to act as the Deputy Chair during a vacancy in that position or when the Deputy Chair is acting as Chair or is absent from duty, overseas or unable to perform his or her duties.

Subclause 15(5) provides that the actions of an acting Deputy Chair would not be invalid merely because of technical or other grounds relating to the person's appointment. This will provide certainty and stability and will ensure that an acting Deputy Chair is accountable for his or her actions.

Instruments of appointment made under clause 15 would not be legislative instruments, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 16 – Remuneration of members

Subclause 16(1) provides that a member is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the member is to be paid such remuneration as is prescribed in the regulations.

Subclause 16(2) provides that a member is to be paid such allowances as are prescribed in the regulations.

Clause 16 has effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders.

Whether a determination of the Remuneration Tribunal is a legislative instrument would be determined under the *Remuneration Tribunal Act 1973*.

Clause 17 – Leave of members

Subclause 17(1) provides that the Minister may grant the Chair leave of absence on such terms and conditions as the Minister determines. Such a grant of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 17(2) provides that the Chair may grant another Board member leave of absence on such terms and conditions as the Chair determines. Such a grant of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 17(3) provides that the Chair must notify the Minister if he or she grants to a member leave of absence for a period exceeding 6 months. Such a notification would not be a legislative instrument, by virtue of the existing exemption under item 20(a) of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 18 – Resignation of members

This clause provides that a Board member may resign by giving the Minister a written notice. Such a notice takes effect on the day it is received by the Minister, or if a later day is specified in the resignation, on that later day. Such a notice would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 19 – Termination of appointment

This clause sets out the grounds upon which the Minister may terminate the appointment of a Board member.

The Minister may terminate the appointment of an individual member for misbehaviour, physical or mental incapacity (subclause 19(1)).

The Minister must terminate the appointment of a member, under subclause 19(2), if:

- the member becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors (paragraph 19(2)(a));
- the member fails without reasonable excuse to comply with section 27F or 27J of the *Commonwealth Authorities and Companies Act 1997*. Section 27F requires a director of a Commonwealth authority to give other directors notice of any material personal interest in a matter which relates to the affairs of the authority, with certain exceptions. Section 27J prevents a director who has a material personal interest in a matter which is being considered at a directors' meeting from being present when that matter is being considered or voting on it, with certain exceptions (paragraph 19(2)(b)); or
- the member is absent without leave from three consecutive meetings of the Board (paragraph 19(2)(c)).

An instrument of termination of appointment would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 20 – Other terms and conditions of members

The terms and conditions on which a member holds office are to be as determined by the Minister except where provided for in the Bill.

An instrument specifying terms and conditions of appointment would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Division 2 – Board Procedures

Clause 21 – Meetings

Subclause 21(1) requires the Chair to convene meetings of the Board as necessary for the efficient conduct of the Authority's affairs.

The quorum for a meeting as provided by subclause 21(2) is nine members. However, subclause 21(3) provides that if section 27J of the *Commonwealth Authorities and Companies Act 1997*

(which deals with conflicts of interest and is referred to by subclause 21(2) of the Bill) requires a member not to be present during deliberations or to take part in a decision in relation to a matter and this member's absence takes the meeting below quorum, the remaining members constitute a quorum in relation to that matter.

Under subclause 21(4), a question arising at a Board meeting is to be decided by a majority of members present and voting.

The Chair is to preside at all meetings at which he or she is present (subclause 21(5)). In the absence of the Chair, the Deputy Chair is to preside (subclause 21(6)). In the absence of both the Chair and the Deputy Chair, the members present are to elect one of their number to preside (subclause 21(7)).

Subclause 21(8) provides that the person presiding at a meeting will have a deliberative vote and, in the event of an equality of votes, also have a casting vote (i.e. the deciding vote).

Subclause 21(9) provides the Board must keep a record of any decisions made at a meeting. It is not required to keep a record of all proceedings.

Subject to the Bill and the CAC Act, the Board may regulate proceedings at its meetings as it thinks fit (subclause 21(10)).

Clause 22 – Decisions without meetings

Clause 22 allows the Board to determine that decisions can be made without a meeting, and also determine the method by which Board members are to indicate agreement with proposed decisions.

Subclauses 22(1) and 22(2) provide that if the Board determines that clause 22 applies in relation to a particular matter or particular matters and also determines the method by which members are to indicate agreement to a proposed decision, a resolution in relation to the matter or matters will be taken to have been passed at a meeting of the Board if:

- without meeting, a majority of members entitled to vote on the proposed decision indicate their agreement in accordance with the method determined by the Board (paragraphs 22(1)(a) and (b)); and
- all members were informed of the proposed decision, or reasonable efforts had been made to inform them of it (paragraph 22(1)(c)).

A member may not vote on a proposed decision if they would not be entitled to vote on the proposed decision if the matter had been considered at a meeting of the Board (subclause 22(3)).

The Board must keep a record of decisions made in accordance with clause 22 (subclause 22(4)).

PART 4 – CHIEF EXECUTIVE OFFICER, STAFF AND COMMITTEES

Division 1 – Chief Executive Officer

Clause 23 – Establishment

This clause provides that there is to be a Chief Executive Officer (CEO) of the Australian Curriculum, Assessment and Reporting Authority.

Clause 24 – Role

This clause provides that the CEO of the Australian Curriculum, Assessment and Reporting Authority is responsible for the day-to-day administration of the Authority (subclause 24(1)), and has the power to do all things necessary or convenient to be done for or in connection with the performance of his or her duties (subclause 24(2)). The CEO must act in accordance with any policies and directions given by the Board in writing (subclause 24(3)). Such policies and directions, should they be in writing, are administrative not legislative in character and therefore not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, which subclause 24(6) confirms.

All acts and things done in the name of or on behalf of the Australian Curriculum, Assessment and Reporting Authority by the CEO, or with the authority of the CEO, are taken to have been done by the Australian Curriculum, Assessment and Reporting Authority (subclause 24(4)). An authority given by the CEO is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

If a function or power of the Australian Curriculum, Assessment and Reporting Authority is dependent on the opinion, belief or state of mind of the Australian Curriculum, Assessment and Reporting Authority in relation to a matter, the function or power may be exercised upon the opinion, belief or state of mind of the CEO or a person acting on the authority of the CEO (subclause 24(5)).

Clause 25 – Appointment

This clause provides that the Board appoints the CEO in writing after consulting with the Minister (subclause 25(1)), for a period not to exceed three years (subclause 25(3)). The CEO holds office on a full-time basis (subclause 25(2)) and must not be a member of the Board (subclause 25(4)). An instrument of appointment as CEO would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

A note to subclause 25(1) assists the reader by clarifying that the CEO is eligible for re-appointment pursuant to subsection 33(4A) of the *Acts Interpretation Act 1901*, which states that in any Act, appointment includes re-appointment.

Clause 26 – Acting appointments

This clause provides that the Board may, after consulting the Minister, appoint an acting CEO during a vacancy in the office of CEO or while the CEO is absent or unavailable (subclause 26(1)). An instrument of appointment as acting CEO would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

It is expected that this provision can encompass standing arrangements to cover short term acting periods or where an urgent acting appointment needs to be made.

Anything done by a person purporting to act under such an appointment is not invalid merely because of technical problems with the appointment of the acting CEO (subclause 26(2)).

Clause 27 – Other employment

This clause provides that the CEO must not engage in paid employment outside the duties of the CEO's office without the Chair's approval (subclause 27(1)). The Chair must notify the Minister of any such approval (subclause 27(2)). Such approval would not be a legislative instrument, by virtue of the existing exemption under item 2 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 28 – Remuneration

This clause provides that the CEO is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the CEO is to be paid such remuneration as is prescribed in the regulations (subclause 28(1)). The CEO is to be paid such allowances as are prescribed in the regulations (subclause 28(2)).

Clause 28 would have effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders (subclause 28(3)).

Whether a determination of the Remuneration Tribunal is a legislative instrument would be determined under the *Remuneration Tribunal Act 1973*.

Clause 29 – Leave

This clause provides that the CEO would have such recreation leave entitlements as are determined by the Remuneration Tribunal (subclause 29(1)).

The Chair may grant the CEO leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Chair determines (subclause 29(2)). The granting of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instrument Regulations 2004*.

The Chair must notify the Minister if the Chair grants to the CEO leave for a period exceeding one month (subclause 29(3)). Such a notification would not be a legislative instrument, by virtue of the existing exemption under item 20(a) of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 30 – Disclosure of interests

Clause 30 provides that the CEO must disclose by written notice to the Minister and the Board all material personal interests that the CEO has or acquires which conflict or could conflict with the proper performance of the CEO's duties. Such a disclosure given by the CEO is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

Clause 31 – Resignation

This clause provides that the CEO may resign by giving a written resignation to the Chair (subclause 31(1)). Such a written resignation would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Such resignation takes effect on the day it is received by the chair or, if a later day is specified in the resignation, on that later day (subclause 31(2)).

The CEO must notify the Minister if the CEO resigns (subclause 31(3)).

Clause 32 – Termination

This clause sets out the grounds upon which the Board may terminate the appointment of the CEO.

The Board may terminate the appointment of the CEO for misbehaviour, physical or mental incapacity (subclause 32(1), or if the Board is satisfied that the performance of the CEO has been unsatisfactory for a significant period of time (subclause 32(2)).

In addition, the Board must terminate the appointment of the CEO under subclause 32(3) if:

- the CEO becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors (paragraph 32(3)(a));
- the CEO is absent without leave for 14 consecutive days or for 28 days in any 12 months (paragraph 32(3)(b));
- without the approval of the Chair under clause 27 of the Bill, the CEO engages in paid employment outside of the duties of his or her office (paragraph 32(3)(c)); or

- the CEO fails without reasonable excuse to comply with clause 30 of the Bill, which deals with disclosure of conflicts of interest and possible conflicts of interest (paragraph 32(3)(d)).

If the Board terminates the appointment of the CEO, the Board must notify the Minister of the termination (subclause 32(4)).

An instrument of termination of appointment would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 33 – Other terms and conditions

This clause provides that where not covered by this Bill, the terms and conditions on which the CEO holds office are to be as determined by the Board.

An instrument specifying terms and conditions of appointment would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Division 2 – Staff

Clause 34 – Staff

This clause provides that the Australian Curriculum, Assessment and Reporting Authority may employ such persons as it considers necessary for the performance of its functions and the exercise of its powers (subclause 34(1)). An employee of is to be employed on the terms and conditions that the Authority determines in writing (subclause 34(2)).

Instruments of employment are not legislative instruments, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.
Instruments determining conditions of employment are not legislative instruments, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Division 3 – Committees

Clause 35 – Committees of the Australian Curriculum, Assessment and Reporting Authority

This clause provides that the Australian Curriculum, Assessment and Reporting Authority may constitute committees comprising Board members and/or other persons to assist the Authority in the performance of its functions (subclauses 35(1) and (2)). The Authority may determine the procedures under which a committee is to operate (subclause 35(3)). A committee must provide the Authority with such reports, documents and information in relation to the committee's functions as the Authority requests (subclause 35(4)).

Clause 36 – Remuneration of committee members

This clause provides that if the Board decides that a member of a committee is to be remunerated, that member is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the member is to be paid such remuneration as is prescribed in the regulations (subclause 36(1)). A member of a committee is to be paid such allowances as are prescribed in the regulations (subclause 36(2)).

Clause 36 would have effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders (subclause 36(3)).

Whether a determination of the Remuneration Tribunal is a legislative instrument would be determined under the *Remuneration Tribunal Act 1973*.

PART 5 – FINANCE

Clause 37 – Money payable to the Australian Curriculum, Assessment and Reporting Authority

This clause provides that money appropriated by the Parliament for the purposes of the Australian Curriculum, Assessment and Reporting Authority is payable to the Authority (subclause 38(1)).

The Finance Minister, or the Minister administering the *Financial Management and Accountability Act 1997*, may give directions about the amount and timing of payments made to the Authority under this clause (subclause 37(2)). A direction by the Finance Minister is administrative, not legislative in character and therefore is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 37(3) confirms this.

Clause 38 – Application of money by the Australian Curriculum, Assessment and Reporting Authority

Subclause 38(1) provides that the money of the Australian Curriculum, Assessment and Reporting Authority consists of money appropriated by Parliament to be paid to the Authority pursuant to Clause 37 and any other money paid to the Authority.

Subclause 38(2) provides that the money of the Authority is to be applied only in payment or discharge of the costs expenses and other obligations incurred or undertaken by the Authority in the performance of its functions and the exercise of its powers (paragraph 38(2)(a)), and in payment of any remuneration or allowances payable under this Bill (paragraph 38(2)(b)).

Subclause 38(2) does not prevent the Authority investing surplus money under section 18 of the CAC Act (subclause 38(3)).

Clause 39 – Taxation

This clause provides that for the avoidance of doubt the Australian Curriculum, Assessment and Reporting Authority is taken to be a public authority constituted under an Australian law for the purposes of section 50-25 of the *Income Tax Assessment Act 1997* (subclause 39(1)) and that the Authority is not subject to taxation under a law of a State or Territory if the Commonwealth is not subject to the taxation (subclause 39(2)).

The effect of this clause is that the Authority would be exempt from income tax but still subject to taxation under certain laws, for example section 177-5 of the *A New Tax System (Goods and Services Tax) Act 1999* and section 66 of the *Fringe Benefits Tax Assessment Act 1986*.

It is intended that the Authority may undertake some commercial activities over time. It is anticipated that any commercial activities, while incidental to its core functions, would not be the primary function of the Authority and would still be related to its governmental role.

PART 6 – OTHER MATTERS

Clause 40 – Information collection, use and disclosure

This clause provides for the handling of personal information which may be collected, used and disclosed by the Australian Curriculum, Assessment and Reporting Authority. Personal information has the same meaning as in section 6 of the *Privacy Act 1988*.

Subclause 40(1) provides that personal information must not be collected by the Authority unless it is necessary for and directly related to the following purposes:

- conducting research relating to the national school curriculum (paragraph 40(1)(a));
- assisting government to formulate policies in relation to education matters (paragraph 40(1)(b)); or
- formulating national reports consisting of aggregated data on school performance (paragraph 40(1)(c)).

Subclause 40(2) provides that if personal information is collected by or lawfully disclosed to the Authority for the purposes of subclause (1), use of that personal information by the Authority which is necessary for and directly related to those purpose is authorised by law for the purposes of Information Privacy Principle 10 in section 14 of the *Privacy Act 1988*.

Subclause 40(3) provides that any disclosure by the Authority of personal information is authorised by law for the purposes of Information Privacy Principle 11 in section 14 of the *Privacy Act 1988* if:

- the disclosure is made to a person or body that is prescribed by the regulations (paragraph 40(3)(a)); and
- the disclosure is necessary for and directly related to the purposes mentioned in subsection (1) (paragraph 40(3)(b)).

A note to subclause (3) assists the reader by clarifying that paragraph 3 of Information Privacy Principle 11 in section 14 of the *Privacy Act 1988* may apply to further disclosures of the personal information.

Clause 41 – Delegation

This clause enables the Minister to delegate any or all of the Minister’s functions or powers under the Bill to the Secretary of the Department or an SES, or acting SES, employee in the Department (subclause 41(1)). In performing functions and exercising powers under the delegation the delegate must comply with any directions of the Minister (subclause 41(2)).

The Chair may, by writing, delegate any or all of his or her functions or powers to another member of the Board (subclause 41(3)). In performing functions and exercising powers under the delegation the delegate must comply with any directions of the Chair (subclause 41(4))

Clause 42 – How Ministerial Council gives directions etc.

Clause 42 provides for the manner in which the Ministerial Council may give a direction, an approval or a refusal for the purposes of a provision of the proposed Act. The Ministerial Council may do so by resolution of the Ministerial Council passed in accordance with the procedures determined by the Ministerial Council.

Clause 43 – Reporting requirements

This clause requires the Chair to prepare and give the Ministerial Council a report on the operations of the Australian Curriculum, Assessment and Reporting Authority relating to that financial year on or before 30 September after the end of that year, or if the Minister specifies a later time – that time (subclause 43(1)).

The report at subclause 43(1) must include:

- particulars of the activities of the Authority during that financial year to the extent they relate to the Charter (paragraph 43(2)(a)); and
- any other information relating to the discharge of the Authority’s functions that the Ministerial Council directs (paragraph 43(2)(b)).

Subclause 43(3) clarifies that the information required in a Ministerial Council direction must not include any personal information.

Clause 44 – Review of role and functions

This clause requires the Minister to arrange a review of the Australian Curriculum, Assessment and Reporting Authority’s ongoing role and functions to be conducted six years after the commencement of this clause and to be completed within 6 months (subclauses 44(1) and (2)). A written report must be prepared and a copy laid before each House of Parliament within 15 sitting days after the Minister receives the report (subclauses 44(3) and (4)).

Clause 45 – Regulations

The Governor General may make regulations prescribing matters required or permitted by this Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

Any such regulations are legislative instruments under section 6(a) of the *Legislative Instruments Act 2003*.