THE LEGAL STRUCTURES OF RESPONSIBLE GOVERNMENT AND MINISTERIAL RESPONSIBILITY

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[The public administration reforms contained in the Public Service Act 1999 (Cth), Financial Management and Accountability Act 1997 (Cth) and Commonwealth Authorities and Companies Act 1997 (Cth) apparently devolve 'responsibility' to Agency Heads, Chief Executives and Directors respectively. This article surveys these framework legal arrangements applying to the executive and then documents the formal involvement of Ministers to assess the notions of responsible government and ministerial responsibility. The article concludes that the real and practical advance of devolution in the public administration reforms has been to distinguish between the spheres of activities of Ministers and public servants. As a consequence, there is a more nuanced understanding of responsible government and ministerial responsibility. It is seen that the 'responsibilities' of Ministers are separated from those of Agency Heads/Chief Executives/Directors, albeit the Ministers remain the conduit between the executive and the Parliament.]

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I INTRODUCTION

The origins of the public administration reforms that have occurred since the 1980s are the reviews of governmental structure and function that took place in the 1970s and early 1980s.1 These early developments culminated in the 1984 ‘Financial Management Improvement Programme’2 and then a cascade of inquiries over the next decade3 leading to Parliament passing the Financial Management and Accountability Act 1997 (Cth) (‘Financial Management and Accountability Act’), Commonwealth Authorities and Companies Act 1997 (Cth) (‘Commonwealth Authorities and Companies Act’), Auditor-General Act 1997


2 See Australian Public Service Board and Department of Finance (Cth), above n 1; Australian Public Service Board and Department of Finance (Cth), Financial Management Improvement Program: FMIP Report (1986); House of Representatives Standing Committee on Finance and Public Administration, Parliament of Australia, Not Dollars Alone: Review of the Financial Management Improvement Program (1990).

These public administration reforms of the 1980s and 1990s (and now the 2000s) have substantially reshaped the executive government, shifting it from being the owner and provider of goods and services to being a standard setter and a regulator and purchaser of goods and services. In practice this has been achieved through a change from centralised ‘command and control’ to devolved responsibility and outsourcing, and a focus on achieving particular objectives (performance) and reporting on that performance (accountability and responsibility). In particular, the public administration reforms adopted new means of allocating resources through accrual budgeting and then devolved responsibility for using those resources according to standards of accrual accounting and performance benchmarking. These reforms also imposed a plethora of ‘reporting back’ arrangements so that allocation and performance could be assessed and hopefully improved.

The significance of these reforms has been apparently to shift the location of responsibility away from Ministers to those actually managing the property and other resources of the Commonwealth. The purpose of this article is to survey the framework legal arrangements applying to the executive and then document the formal involvement of Ministers to assess the conceptions of responsible government and ministerial responsibility. The next Part sets out a brief explanation of the place of ministerial responsibility as an element of responsible government within the constitutional compact; the following Parts then address the governance frameworks under the Financial Management and Accountability Act, Commonwealth Authorities and Companies Act and Public Service Act that apparently devolve responsibility, tracing the significant role that Ministers

4 Since the preparation of this article the Public Service Amendment Bill 2012 (Cth) has been introduced into Parliament: see Commonwealth, Parliamentary Debates, House of Representatives, 1 March 2012, 2443 (Gary Gray, Special Minister of State and Minister for the Public Service and Integrity).


7 Although there appears to be a shift back towards centralisation: see, eg, Advisory Group on Reform of Australian Government Administration, above n 5, x–xi, 45–66 (recommending that employment arrangements be centralised); Australian Government Information Management Office, Department of Finance and Administration (Cth), Responsive Government: A New Service Agenda — 2006 e-Government Strategy (2006) 21 (outlining a project management and investment framework).
retain in these arrangements; the article then concludes with a discussion of the likely consequences of these apparent changes to the location of responsibility away from Ministers. The analysis demonstrates that responsibility has been only apparently devolved and that the real and practical advance of the public administration reforms has been to distinguish between the spheres of activities and responsibilities of Ministers and public servants. The article posits that the parliamentary institutions tasked with reviewing the executive need to take these developments into account with a more nuanced understanding of responsible government and ministerial responsibility, albeit Ministers should remain the conduit between the executive and the Parliament.

II RESPONSIBLE GOVERNMENT AND MINISTERIAL RESPONSIBILITY

The principle of ‘responsible government’ — at its simplest, where the executive is responsible to the legislature — emanates from the Westminster system of government and is reflected in the Constitution in ‘practical constitutional understandings not reducible to written law’. As a principle it is ‘part of the

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8 In addition, there has been some experimentation with partial devolution — transferring accountability and responsibility to either the ‘Head of an Executive Agency’ under the Public Service Act 1999 (Cth) s 65 (‘Establishment etc of Executive Agencies’) or the ‘Chief Executive’ of a ‘prescribed Agency’ under the Financial Management and Accountability Act s 5 (definition of ‘Chief Executive’) and Financial Management and Accountability Regulations 1997 (Cth) reg S(1), sch 1 (‘Financial Management and Accountability Regulations’) but not both. Bodies established under these Acts are Biosecurity Australia, Defence Materiel Organisation (‘DMO’), Australian Agency for International Development (‘AusAID’), IP Australia, Geoscience Australia, Australian Office of Financial Management (‘AOFM’) and Royal Australian Mint: Department of Finance and Deregulation (Cth), List of Australian Government Bodies and Governance Relationships 3rd ed, 2009) 36, 163, 371, 486, 567, 598, 606.

9 The term ‘responsible government’ has been defined to mean (1) that the executive is responsible to the public opinion through the Parliament; (2) that strong governments can take unpopular decisions in the ‘national interest’; and (3) that Ministers form a government that is collectively accountable to the Parliament: A H Birch, Representative and Responsible Government: An Essay on the British Constitution (George Allen and Unwin Ltd, 1964) 17–20. However, the meaning of ‘responsible government’ at any one time is probably more a reflection of evolving theories and practices: see John Uhr, ‘Parliament and the Executive’ (2004) 25 Adelaide Law Review 51, 55–62; J R Archer, ‘The Theory of Responsible Government in Britain and Australia’ in Patrick Weller and Dean Jaensch (eds), Responsible Government in Australia (Drummond Publishing, 1980) 23, 24–30. See also Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 184–5 (Dawson J), 228–9 (McHugh J); Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, 47–8 (Brennan J), 69–71 (Deane and Toohey JJ); New South Wales v Commonwealth (1975) 135 CLR 337, 364–5 (Barwick CJ) (‘Seas and Submerged Lands Case’); R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (‘Boilermakers’ Case’); Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 146–8 (Knox CJ, Isaacs, Rich and Starke JJ) (‘Engineers’ Case’).


12 Williams v A G (NSW) (1913) 16 CLR 404, 457 (Isaacs J). See also Edi Insurances Ltd v Winneke (1982) 151 CLR 342, 364–5 (Mason J); Sankey v Whitlam (1978) 142 CLR 1, 102
fabric on which the written words of the Constitution are superimposed."13 In effect, this system of government identifies separate institutions — the Parliament, the judiciary and the executive — with the Crown (and Governor-General) apparently exercising significant power within the Parliament and the executive, but in practice acting on the advice of Members of the Parliament (Ministers) and responsible to Parliament14 — the ‘Westminster syndrome’.15 Thus responsible government explains the nature of the relationship between the executive and the Parliament: the Ministers are in Parliament and responsible to Parliament; the department appointments (to the public service) are distinct from the political appointment of Ministers; the Ministers have authority over the departments (including the public service). Accountability flows from the department officials (including the public service and comprising public servants) to Ministers to Cabinet to Parliament and finally to voters.16


15 See Parker, ‘Responsible Government in Australia’, above n 10, 12–13. Parker identifies the ‘Westminster syndrome’ as the culmination of the political developments which replaced the arbitrary powers of the Crown with parliamentary laws that both bound governments and allowed for ‘the toleration of peaceful opposition and orderly transfer of power from one set of political leaders to another’, with parliamentary control over government actions directed by Ministers. But see, for a critical perspective, Elaine Thompson, ‘The “Washminster” Mutation’ in Patrick Weller and Dean Jaensch (eds), Responsible Government in Australia (Drummond Publishing, 1980) 32.

16 See Parker, ‘Responsible Government in Australia’, above n 10, 12; H N Collins, ‘What Shall We Do with the Westminster System?’ in R F I Smith and Patrick Weller (eds), Public Service Inquiries in Australia (University of Queensland Press, 1978) 360, 366. The High Court has articulated the principle of responsible government on numerous occasions: see, eg, Pope v...
propositions are not so clear in practice, as their content ‘is a matter of continued debate’¹⁷ and dynamic evolution.¹⁸

It is apparent that the principle of responsible government does not really assist in delineating the actual roles and responsibilities of a Minister. A more useful approach is to examine the Minister’s responsibilities through statutes implementing the principle; such statutes give an indication of the Parliament’s conception of ministerial responsibility within the constitutional compact.¹⁹ In this article the content of ‘responsibility’ is traced to the executive responsibility formally allocated to Ministers for ‘matters dealt with by a Department of State’ and ‘legislation administered by a Minister of State administering a Department’ according to the Administrative Arrangements Order.²⁰ The following Parts set out the way the legal architecture of the recent public administration reforms have delineated Ministers’ responsibilities.²¹


¹⁸ See Re Patterson; Ex parte Taylor (2001) 207 CLR 391, 402–3 [13]–[15] (Gleson CJ); Egan v Willis (1998) 195 CLR 424, 451 [41] (Gaudron, Gummow and Hayne JJ). See also Uhr, above n 9; Lindell, ‘Responsible Government’, above n 14; Elizabeth Harman, ‘Accountability and Challenges for Australian Governments’ (1994) 29 Australian Journal of Political Science 1; Parker, ‘Responsible Government in Australia’, above n 10. Notably, there has been a proliferation of ‘new’ administrative laws creating tribunals, ombudsmen, administrative review councils and so on which now perform functions once considered part of a Minister’s responsibilities: see Reid, above n 17, 307–8. It has been argued that the ‘folly at the heart of the founders’ blueprint for the Australian system of government was the presumption that “responsible government” would exist’: Jim Chalmers and Glyn Davis, ‘Power: Relations between the Parliament and the Executive’ (Research Paper No 14, Parliamentary Library, Parliament of Australia, 2000) i.

¹⁹ This approach also addresses the perspective of the High Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ): ‘Under the Constitution, the relevant question is not, “What is required by representative and responsible government?” It is, “What do the terms and structure of the Constitution prohibit, authorise or require?”’. Importantly, ministerial responsibility within a principle of responsible government may not be justiciable except perhaps where a Minister fails to resign following a successful motion of no confidence: see Geoffrey Lindell, Responsible Government and the Australian Constitution: Conventions Transformed into Law? — Law and Policy Paper 24 (Federation Press, 2004) 16–17.

²⁰ Commonwealth, Administrative Arrangements Order, 9 February 2012.

²¹ The debate about ‘ministerial responsibility’ is broader than just about legal architecture and includes a range of disciplinary perspectives, although the detailed legal architecture addressed in this article has not been considered in these other fields of inquiry. See, for recent notable discussions of ministerial responsibility, Richard Mulgan, ‘Where Have All the Ministers Gone?’ (2010) 69 Australian Journal of Public Administration 289; Richard Mulgan, ‘On Ministerial...
At the most basic level, the *Financial Management and Accountability Act* and the *Commonwealth Authorities and Companies Act* replaced the *Audit Act 1901 (Cth)* and clarified the legal status of entities within the Commonwealth, those under the *Commonwealth Authorities and Companies Act* having a separate legal status from the Commonwealth. The *Financial Management and Accountability Act* and *Commonwealth Authorities and Companies Act* also established underlying governance arrangements for financial management, reporting and audit. Meanwhile, the *Public Service Act* replaced the *Public Service Act 1922 (Cth)* and established the underlying governance arrangements for the employment of those predominantly engaged under the *Financial Management and Accountability Act*. The following analysis provides further detail about these governance frameworks and the role of Ministers within them. While each framework scheme provides only limited ministerial controls, together they provide a comprehensive means by which Ministers maintain their control and satisfy their responsibilities to Parliament.

### III THE FINANCIAL MANAGEMENT AND ACCOUNTABILITY ACT 1997 (Cth)

#### A Outline

The *Financial Management and Accountability Act* established a ‘regulatory/accounting/accountability framework for dealing with and managing the money and property of the Commonwealth’. It specified the ‘responsibilities


22 See *Audit (Transitional and Miscellaneous) Amendment Act 1997 (Cth)* sch 1, repealing *Audit Act 1901 (Cth)*.

23 See *Public Employment (Consequential and Transitional) Amendment Act 1999 (Cth)* sch 1 item 754, repealing *Public Service Act 1922 (Cth)*.

24 Moreover, a number of *Commonwealth Authorities and Companies Act ‘bodies’* are ‘Statutory Agencies’ under the *Public Service Act s 7* (definition of ‘Statutory Agency’), meaning that they too fall under the governance arrangements in the *Public Service Act 1999 (Cth)*. These bodies are: Defence Housing Australia (*Defence Housing Australia Act 1987 (Cth)* s 57(2)(a)); Australian Institute of Aboriginal and Torres Strait Islander Studies (*Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)* s 29(2)(a)); Comcare (*Safety, Rehabilitation and Compensation Act 1988 (Cth)* s 88(2)(a)); Screen Australia (*Screen Australia Act 2008 (Cth)* s 31(3)(a)); Australian National Maritime Museum (*Australian National Maritime Museum Act 1990 (Cth)* s 40(2)(a)); National Library of Australia (*National Library Act 1960 (Cth)* s 17(4)(a)); National Museum of Australia (*National Museum of Australia Act 1980 (Cth)* s 30(2)(a)); Torres Strait Regional Authority (*Aboriginal and Torres Strait Islander Act 2005 (Cth)* s 144R(2)(a)); Australian Institute of Health and Welfare (*Australian Institute of Health and Welfare Act 1987 (Cth)* s 19(2)(a)); Food Standards Australia New Zealand (*Food Standards Australia New Zealand Act 1991 (Cth)* s 135(2)(a)); Australian War Memorial (*Australian War Memorial Act 1980 (Cth)* s 27(2)(a)).

and powers necessary for the efficient, effective and ethical use of the resources lawfully available to the Commonwealth to carry out its program" and "provide[d] for appropriate mechanisms to ensure that the stewardship and management performance of those who are responsible for those resources can be made visible and, thereby, allow them to be held accountable. The central objective of this Act was to devolve financial management to 'Agencies' by giving 'Chief Executives' the powers to make, and then be accountable for, decisions about expenditure and the use of the money and other resources of the Commonwealth under their control. The scheme was substantially altered by the Financial Management Legislation Amendment Act 1999 (Cth), which introduced accrual budgeting to essentially replace 'fund accounting' (that had been carried over from the Audit Act 1901 (Cth)) with 'accrual accounting', and which further provided for the transactions of Agencies to be processed and recorded in their own accounting systems. The result of these legislative developments is a

27 Ibid 8345.
28 See Financial Management and Accountability Act s 5 (definition of 'Agency'), which states that an 'Agency' is
   • a 'Department of State', including persons allocated to that Department (see Financial Management and Accountability Regulations regs 4(1)(a)–(d));
   • a 'Parliamentary Department', including persons allocated to that Department (see Financial Management and Accountability Regulations reg 4(1)(e)); and
   • a 'prescribed Agency' (see Financial Management and Accountability Act s 5 (definition of 'prescribed Agency'); Financial Management and Accountability Regulations reg 5).
29 See Financial Management and Accountability Act s 5 (definition of 'Chief Executive'). The Chief Executive is, for a prescribed Agency, 'the person identified by the regulations as the Chief Executive of the Agency', and for any other Agency, 'the person who is the Secretary of the Agency for the purposes of the Public Service Act 1999 or the Parliamentary Service Act 1999 [(Cth)]. Note that Public Service Act s 7 provides that: 'Secretary' means 'the Secretary of a Department'; 'Department' means 'a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency'; 'Agency Head' means 'the Secretary of a Department', 'the Head of an Executive Agency' or 'the Head of a Statutory Agency'. Moreover, Parliamentary Service Act 1999 (Cth) s 7 provides that 'Secretary' means 'the Secretary of a Department and includes the Clerk of the Senate, the Clerk of the House of Representatives, the Clerk of the House of Representatives, the Clerk of the Parliament, and the Parliamentary Budget Officer'.
31 See Commonwealth, Parliamentary Debates, House of Representatives, 10 February 1999, 2283 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration). Other amendments were included in the Public Employment (Consequential and Transitional) Amendment Act 1999 (Cth), Financial Management and Accountability Amendment Act 2000 (Cth), Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth) and Parliamentary Service (Consequential and Transitional) Determination 2000/1 (Cth).
32 As explained in Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) 1:
The requirements for debiting and crediting all cash transactions to a fund account in a central ledger will be removed. In future, transactions of Agencies will be processed and recorded in
modern financial framework based around accrual budgeting. The *Financial Management and Accountability Act* now provides, in general terms, the following regulatory, accounting and accountability framework.\(^{33}\)

1. **Collection and Custody of, and Dealings with, Public Money**

   ‘Public money’ — being ‘money in the custody or under the control of the Commonwealth’ or ‘money in the custody or under the control of anyone acting for or on behalf of the Commonwealth in respect of the custody or control of the money’, and ‘including such money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth’\(^ {34}\) — must be promptly placed into an ‘official bank account’.\(^ {35}\) Once the money is in such an account it can generally only be withdrawn with authorisation, and requires a valid appropriation and a ‘drawing right’.\(^ {36}\)

2. **Appropriations, Payments and Account-Keeping**

   Records are required to be kept for all receipts and expenditures of public money.\(^ {37}\) Various guidelines, including the *Commonwealth Procurement Guidelines*\(^ {38}\) and the *Commonwealth Grant Guidelines*,\(^ {39}\) must be complied with before money can be withdrawn and expended.\(^ {40}\) This process essentially requires that a spending proposal be approved by an authorised approver\(^ {41}\) after a relevant appropriation has been identified,\(^ {42}\) or that the Finance Minister’s approval for a commitment of future spending be sought,\(^ {43}\) and that a record of

...their own accounting systems. The amendments will therefore facilitate the move to devolved accounting and banking arrangements for Agencies, consistent with more business like approaches used in the private sector.

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\(^{33}\) It should be noted that a modified framework applies to certain intelligence agencies and law enforcement agencies: *Financial Management and Accountability Act* s 58; *Financial Management and Accountability Regulations* sch 2.

\(^{34}\) *Financial Management and Accountability Act* s 5 (definition of ‘public money’).

\(^{35}\) Ibid s 10; *Financial Management and Accountability Regulations* reg 17.


\(^{39}\) Department of Finance and Deregulation (Cth), *Commonwealth Grant Guidelines* (2009). See *Financial Management and Accountability Act* s 64; *Financial Management and Accountability Regulations* reg 7A. See also, for examples of other guidelines, Department of Finance and Deregulation (Cth), *Guidelines on Non-Campaign Recruitment Advertising* (2010); Department of Finance and Administration (Cth), *Australian Government Cost Recovery Guidelines* (2005); Department of Finance and Administration, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Department and Agency Contracts)* (2004); Department of Finance and Administration (Cth), *Australian Government Competitive Neutrality Guidelines for Managers* (2004); Department of Finance and Administration (Cth), *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort* (2003).

\(^{40}\) *Financial Management and Accountability Act* ss 13, 44; *Financial Management and Accountability Regulations* regs 7–12.

\(^{41}\) Ibid reg 10.

\(^{42}\) Ibid reg 8.
the approval is made. Special provision is made for ‘contingent liabilities’ and ‘loan guarantees’ that may commit future unappropriated money. When payment becomes due, the payment must be made by a person with approval to make the payment (a ‘drawing right’), debiting an appropriation, subject to various provisions for repayments. There are various provisions dealing with Agency receipts, act of grace payments, waiving debts, and so on.

3 Borrowing and Investment

Borrowing, including obtaining an advance on overdraft, is of no effect unless it is authorised by an Act or constitutes short-term borrowing by the Finance Minister (such as occurs using credit cards and credit vouchers). It is only the Finance Minister and the Treasurer who can invest public money in an authorised investment (an authorised investment being primarily securities of the Commonwealth or of a state or territory, securities guaranteed by the Commonwealth, a state or a territory, and bank deposits).

4 Control and Management of Public Property

‘Public property’ — being ‘property in the custody or under the control of the Commonwealth’ or ‘property in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the property’, and ‘including such property that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth’ — must not be misapplied, improperly used or disposed of, or given away.

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44 Ibid reg 12.
46 There are policies directed to payment periods and penalties for late payment by Commonwealth agencies: see, eg, Department of Finance and Deregulation (Cth), Procurement 30 Day Payment Policy for Small Business (2008).
48 Ibid ss 28–30A.
49 Ibid ss 31, 32A; Financial Management and Accountability Regulations reg 15.
52 Financial Management and Accountability Act s 37. These are generally the loans Acts: see, eg, Loan (Temporary Revenue Deficits) Act 1953 (Cth) ss 4–5.
54 Financial Management and Accountability Act s 39; Financial Management and Accountability Regulations reg 22. See also Department of Finance and Administration (Cth), Investment of Public Money — Section 39 of the Financial Management and Accountability Act 1997 (2005). Notably, some investments are outside this scheme: see, eg, Nation-Building Funds Act 2008 (Cth) ss 34(6), 121(3) (regarding the Building Australia Fund), 153(6), 206(3) (regarding the Education Investment Fund), 228(6), 274(3) (regarding the Health and Hospitals Fund); Future Fund Act 2006 (Cth) s 17(6) (regarding the Future Fund).
56 Ibid s 5 (definition of ‘public property’).
57 Ibid s 41.
58 Ibid s 43 (but note that there are some limited circumstances where a gift may be made).
5 Governance Arrangements

The key responsibility of a Chief Executive is to ‘manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible’59 (where ‘proper use’ means ‘efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth’).60 In satisfying this obligation the Chief Executive must also keep the responsible Minister and the Finance Minister informed,61 implement a fraud control plan,62 establish and maintain an audit committee,63 recover debts,64 maintain accounts and records,65 have the financial statements audited by the Auditor-General,66 and provide to the Finance Minister any financial statements that the Finance Minister requires.67

6 Reporting and Audit

The Finance Minister must publish financial statements monthly,68 prepare the annual financial statements comprising an operating statement, a statement of financial position, a statement of cash flows and notes to the financial statements,69 and have those annual statements audited by the Auditor-General.70

7 The Consequence of the Arrangements

The consequence of these arrangements is that Chief Executives have had management authority and responsibility for the Commonwealth resources under their control devolved to them. There remain, however, some formal elements of ministerial control. A summary is set out below in Table 1. In addition to these formal elements, there are a range of other less formal elements of control: first, the use of policy pronouncements to, and secondly, limiting the ability of authorities to spend money.

B Not Inconsistent with the Policies of the Commonwealth

One of the most significant controls over Chief Executives is the obligation that they ‘manage the affairs of the Agency in a way that promotes proper use of

59 Ibid s 44(1).
60 Ibid s 44(3).
61 Ibid s 44A.
62 Ibid s 45.
63 Ibid s 46. See also Financial Management and Accountability Regulations reg 22C.
64 Financial Management and Accountability Act s 47.
67 Financial Management and Accountability Act s 50.
68 Ibid s 54.
69 Ibid s 55; Financial Management and Accountability Regulations reg 22A.
70 Financial Management and Accountability Act s 56; Financial Management and Accountability Regulations reg 22B.
the Commonwealth resources for which the Chief Executive is responsible’, 71
with ‘proper use’ being ‘efficient, effective, economical and ethical use that is
not inconsistent with the policies of the Commonwealth’. 72 The phrase ‘that is
not inconsistent with the policies of the Commonwealth’ was introduced as an
amendment. 73 The principal purpose of the amendment was stated to be
to ensure that subsection 44(1) — although conferring basic responsibilities on
a Chief Executive in relation to the operations of an agency — is not seen as
conferring on Chief Executives autonomy from the Government’s policies (in
particular, Chief Executives of bodies such as Departments, which do not have
any legal independence from the Commonwealth Government). To that extent,
the amendment serves a function similar to the stipulation in subsection 57(1)
of the Public Service Act 1999 that the Secretary of a Department manages the
Department ‘under the Agency Minister’ … The proposed test in section 44 that
proper use be ‘not inconsistent’ with Commonwealth policies is not as emphatic
as the requirement under [Financial Management and Accountability Regula-
tions] Regulation 9 that the approval of a spending proposal be ‘in accordance
with’ Commonwealth policies. However, the distinction has been made con-
ciously, on the basis that a specific spending proposal will allow for a more
direct consideration of relevant policies in the context of the relevant procure-
ment, grant or other commitment. 74

This amendment was also part of an ‘ongoing process of monitoring and
review, and clarifying issues as they arise, [which was] consistent with respon-
sible government’ 75 and was framed as merely an amendment to ‘primarily clarify
the operation of the law, rather than change it substantively, and allow for more
efficient processes’. 76 The Finance Minister stated that the amendment

reinforces the clear role that policy plays in agencies ascertaining the efficient,
effective and ethical use of Commonwealth resources. Also, it helps ensure that
contracts entered into by [Financial Management and Accountability Act]
agency chief executives, or their officials, are not inconsistent with Common-
wealth policy. Next, it reinforces the longstanding requirement in regulations
made under the [Financial Management and Accountability Act] that require
approvers of proposals for procurement and grants et cetera to ensure that the
spending proposal is efficient, effective and in accordance with Commonwealth
policy. And, last but not least, it places an appropriate emphasis on how policies
are developed, implemented and maintained in and across agencies. 77

This requirement on Chief Executives, to manage the resources under their
control according to the policies of the Commonwealth, is a potentially signifi-
cant limitation on devolution. In this context ‘policy’ might be considered to refer
to some form of rule, instrument or standard issued by the Commonwealth

71 Financial Management and Accountability Act s 44(1).
72 Ibid s 44(3) (emphasis added).
73 Financial Framework Legislation Amendment Act 2008 (Cth) sch 1 item 49.
75 Commonwealth, Parliamentary Debates, House of Representatives, 26 June 2008, 6023
(Lindsay Tanner, Minister for Finance and Deregulation) (emphasis added).
76 Ibid.
77 Ibid 6024.
government with an expectation of compliance — the plethora of sub-delegated legislation and unsanctioned administrative rules, directions, standards and so on adopted by governments are legion and impossible to comprehensively detail.  

The following useful overlapping categories illustrate their breadth: procedural rules; interpretive guides; instructions to officials; prescriptive/evidential rules; commendatory rules; voluntary codes; rules of practice, management or operation; and consultative devices and administrative pronouncements. Significantly for present purposes, much policy is sanctioned by Ministers, who often issue written and spoken statements about the ways government will operate with the expectation that those pronouncements will be followed.

In complying with s 44 of the Financial Management and Accountability Act a Chief Executive (or their delegate) is obliged to identify the relevant policies and then apply those policies, making choices to suit the particular circumstances. In effect this raises the policy to the status of law by requiring compliance or a rationalisation for non-compliance. These policy obligations can tie the Chief Executive’s (or their delegate’s) decision-making to directives from Ministers.

C Drawing Rights

A drawing right is an authority issued by the Finance Minister to ‘make a payment of public money’, ‘request that an amount be debited against an appropriation’ or ‘debit an amount against an appropriation’, it can be amended or revoked by the Minister. The power to issue, revoke or amend a drawing right is generally delegated to Chief Executives, with the delegation being accompanied by a direction. In effect, however, drawing rights are issued subject to the Finance Minister setting the conditions and limits on their use and maintaining the authority to revoke them. The drawing right is significant in that a payment may not be made from monies appropriated by the Parliament (out of the constitutionally mandated Consolidated Revenue Fund) without a drawing right. As such, the ability to issue and then determine the conditions

81 Financial Management and Accountability Act s 27(1).
82 Ibid s 27(4).
83 Financial Management and Accountability (Finance Minister to Chief Executives) Delegation 2010 (Cth) items 5–6, sch 1 pts 8–9. See also Department of Finance and Deregulation (Cth), Issuing and Exercising Drawing Rights (2009) 3 [13]–[17].
84 See Department of Finance and Deregulation (Cth), Issuing and Exercising Drawing Rights, above n 83, 1 [4].
85 See ibid 2 [11].
86 See Constitution ss 81, 83.
and limits on drawing rights is a considerable power retained by the Finance Minister over the spending of individual Chief Executives (and their delegates):

The system of drawing rights proposed to be established under these clauses is intended to give operational substance to section 83 of the Constitution (‘No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law’). The Finance Minister, having comprehensive powers, responsibilities and accountability obligations in relation to the Commonwealth’s cash holdings … is therefore, effectively, the custodian of that ‘Treasury’ on behalf of the Executive Government in its stewardship to the Parliament and the people. Drawing rights — issued by the Finance Minister — are intended to be the key means in fulfilling that custodial role.88

No Finance Minister has yet revoked drawing rights as a specific measure to control spending by a Chief Executive (or their delegate). However, the power to do so is a significant ministerially controlled limit on spending which, as a direct consequence, allows for control over Chief Executives and their Agencies (and prescribed Agencies).

IV THE COMMONWEALTH AUTHORITIES AND COMPANIES ACT 1997 (CTh)

The Commonwealth Authorities and Companies Act established a regulatory, accounting and accountability framework for all those Commonwealth bodies that had previously been covered by the Audit Act 1901 (Cth) pt XI (predominantly statutory authorities) and the plethora of other Commonwealth bodies having their own financial, reporting and auditing provisions.89 The underlying objective of this framework was devolved management consistent with an entity’s departure from ministerial control and its legal and financial separation from the Commonwealth,90 while allowing for the assessment and comparison of the financial performance of individual bodies through obligatory and uniform reporting and audit requirements.91

89 See Commonwealth, Parliamentary Debates, House of Representatives, 12 December 1996, 8346–7 (John Fahey, Minister for Finance). The Minister stated at 8347: The underlying purpose of the proposed Commonwealth Authorities and Companies Act is to replace all of these diverse accountability requirements with a single set of core requirements. The approach proposed will enable the accountability requirements of Commonwealth controlled bodies to be viewed as a whole and should significantly streamline the focus of the government’s and the parliament’s interest in this area.
A Bodies to Which the Act Applies

The Commonwealth Authorities and Companies Act applies to ‘financially autonomous incorporated Commonwealth bodies that can acquire legal ownership of money in their own right.’ In contrast, the Financial Management and Accountability Act applies to ‘agents of the Commonwealth’ that ‘function only as a financial and custodial agent for the legal entity that is the Commonwealth, without acquiring separate legal ownership of the … assets [they deal] with on the Commonwealth’s behalf.’

The Commonwealth Authorities and Companies Act distinguishes between Commonwealth authorities and Commonwealth companies. A Commonwealth authority is a ‘body that holds money on its own account’ that is either

(a) a body corporate that is incorporated for a public purpose by an Act; [or]

(b) a body corporate that is incorporated for a public purpose by:

(i) regulations under an Act; or

(ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance;

and is prescribed for the purposes of this paragraph by regulations under this Act.

A further distinction is made between Commonwealth authorities that are government business enterprises (‘GBEs’), statutory marketing authorities

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93 Ibid. There are also other governmental entities outside the realms of the Financial Management and Accountability Act and Commonwealth Authorities and Companies Act, such as the High Court of Australia, which is administered under the High Court of Australia Act 1979 (Cth).


95 Ibid ss 5 (definition of ‘Commonwealth company’), 34(1).

96 Ibid ss 7(1). Note that ‘all money that a body holds is taken to be held by it on its own account, unless the money is public money as defined in s 5 of the Financial Management and Accountability Act’ ss 7(3). For the definition of ‘public money’, see above Part III(A)(i).

In s 16 ‘special public money’ is defined as ‘public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth.’

97 Commonwealth Authorities and Companies Act ss 7(1). The only prescribed body is the ‘Army and Air Force Canteen Service Board of Management’: Commonwealth Authorities and Companies Regulations 1997 (Cth) reg 6 (‘Commonwealth Authorities and Companies Regulations’). Some exceptions are outlined in Commonwealth Authorities and Companies Act ss 7(2):

(a) Corporations Act companies;

(b) corporations registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006;

(c) associations that are organisations (within the meaning of the Fair Work (Registered Organisations) Act 2009).

98 A GBE is a Commonwealth authority or company prescribed as such by the regulations: Commonwealth Authorities and Companies Act ss 5 (definition of ‘GBE or government business enterprise’). See Commonwealth Authorities and Companies Regulations reg 4(1), prescribing the Australian Government Solicitor, Australian Postal Corporation and Defence Housing Australia.
‘SMAs’\(^9\) and all other Commonwealth authorities. Essentially the GBEs and SMAs are able to invest their ‘surplus money’\(^10\) with less oversight by the Finance Minister than can other Commonwealth authorities,\(^11\) although there are some specific additional governance arrangements.\(^12\)

A Commonwealth company is ‘a Corporations Act [2001 (Cth)] company that the Commonwealth controls’, but ‘not … a company that is a subsidiary of a Commonwealth authority or Commonwealth company.’\(^13\) The ‘control’ relates to the composition of the company’s board, the casting of votes at a general meeting, or the number of shares held.\(^14\) Notably, some of those bodies classified as GBEs are also Commonwealth companies.\(^15\)

The essence of the distinction between Commonwealth authorities and Commonwealth companies is in the sources of their management framework obligations.\(^16\) Commonwealth authorities must comply with the Commonwealth Authorities and Companies Act obligations\(^17\) as well as those obligations imposed by their enabling legislation\(^18\) and, where relevant, their founding constitutions and other administrative arrangements.\(^19\) In contrast, Commonwealth companies must comply with the Corporations Act 2001 (Cth) and their constitutions, and some additional Commonwealth Authorities and Companies Act obligations.\(^20\)

\(^9\) An SMA is a Commonwealth authority prescribed as such by the regulations: Commonwealth Authorities and Companies Act s 5 (definition of ‘SMA or statutory marketing authority’). See Commonwealth Authorities and Companies Regulations reg 5, prescribing the Wine Australia Corporation.

\(^10\) ‘Surplus money’ means ‘money of the authority that is not immediately required for the purposes of the authority’: Commonwealth Authorities and Companies Act ss 18(5), 19(5).

\(^11\) See ibid ss 18(3)(d), 19(3)(d), allowing GBEs and SMAs, but not other authorities, to invest surplus money ‘in any manner that is consistent with sound commercial practice’, without the authority of the Finance Minister.

\(^12\) See Department of Finance and Administration (Cth), Governance Arrangements for Commonwealth Government Business Enterprises (1997).

\(^13\) Commonwealth Authorities and Companies Act s 34(1).

\(^14\) Ibid ss 34(1A)–(2).

\(^15\) See the definition in above n 98. See also Commonwealth Authorities and Companies Regulations reg 4(2), prescribing ASC Pty Ltd; Australian Rail Track Corporation Ltd; Medibank Private Ltd; NBN Co Ltd.

\(^16\) Commonwealth, Parliamentary Debates, House of Representatives, 12 December 1996, 8346 (John Fahey, Minister for Finance).

\(^17\) See Commonwealth Authorities and Companies Act pt 3.

\(^18\) See ibid s 7.

\(^19\) These administrative arrangements may include other means of governmental transparency and accountability through, for example, the Auditor-General Act 1997 (Cth), Ombudsman Act 1976 (Cth), Privacy Act 1988 (Cth), Archives Act 1983 (Cth) and Public Accounts and Audit Committee Act 1951 (Cth).

\(^20\) For an overview of these governance arrangements, see Department of Finance and Administration (Cth), Governance Arrangements for Australian Government Bodies, above n 5, 22–7.
B Effect of the Act

The overall effect of the introduction of the *Commonwealth Authorities and Companies Act* was to:

- replace the diverse accountability requirements of *Commonwealth Authorities and Companies Act* bodies with a single set of core requirements;
- enable the accountability requirements to be viewed as a whole, thereby significantly streamlining the focus of the government’s and Parliament’s interest;
- insert provisions modelled on comparable areas of the *Corporations Law* and adopt best practice applying to individual authorities; and
- bring the requirements for the Auditor-General’s audits of financial statements into line with those required by the *Corporations Law*.

The *Commonwealth Authorities and Companies Act* management framework sets out high-level general management duties and audit and financial reporting requirements, and prescribes compliance with certain general policies of the government. The management unit of a Commonwealth authority is generally a governing board of one or more ‘directors’, who are subject to directors’ duties and must act in the interests of the body. The *Commonwealth Authorities and Companies Act* model prescribes the reporting obligations of ‘directors’ and the conduct obligations of ‘officers’. The term ‘officers’ includes ‘directors’, but also extends to ‘senior manager[s] of the..."
authority’. The intention of this broad term was to align the Commonwealth Authorities and Companies Act with the Corporations Law requirements relating to conduct, and it has been noted that the term potentially captures the activities of some Commonwealth Authorities and Companies Act body advisers. The Commonwealth Authorities and Companies Act conduct obligations impose, in some circumstances, obligations of care and diligence (including the ‘business judgement rule’), good faith, proper use of position and proper use of information; certain duties of disclosure for directors; some restrictions on attendance and voting for directors; and certain indemnities. There is also a requirement to convene an audit committee that functions to help the Commonwealth authority and its directors comply with its Commonwealth Authorities and Companies Act obligations and to ‘[provide] a forum for communication between the directors, the senior managers … and the internal and external auditors’.

1 Framework for Commonwealth Authorities

The regulatory, accounting and accountability framework established for Commonwealth authorities by the Commonwealth Authorities and Companies Act covers a number of matters.

(a) Collection and Custody of, and Dealings with, Money

All money held by a Commonwealth authority is taken to be held by it on its own account ‘unless the money is public money as defined in section 5 of the

119 Ibid s 5 (definition of ‘officer’).
120 Commonwealth, Parliamentary Debates, House of Representatives, 12 December 1996, 8348 (John Fahey, Minister for Finance). See also Corporations Act 2001 (Cth) s 9 (definition of ‘officer’).
122 Commonwealth Authorities and Companies Act ss 22(1)–(2). ‘Business judgement’ means ‘any decision to take or not take action in respect of a matter relevant to the operations of the Commonwealth authority’: s 22(3). If a person contravenes a civil penalty provision, a court may make various declarations and impose a pecuniary penalty and compensation: sch 2 cls 2–4.
123 Ibid ss 23(1) (civil), 26(1) (criminal). There is a defence to s 23 for an officer if the officer is required to do the act under the Commonwealth Authorities and Companies Act (s 27A(1)) or in the course of the performance of duties as a public servant (s 27A(2)), and (in some circumstances) for a director acting in good faith and after making proper inquiry if appropriate (ss 27D–27E).
124 Ibid ss 24(1) (civil), 26(2) (criminal). The defences to s 24 are the same as those for s 23: see above n 123.
125 Ibid ss 25(1) (civil), 26(3) (criminal). The defences to s 25 are the same as those for s 23: see above n 123.
126 Ibid ss 27F–27G.
127 Ibid s 27J.
128 Ibid pt 3 div 4A.
129 Ibid s 32.
130 There are also provisions addressing entities controlled by Commonwealth authorities (subsidiaries) (see, eg, ibid ss 12, 29–31), and some special rules for Commonwealth authorities established by regulations (see s 33).
Financial Management and Accountability Act’. The money held by the Commonwealth authority on its own account is held by the legal entity that is the Commonwealth authority (usually a statutory authority established by its founding legislation). Commonwealth authorities must maintain a bank account and deposit their moneys into that account. ‘Public money’ is money held on account of the Commonwealth rather than the Commonwealth authority.

(b) Applying Australian Government Policies

A Commonwealth authority must comply with General Policy Orders to the extent they apply to the authority. These Orders apply Australian government policies to the particular authority, although for some authorities the procurement of property or services must comply with the Commonwealth Procurement Guidelines.

(c) Borrowing and Investment

Commonwealth authorities may invest their surplus money (excluding Financial Management and Accountability Act ‘public money’) in a limited range of investments. Commonwealth authorities may generally borrow according to their founding legislation, although there may be some limits for credit cards and vouchers.

131 Ibid s 7(3).
132 Ibid. See also Commonwealth, Parliamentary Debates, House of Representatives, 12 December 1996, 8346 (John Fahey, Minister for Finance).
133 Ibid s 18(2).
134 Financial Management and Accountability Act s 5 (definition of ‘public money’).
135 Commonwealth Authorities and Companies Act ss 28(1), 48A. See also Department of Finance and Deregulation (Cth), ‘Application of General Policies of the Australian Government to Bodies Subject to the CAC Act — General Policy Orders’ (Finance Circular No 2009/08, 2009). Notably, ‘General Policy Orders’ are ‘legislative instruments’ for the purposes of the Legislative Instruments Act 2003 (Cth), although they are not subject to disallowance or sunsetting: Commonwealth Authorities and Companies Act s 48A(5).
136 See Department of Finance and Deregulation (Cth), ‘Application of General Policies of the Australian Government to Bodies Subject to the CAC Act’, above n 135, 2–3; Explanatory Memorandum, Commonwealth Authorities and Companies Amendment Bill 2008 (Cth) 5–7 [17]–[20].
137 Commonwealth Authorities and Companies Act s 47A; Commonwealth Authorities and Companies Regulations reg 9, sch 1 pt 1. See also Department of Finance and Deregulation (Cth), Commonwealth Procurement Guidelines, above n 38, 2; Finance Minister’s (CAC Act Procurement) Directions 2004 (Cth).
138 See Commonwealth Authorities and Companies Act s 7(3); Financial Management and Accountability Act s 5 (definition of ‘public money’).
139 Commonwealth Authorities and Companies Act ss 18(3) (Commonwealth authorities other than GBEs and SMAs), 19(3) (GBEs or SMAs).
140 See Commonwealth Authorities and Companies Act s 28A; Commonwealth Authorities and Companies Regulations regs 6AA–6AE.
(d) Reporting and Audit

A Commonwealth authority must prepare an annual report that includes financial statements that have been audited by the Auditor-General. The financial statements must conform to the Finance Minister’s Orders. The annual report is then tabled in Parliament. The annual report must include a report of operations, financial statements and the Auditor-General’s certification of the financial statements. In addition, there are other reporting obligations, including interim reporting to the responsible Minister, providing budget estimates, reporting various significant events, keeping responsible ministers and the Finance Minister informed generally, and for GBEs, preparing a corporate plan.

2 Framework for Commonwealth Companies

Commonwealth Authorities and Companies Act Commonwealth companies, consistent with their departure from ministerial control (via board composition, voting power or number of shares), have a less formal regulatory, accounting and accountability framework. The Corporations Act 2001 (Cth) provides the basic framework and there are various additional obligations for audit, reporting, audit committees and compliance with General Policy Orders to the extent that they are applicable to the company.

141 Commonwealth Authorities and Companies Act s 9(1), sch 1. See also ss 8, 12(4) (excluded subsidiaries), Auditor-General Act 1997 (Cth) s 12.
142 Commonwealth Authorities and Companies Act sch 1 item 2. See also Commonwealth Authorities and Companies (Report of Operations) Orders 2008 (Cth); Commonwealth Authorities and Companies Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2010 (Cth). The Finance Minister’s Orders are ‘disallowable instruments’ requiring the involvement of Parliament in their implementation: Commonwealth Authorities and Companies Act s 48; Legislative Instruments Act 2003 (Cth) s 42.
143 Commonwealth Authorities and Companies Act s 9(1)(b). See also Acts Interpretation Act 1901 (Cth) s 34C.
145 Commonwealth Authorities and Companies Act s 9(1)(a), sch 1 items 1(b), 2. See also amended Commonwealth Authorities and Companies Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2010 (Cth).
146 Commonwealth Authorities and Companies Act s 9(1)(a), sch 1 items 1(c), 3–7. See also Auditor-General Act 1997 (Cth) s 12.
147 Commonwealth Authorities and Companies Act ss 13, 48.
148 Ibid s 14.
149 Ibid s 15.
150 Ibid s 16.
151 Ibid s 17.
152 Ibid s 34(1A).
153 See, eg, Corporations Act 2001 (Cth) ss 301 (audit of annual financial report), 302 (half-year financial report and directors’ report).
154 Commonwealth Authorities and Companies Act s 35.
155 Ibid ss 36 (annual report including financial statements), 37 (subsidiary financial statements), 38 (interim reports), 39 (estimates), 40 (significant events), 41 (keeping Ministers informed), 42 (corporate plans for GBEs).
156 Ibid s 44.
157 Ibid s 43.
3 The Ministerial Role

For both Commonwealth authorities and Commonwealth companies under the Commonwealth Authorities and Companies Act, the Minister’s role is more distant than that for Financial Management and Accountability Act Agencies (and prescribed Agencies). There remain, however, some formal elements of ministerial control.158 A summary is set out below in Table 2.159 In addition to these formal elements, there are a range of other less formal elements of control. The element with the potential to be most significant is a General Policy Order made by the Finance Minister160 that applies to Commonwealth authorities161 and wholly owned Commonwealth companies,162 and to their subsidiaries.163 While the General Policy Order on its face requires approval by the Parliament as a disallowable instrument, it is expressly exempted from disallowance and sunsetting.164 The effect is that the Finance Minister can essentially direct Commonwealth authorities and wholly owned Commonwealth companies, and their subsidiaries, to comply with the General Policy Order.165 The content of the Order is perhaps limited, with the Finance Minister stating during the second reading speech:

Such policies cannot be in conflict with any statutory obligations of a particular authority or company. I should emphasise that this provision does not confer on responsible ministers, or the government, a general power of direction as to how authorities and wholly-owned companies are to carry out their particular functions. It is only intended to cover government policies that are applicable to the Commonwealth public sector in general, such as, for example, policies relating to trade contact with particular foreign countries or for the observance of equal employment opportunity policies …166

158 These controls may be delegated to a Public Service Act ‘Secretary’: Commonwealth Authorities and Companies Act s 48B(1).
159 There is also the possibility for Commonwealth authorities to be prescribed interjurisdictional authorities with various obligations to state/territory Ministers: Commonwealth Authorities and Companies Act s 33A. The Commonwealth Authorities and Companies Regulations do not presently prescribe any such authorities or impose any such obligations.
160 Commonwealth Authorities and Companies Act s 48A(1).
161 Ibid s 28(1). There are existing exemptions: Australian Broadcasting Corporation Act 1983 (Cth) s 78(7); Australian National University Act 1991 (Cth) s 4A(1); Special Broadcasting Service Act 1991 (Cth) s 13(2). The exemption of Australian Industry Development Corporation Act 1970 (Cth) s 5A lapsed at the winding down of the Corporation’s residual activities on 22 April 2011: AIDC Sale Act 1997 (Cth) s 2(2), sch 2 item 2, repealing Australian Industry Development Corporation Act 1970 (Cth).
162 Commonwealth Authorities and Companies Act s 43(1).
163 Ibid ss 28(2) (Commonwealth authorities), 43(2) (wholly owned Commonwealth companies).
164 See Commonwealth Authorities and Companies Act s 48A(5), providing: ‘A General Policy Order is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the Legislative Instruments Act 2003 [(Cth)] applies to it.’
165 Notably, consultation with the relevant Commonwealth authorities or Commonwealth wholly owned companies is required, albeit there is no requirement for the Finance Minister to adopt the desires of a Commonwealth authority or wholly owned Commonwealth company: Commonwealth Authorities and Companies Act s 48A(2).
Like the policies applying to Chief Executives of Agencies (and prescribed Agencies) under the Financial Management and Accountability Act, the General Policy Order has the potential to be a significant limitation on devolution and an important means of asserting ministerial control.

V THE PUBLIC SERVICE ACT 1999 (CTh)

The Public Service Act is the latest in the succession of Acts outlining public service employment arrangements which started with the Commonwealth Public Service Act 1902 (Cth) and was then continued by the Public Service Act 1922 (Cth). Importantly, the Australian government’s employment practices have closely followed the approach and rationales of the broader economy’s judicially based third party conciliation and arbitration system. The introduction of the Public Service Act was also significant in that it reflected the modernising public administration reforms of the 1980s and 1990s, devolving authority to those managing the resources of the Commonwealth to hire and fire employees according to their specific needs and arrangements, in line with private sector models. The effect has been to change the framework of employment so that the focus is on the effectiveness of a particular Agency in achieving its objective and the performance of the public service is aligned more closely with that of the government of the moment.

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167 For an historical analysis, see Australian Public Service Commission, ‘A History in Three Acts: Evolution of the Public Service Act 1999’ (Occasional Paper No 3, 2004). See also Public Service and Merit Protection Commission and Department of Industrial Relations (Cth), The Public Service Act 1997: Accountability in a Devolved Management Framework (1997) 4–8. Notably, the Commonwealth also engages employees under a range of other statutes: see Air Force Act 1923 (Cth); Australian Bureau of Statistics Act 1975 (Cth); Australian Federal Police Act 1979 (Cth); Australian Prudential Regulation Authority Act 1998 (Cth); Australian Securities and Investments Commission Act 2001 (Cth); Australian Security Intelligence Organisation Act 1979 (Cth); Commonwealth Electoral Act 1918 (Cth); Defence Act 1903 (Cth); Director of Public Prosecutions Act 1983 (Cth); Family Law Act 1975 (Cth); Governor-General Act 1974 (Cth); High Court of Australia Act 1979 (Cth); Intelligence Services Act 2001 (Cth); Members of Parliament (Staff) Act 1984 (Cth); Naval Defence Act 1910 (Cth); Office of National Assessments Act 1977 (Cth); Parliamentary Service Act 1999 (Cth).


The Workplace Relations Act 1996 (Cth) established a process for agreement-making and detailed specific protection against unlawful termination and discrimination, among other things. That Act also imposed the same industrial relations and employment arrangements for public servants as those applying to other workers. The effect was to devolve decisions about remuneration and employment terms and conditions to the individual Agencies through Australian Workplace Agreements (‘AWAs’) and certified agreements.\textsuperscript{171} The amendments made under the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth) addressed the process of agreement-making, replacing the terminology of ‘AWAs’.\textsuperscript{172} The government also developed an ‘Australian Government Employment Bargaining Framework’ that continued the practice of Agency-level agreement-making with employees and maintained a number of elements of the Workplace Relations Act regime, including choice of representation, genuine bargaining, the setting out of terms and conditions in ‘modern, flexible and streamlined instruments’, and the requirements that ministerial approval for collective terms and conditions be obtained and that improvements in pay and conditions be funded from existing budget allocations and linked to productivity gains (or ‘genuine quantifiable productivity initiatives’).\textsuperscript{173}

The Public Service Act was also amended by the Fair Work (State Referral and Consequential and Other Amendments) Act 2009 (Cth) to replace references to the Workplace Relations Act 1996 (Cth) with references to the Fair Work Act 2009 (Cth) and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth).\textsuperscript{174} These amendments subject members of the Australian Public Service (‘APS’)\textsuperscript{175} (employed under the Public Service Act) to the process for agreement-making through enterprise bargaining and the safety net of minimum employment conditions set out in the Fair Work Act 2009 (Cth).\textsuperscript{176} Under the new model, modes of employment under the Public Service Act scheme\textsuperscript{177} involve a classification\textsuperscript{178} of the ‘Senior Executive Service’

\textsuperscript{171} Although this devolution was not without some limits: see, eg, Australian Public Service Commission, ‘Policy Parameters for Agreement Making in the Australian Public Service’ (Supporting Guidance, April 2006).

\textsuperscript{172} See, eg, Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth) sch 1 item 16.


\textsuperscript{174} Fair Work (State Referral and Consequential and Other Amendments) Act 2009 (Cth) s 3, sch 16 items 18–19, amending Public Service Act 1999 (Cth) s 8(1).

\textsuperscript{175} The APS consists of Agency Heads and APS employees: Public Service Act s 7. Agency Heads are Secretaries of Departments, Heads of Executive Agencies and Heads of Statutory Agencies: s 7 (definition of ‘Agency Head’).


\textsuperscript{177} This scheme includes the Public Service Act 1999 (Cth), Public Service Regulations 1999 (Cth), Public Service Commissioner’s Directions 1999 (Cth) (‘Public Service Commissioner’s Directions’), Prime Minister’s Public Service Directions 1999 (Cth) and Public Service Classification Rules 2000 (Cth).

\textsuperscript{178} See Public Service Act s 23(1); Public Service Classification Rules 2000 (Cth) r 5.
(‘SES’)\(^{179}\) as a subset of ‘APS employees’\(^{180}\) with the SES being subject to specific rules about engagement, promotion, redeployment, mobility and termination.\(^{181}\) ‘APS employees’ (including the SES) may now be employed on terms and conditions according to an enterprise agreement,\(^{182}\) a unilateral contract (or ‘determination’)\(^{183}\) or an individual common law employment contract,\(^{184}\) each being a negotiation between the Agency and its employee or employees.\(^{185}\)

In addition to the devolution to ‘Agency Heads’ of all the rights, duties and powers of an employer in respect of their APS employees\(^{186}\) (subject to the \textit{Fair Work Act 2009} (Cth)), the \textit{Public Service Act} essentially provides the basic framework for the structure, responsibilities and management of the Australian Public Service (‘APS’).\(^{187}\) The major advances brought about by the \textit{Public Service Act} were a declaration of ‘APS Values’ (reflecting public expectations of the relationship between the public service and the government, the Parliament and the Australian community)\(^{188}\) and a ‘Code of Conduct’ (reflecting the public expectation that public servants will exercise appropriate conduct).\(^{189}\) Under the \textit{Public Service Act} there is also a statutory office of Public Service Commissioner\(^{190}\) with various functions addressing APS employment,\(^{191}\) including promoting the APS Values and the Code of Conduct.\(^{192}\) The Public Service Commissioner must issue directions about APS Values,\(^{193}\) the Code of Conduct\(^{194}\) and various other matters.\(^{195}\) Further, the Prime Minister may issue

\(^{179}\) See Public Service Act ss 7 (definition of ‘SES employee’), 34; Public Service Classification Rules 2000 (Cth) r 8; Public Service Commissioner’s Directions cls 6.6–6.6B.

\(^{180}\) See Public Service Act ss 7 (definition of ‘APS employee’), 22; Public Service Classification Rules 2000 (Cth) r 6.

\(^{181}\) Public Service Act s 36; Public Service Commissioner’s Directions cls 6.1–6.8.

\(^{182}\) Public Service Act ss 22, 72. See also \textit{Fair Work Act 2009} (Cth) s 172.

\(^{183}\) Public Service Act s 24.

\(^{184}\) Ibid s 22.

\(^{185}\) See Department of Education, Employment and Workplace Relations (Cth), ‘Australian Government Employment Bargaining Framework’, above n 173, 3. Notably the ‘Public Service Minister’ can, in ‘exceptional circumstances’, ‘determine the remuneration and other terms and conditions of employment applying to APS employees’: ibid s 24(3).

\(^{186}\) See Public Service Act ss 20, 22, 24(1). See also Australian Public Service Commission, ‘The Australian Experience of Public Sector Reform’, above n 6, 33–7.

\(^{187}\) Public Service Act 1999 (Cth) s 8(1). Australian Public Service Commission, ‘The Australian Experience of Public Sector Reform’, above n 6, 36, notes that in this structure, [s]taffing powers previously assigned to the Public Service Commissioner and delegated to the heads of public service agencies, are fully devolved to them. They are thus afforded all the rights, duties and powers of an employer in respect of their APS employees, with authority to engage, terminate and determine their employment terms and conditions.

\(^{188}\) Public Service Act s 10. See also Public Service Commissioner’s Directions chs 2–4.

\(^{189}\) Public Service Act s 13. See also Public Service Commissioner’s Directions ch 5.

\(^{190}\) Public Service Act s 40(1).

\(^{191}\) See ibid s 41(1).


\(^{193}\) Public Service Act s 11. See also Public Service Commissioner’s Directions chs 2–4.

\(^{194}\) Public Service Act s 15(4). See also Public Service Commissioner’s Directions ch 5.

\(^{195}\) Public Service Act s 36 (matters relating to SES employees). See also Public Service Commissioner’s Directions ch 6 (SES employment).
general directions to Agency Heads about the management and leadership of APS employees. The ‘people management’ approach to devolution under the Public Service Act and Workplace Relations Act 1996 (Cth) (and retained under the Fair Work Act 2009 (Cth)) was also balanced with ‘enhanced accountability for agency performance’197 that included an annual report obligation.198

The consequence of these arrangements is that employment authority and responsibility has been devolved to Agency Heads. There remain, however, some formal elements of ministerial control. A summary is set out below in Table 3. In addition to these formal elements, there are a range of other less formal, but still significant, elements of ministerial control. Some of these are considered next. Notably, the ministerial controls asserted under the Financial Management and Accountability Act and Commonwealth Authorities and Companies Act are generally of an overarching managerial nature, while those under the Public Service Act are generally more specifically directed to the performance of individual public servants.

A. The Public Interest

The Public Service Act recognises, although it does not expressly state, that it is

the government and its Ministers [that] determine the public interest in terms of policies and program priorities, and public servants, within the requirements of the legal framework, [that] advise on and implement their decisions.199

In this framework ‘[t]he public service has particular responsibility for the public interest in upholding the law and ensuring due process.’200 Thus:

The legislation has been framed to provide an inter-locking system of powers and responsibilities, integrated within a departmental management framework. It provides a model of accountability in which the public interest is clearly articulated.201

In this context the ‘public interest’ is a theme that runs through the legislated APS Values (discussed below), which require that the public service be (among other things) apolitical and professional,202 merit-based,203 ethical,204 account-

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196 Public Service Act s 21(1). See Prime Minister’s Public Service Directions 1999 (Cth).
197 Australian Public Service Commission, ‘The Australian Experience of Public Sector Reform’, above n 6, 55.
198 Public Service Act s 63. See also Department of the Prime Minister and Cabinet (Cth), Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies (2011).
199 Australian Public Service Commission, ‘The Australian Experience of Public Sector Reform’, above n 6, 37.
200 Ibid.
201 Ibid.
202 Public Service Act s 10(1)(a).
203 Ibid s 10(1)(b).
204 Ibid s 10(1)(d).
able ‘within the framework of Ministerial responsibility’ and responsive to government. The important point is that ‘public interest’ has a specific meaning in APS employment that is tied to the APS Values; ‘[t]he APS Values describe the unique public interest features of the APS, the attributes that, collectively, differentiate it from other enterprises.’ Significantly, it is the Ministers that determine what the ‘public interest’ is and it is for public servants to ‘advise on and implement [the Ministers’] decisions.’ In short, the Ministers control the ‘public interest’ and it is this ‘public interest’ that APS employees carry out in their work.

B Responsiveness

The Public Service Act expressly recognises that the APS should strive to be responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and programs. Responsive APS employees:

- ‘are knowledgeable about the Government’s stated policies’;
- ‘are sensitive to the intent and direction of policy’;
- ‘take a whole-of-government view’;
- ‘are well informed about the issues involved’;
- ‘draw on professional knowledge and expertise and are alert to best practice’;
- ‘consult relevant stakeholders and understand their different perspectives’;
- ‘provide practical and realistic options and assess their costs, benefits and consequences’;
- ‘convey advice clearly and succinctly’; and
- ‘carry out decisions and implement programmes promptly, conscientiously, efficiently and effectively.’

There is more specific guidance regarding dealings with Ministers:

Responsive implementation of the Government’s policies and programmes … is achieved through a close and cooperative relationship with Ministers and their employees. Ministers may make decisions, and issue policy guidelines

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205 Ibid s 10(1)(e).
206 Ibid s 10(1)(f). See also Australian Public Service Commission, Values in the Australian Public Service (2nd ed, 2002) viii.
207 Australian Public Service Commission, Values in the Australian Public Service, above n 206, viii.
208 Australian Public Service Commission, ‘The Australian Experience of Public Sector Reform’, above n 6, 37.
209 Public Service Act s 10(1)(f).
210 Australian Public Service Commission, Enhancing Ethical Awareness in the APS — APS Values and Code of Conduct in Practice (2009) ch 2. See also Australian National Audit Office, ‘Developing Policy Advice’ (Audit Report No 21, 2001) 30 [1.6] (‘any proposals and advice need to recognise the sensitivity of both being responsive to government objectives and fully informing the ministers concerned in a professional manner’).
with which decisions made by APS employees must comply. Such Ministerial decisions and policy guidance must, of course, comply with the law and decisions by APS employees must meet their responsibilities for impartiality and efficient, effective and ethical use of resources.\(^{211}\)

The effect of the reforms has probably been to engender a high level of responsiveness to government in the APS,\(^ {212}\) albeit there might have been some adverse consequences for public administration.\(^ {213}\) ‘Responsiveness’ is, of course, a complex conception and open to significant flexibility.\(^ {214}\) Importantly, however, the requirement of ‘responsiveness’ is a significant limitation on devolution and a source of potentially considerable ministerial control over APS employees.

C Promoting ‘Performance’

The purpose of the ‘outcomes and outputs/programs’ framework, introduced in the 1999 federal budget and coinciding with the adoption of the accrual budgeting framework in the *Financial Management and Accountability Act*,\(^ {215}\) was to impose ‘a means of structuring corporate governance and management arrangements and reporting on planned and actual performance’, taking into account that ‘agencies and their ministers have considerable scope for adopting specific structures and arrangements that suit their circumstances’.\(^ {216}\)

Alignment of an agency’s organisational structure with outcomes, outputs and administered items best defines management accountabilities and responsibilities and enables agencies to directly translate internal reporting to external reporting.\(^ {217}\)

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\(^{211}\) Australian Public Service Commission, *APS Values and Code of Conduct in Practice*, above n 210, ch 2 (citations omitted).

\(^{212}\) See KPMG, *Benchmarking Australian Government Administration Performance* (Department of the Prime Minister and Cabinet (Cth), 2009) 70–3 [7.1]–[7.1.3].

\(^{213}\) The concern is that the new disciplines introduced to the public service emphasising responsiveness to the government ‘have been ratcheted up to the point where responsiveness tips into complicity’: MacDermott, above n 170, 2.

\(^{214}\) For an analysis of this flexibility, especially in the face of contestability, see ibid 35–40. See also Geoffrey Barker, ‘The Public Service’ in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (Allen & Unwin, 2007) 124.


At this framework’s heart was the imperative to establish benchmarks based on performance indicators of efficiency of agency operations and cost effectiveness of the outputs/programs delivered. Agencies focused on improving performance management within the context of their businesses by linking individual and business plans with organisational plans, measuring and rewarding performance, and assessing overall performance.

Despite the apparent changes following the move from the Workplace Relations Act 1996 (Cth), which devolved employment decisions about setting remuneration and employment terms and conditions to the individual agencies through AWAs and certified agreements, to the Fair Work Act 2009 (Cth), which sets out a process of agreement-making through enterprise bargaining and a safety net of minimum employment conditions, the need to measure performance remains unchanged. Significantly, however, the parameters of performance are set according to the outcomes and outputs/programs framework that is determined by Ministers during the budget cycle and set out in the Portfolio Budget Statements. In short, it is the Ministers who establish the benchmarks against which performance is assessed, and in that way, determine what it is that Agency Heads and the APS employees under their direction are seeking to achieve.

D APS Values and Code of Conduct

The APS Values are another incident of devolution intended ‘to facilitate a more responsive, flexible and performance-focused’ public service. An Agency Head is required to ‘uphold and promote the APS Values’. An Agency Head must also ‘establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct’, that Code includes the statement that an ‘APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.’ The APS Commissioner may issue directions for the purpose of promoting the APS Values

221 See, eg, Department of Families, Housing, Community Services and Indigenous Affairs (Cth), ‘Budget Initiatives and Explanations of Appropriations Specified by Outcomes and Programs by Agencies’ (Budget Related Paper No 1.8, 2010) iii, stating: ‘I present these statements to provide accountability to the Parliament and, through it, the public.’
222 Australian Public Service Commission, APS Values and Code of Conduct in Practice, above n 210, ch 1. See Public Service Act s 10(1); text accompanying above nn 202–206.
223 Ibid s 15(3).
224 Ibid s 13(11).
and determining their scope or application. The APS Values and Code of Conduct apply to all those employed under the Public Service Act in the performance of their duties.

APS employees must identify what the Values mean in practical terms within the context of their organisation and must work together to ensure that these Values are embedded in their agency’s culture.

The APS Values specifically address the relationships between the executive and the Parliament regarding the performance of employees working under the Public Service Act. Importantly for present purposes, the APS Values clearly articulate a subservient role for the APS, with a focus on meeting the needs and demands of Ministers. The following are examples.

- ‘[T]he APS is apolitical, performing its functions in an impartial and professional manner’. The Public Service Commissioner’s Directions 1999 (Cth) provide substance to this value, stating that an Agency Head and an APS employee must ensure that ‘management and staffing decisions in the Agency are made on a basis that is independent from the political party system, political bias and political influence’ and that policy advice and implementation, and ... high quality professional support, is provided to the elected Government, irrespective of which political party is in power and irrespective of the [Agency Head’s or employee’s] political beliefs.

In articulating what this direction might mean, the Australian Public Service Commission has provided that the ‘advice [must be] impartial, relevant and useful to Ministers and the government of the day’, that ‘legislation [must be] implemented in a non-partisan way and [that] the policies of the government of the day [must be] administered impartially.

- ‘[T]he APS is openly accountable for its actions, within the framework of ministerial responsibility to the Government, the Parliament and the Australian public’. The Public Service Commissioner’s Directions 1999 (Cth) provide substance to this value by stating that an Agency Head or APS employee must take all reasonable steps to ensure that he or she ... is able, within the accountability framework, to demonstrate clearly and appropriately to Ministers, to the Parliament and to other stakeholders that he or she has...
efficiently, effectively and ethically used the resources allocated to him or her.235

In articulating what this direction might mean, the Australian Public Service Commission has stated that ‘agencies [must be] able to provide timely, regular and comprehensive information and other support to Ministers to help them meet their accountability obligations to Parliament and the public’ and that ‘staff [must] understand the accountability framework in which they operate’.236 The Commission elaborates:

Ministers are accountable to Parliament for the effectiveness of their portfolios, but for operational efficiency they must be able to delegate substantial powers to staff in APS agencies. APS staff are accountable for the way in which they administer government policies. Ministers must therefore be able to have confidence in the performance of the APS and must also be able to account to Parliament, and through it to the public, for actions undertaken by the APS on the Government’s behalf.237

• ‘[T]he APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and programs’.238 The Public Service Commissioner’s Directions 1999 (Cth) provide that an Agency Head or APS employee must ensure that ‘Government decisions are implemented professionally and with integrity, irrespective of the nature of any advice that may have been provided to the Government at an earlier time.’239 In articulating what this direction might mean, the Australian Public Service Commission has provided:

The APS has a responsibility to advise and assist the government of the day in implementing the law and in developing and applying the government’s policies and programs. This Value, which complements the apolitical service Value, will ensure that governments have a comprehensive view of issues and access to a full range of options on which to make decisions.240

Despite these directions and the apparent apolitical imperative of the APS Values, the Australian Public Service Commission has also clearly stated that

Ministers and governments as the elected representatives of the Australian people determine and define the public interest. Public servants advise and implement — assisting governments to deliver their policy agenda and priorities.

They share an objective of achieving better outcomes for the Australian community …

235 Public Service Commissioner’s Directions cl 2.6.
236 Australian Public Service Commission, Values in the Australian Public Service, above n 206, 10.
238 Public Service Act s 10(1)(f).
239 Public Service Commissioner’s Directions cl 2.7.
240 Australian Public Service Commission, Values in the Australian Public Service, above n 206, 11.
The APS works within, and to implement, the elected government’s policies and outcomes. While it is not independent, it is well placed to draw on a depth of knowledge and experience including longer-term perspectives.241

The increasing interaction between public servants and Minister’s offices for the purpose of giving advice242 indicates that managing this APS Value is constantly in issue.243 The APS Values are an avenue whereby APS employees are acting to satisfy Ministers’ imperatives, and this is a significant means of ministerial control.

VI Conclusion

In contrast to the earlier centralised models of employment, the Public Service Act expressly devolved many of the employment decisions from central agencies to ‘Agency Heads’, thus ‘freeing APS agencies from central controls and enabling APS agencies to adopt employment arrangements that meet their particular needs.’244 In effect, devolution was the transfer of managerial power from central agencies of government to the parts of government delivering goods and services (the ‘line agencies’).245 This matched the similar devolution under the Financial Management and Accountability Act of regulatory and accounting functions, and accountability for the Australian government’s expenditures, to Agency (and prescribed Agency) Chief Executives.246 The intention of these arrangements was to improve Agency performance by recognising that the employment and financial arrangements (ie the terms and conditions of employment and spending) needed to be suited to the particular Agency’s outcomes and outputs/programs.247 For those parts of government previously removed from direct ministerial control, and legally and financially separated from the Com-

241 Australian Public Service Commission, APS Values and Code of Conduct in Practice, above n 210, ch.2.

242 In Australian Public Service Commission, State of the Service Report — State of the Service Series 2010–11 (2011) 65 it is noted that [m]ost SES employees (83%) and 29% of [executive level] employees reported having direct contact with ministers and/or their advisers in the previous 12 months, compared to 12% of APS 1–6 employees. Thirty-five per cent of SES and [executive level] employees who had direct contact with ministers and/or their advisers during the previous year reported they had faced a challenge in balancing the need to be apolitical, impartial and professional; to be responsive to the government; and to be openly accountable in dealing with ministers and/or their offices in the previous 12 months. This is similar to the 2009–10 result.

243 See generally Australian Public Service Commission, APS Values and Code of Conduct in Practice, above n 210, chs 1–5.

244 Commonwealth, Parliamentary Debates, Senate, 14 October 1999, 9680 (Chris Ellison, Special Minister of State). See also Commonwealth, Parliamentary Debates, House of Representatives, 30 March 1999, 4684 (David Kemp, Minister Assisting the Prime Minister for the Public Service).

245 This is to be distinguished from ‘devolved’ in the sense of ‘the use by the public sector of the not-for-profit and/or the private sectors to deliver public goods and services’: see Australian Public Service Commission, Policy Implementation through Devolved Government (2009) 2.

246 See Financial Management and Accountability Act s 44.

monwealth, the Commonwealth Authorities and Companies Act standardised reporting and audit requirements to allow the financial performance of individual bodies to be assessed, compared and improved.248

The rhetoric of ‘devolution’ under the Public Service Act, Financial Management and Accountability Act and Commonwealth Authorities and Companies Act has placed responsibility for staffing, workplace relations, finances, assets and resources with the Agency Heads/Chief Executives/Directors. This might suggest that these schemes removed accountability, authority and oversight of performance from the responsible Ministers. Despite this rhetoric, however, the analysis presented in this article demonstrates that Ministers do maintain significant controls, and that they have retained lines of responsibility and reporting such that they remain answerable to Parliament (and ultimately the electorate) for matters entrusted to them according to their portfolio allocation.249 The reality is that the Public Service Act, Financial Management and Accountability Act and Commonwealth Authorities and Companies Act were always intended to maintain ministerial responsibility while placing some responsibilities on Agency Heads/Chief Executives/Directors to be accountable to Ministers in order to improve their management performance.250 According to this perspective, the location of responsibility remains with Ministers, with the Public Service Act, Financial Management and Accountability Act and Commonwealth Authorities and Companies Act merely formally establishing the avenues of performance and accountability between Ministers and their Agency Heads/Chief Executives/Directors. Thus, the great advance of these public administration reforms has been to formally articulate the roles of Ministers and their Agency Heads/Chief Executives/Directors, giving clearer content to the conception of responsible government and ministerial responsibility. These reforms confirm that it is the Ministers who are the conduit between the Parliament and the executive and that the Ministers are, in practice, answerable to Parliament for both their own decisions and actions and those of the APS hierarchy (that is in turn answerable to the Minister).251 An exemplar demonstration of this clear and


249 The allocation of portfolio responsibilities is addressed in Commonwealth, Administrative Arrangements Order, 14 October 2010.


251 See Management Advisory Board and Management Improvement Advisory Committee, Accountability in the Public Sector (1993) 6. But see Egan v Willis (1998) 195 CLR 424 for an example of the potential conflicts that can arise between the executive and the Parliament. See also Groves, above n 14, 83–90.
formal articulation of responsible government and ministerial responsibility can be found in the Public Service Act which, in addition to stipulating that an Agency Head manages ‘under the Agency Minister’, expressively provides that ‘the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public’. Another clear example is the amendment of the Financial Management and Accountability Act to enhance the reporting obligations of Chief Executives. This amendment required Chief Executives to provide ‘reports, documents and information in relation to the operations of the Agency’ and ‘such reports, documents and information in relation to the financial affairs of the Agency’ as required by the portfolio Minister and Finance Minister respectively. This amendment was justified as an ‘explicitly articulated’ requirement of ‘responsible government’.

The real and practical advance of devolution in the public administration reforms in the Public Service Act, Financial Management and Accountability Act and Commonwealth Authorities and Companies Act, however, has been to distinguish between the spheres of activities and responsibilities of Ministers and APS employees. The analysis of the formal elements of ministerial involvement set out below in Tables 1–3 reveals that while Ministers are involved in making key decisions within the scope of their portfolio responsibilities, in most instances they are receiving various forms of information about the conduct of the portfolio administration under the authority of Agency Heads/Chief Executives/Directors. The analysis also reveals different levels of ministerial control: the Financial Management and Accountability Act and the Commonwealth Authorities and Companies Act provide for more general controls by Ministers over the operations of Agencies, prescribed Agencies and bodies, while the Public Service Act provides for more specific controls over individual APS employees in the performance of their duties.

It is within these frameworks for financial and employment governance that the actual roles and responsibilities of Ministers are revealed, detailing the Parliament’s conception of ministerial responsibility within the constitutional compact. This is significant because it confirms that responsible government and ministerial responsibility are implemented practically within the Australian government’s administration. It also means that the various forms of parliamentary scrutiny of ministerial responsibility need to make some distinctions.

252 Public Service Act ss 57(1) (Secretary of a Department), 66(1) (Head of an Executive Agency).
253 Public Service Act s 10(1)(e).
254 See Financial Framework Legislation Amendment Act 2008 (Cth) s 3, sch 1 item 50.
255 Financial Management and Accountability Act ss 44A(1)(a)–(b).
256 Commonwealth, Parliamentary Debates, House of Representatives, 26 June 2008, 6024 (Lindsay Tanner, Minister for Finance and Deregulation). Notably, the amendment also mirrored the equivalent provisions in the Commonwealth Authorities and Companies Act ss 16(1) (directors of Commonwealth authorities), 41(1) (directors of wholly owned Commonwealth companies). See also Explanatory Memorandum, Financial Framework Legislation Amendment Bill 2008 (Ch 9) [72]–[74].
First, they must distinguish between the clear and formal ‘responsibilities’ of the Ministers and the Agency Heads/Chief Executives/Directors. As Tables 1–3 show, there are discernable ‘responsibilities’ under the Public Service Act, Financial Management and Accountability Act and Commonwealth Authorities and Companies Act. So, for example, in employment matters under the Public Service Act the ‘responsibilities’ of various Ministers involve making high-level public service appointments (for example, of Secretaries of Departments), and this is distinct from responsibility for the engagement, performance and dismissal of other APS employees by an Agency Head. While the Ministers remain ‘responsible’, the scrutiny of engagement, performance and dismissal of other APS employees needs to be directed to Agency Heads.

Second, the forms of scrutiny must distinguish between: (a) environments established by Ministers for the administration of the portfolios under the authority of Agency Heads/Chief Executives/Directors; and (b) the performance of the administration by the Agency Heads/Chief Executives/Directors (and their employees). The environments are determined by the policies promulgated by the Ministers. In effect, the Public Service Act, Financial Management and Accountability Act and Commonwealth Authorities and Companies Act raise certain policies to the level of legislated rules and make clear that Agency Heads/Chief Executives/Directors (and their employees) are required to comply. While the Ministers remain ‘responsible’, the scrutiny of the content and consequences of the policy needs to be directed to Ministers, while scrutiny of the administrative performance based on the policy needs to be directed to the Agency Heads/Chief Executives/Directors (and their employees).

This is a nuanced understanding of responsible government and ministerial responsibility, which separates out the distinct responsibilities of Ministers from those of Agency Heads/Chief Executives/Directors (albeit Ministers remain the conduit between the executive and the Parliament). Most importantly, however, the analysis in this article reveals a conception of ministerial responsibility within the constitutional compact of responsible government and, in doing so, demonstrates the application of that constitutional principle.

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258 See, eg, Public Service Act s 10(1)(f); Financial Management and Accountability Act s 44(1); Commonwealth Authorities and Companies Act ss 28(1), 43(1).
Table 1: Ministerial Controls under the *Financial Management and Accountability Act 1997* (Cth) and *Financial Management and Accountability Regulations 1997* (Cth) in Respect of Agencies and Prescribed Agencies

<table>
<thead>
<tr>
<th>Minister</th>
<th>Activity</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finance Minister</td>
<td>Make Special Instructions about special public money</td>
<td>s 16</td>
</tr>
<tr>
<td></td>
<td>Make determination establishing Special Accounts</td>
<td>s 20</td>
</tr>
<tr>
<td></td>
<td>Make <em>Finance Minister’s Orders</em></td>
<td>s 63</td>
</tr>
<tr>
<td></td>
<td>Regulations may authorise issue of guidelines by Ministers</td>
<td>s 64</td>
</tr>
<tr>
<td></td>
<td>Issue drawing right</td>
<td>s 27</td>
</tr>
<tr>
<td></td>
<td>Issue <em>Commonwealth Procurement Guidelines</em></td>
<td>reg 7</td>
</tr>
<tr>
<td></td>
<td>Issue <em>Commonwealth Grant Guidelines</em></td>
<td>reg 7A</td>
</tr>
<tr>
<td></td>
<td>Approve future commitments of public money</td>
<td>reg 10</td>
</tr>
<tr>
<td></td>
<td>Specify a threshold for contingent liabilities</td>
<td>reg 10A</td>
</tr>
<tr>
<td></td>
<td>Approve loan guarantees</td>
<td>reg 11</td>
</tr>
<tr>
<td></td>
<td>Approve payments pending probate</td>
<td>reg 30</td>
</tr>
<tr>
<td></td>
<td>Authorising act of grace payments</td>
<td>s 33</td>
</tr>
<tr>
<td></td>
<td>Approve waiving debts</td>
<td>s 34</td>
</tr>
<tr>
<td></td>
<td>Make investments of public money</td>
<td>s 39</td>
</tr>
<tr>
<td></td>
<td>Accessing accounts and records</td>
<td>s 48</td>
</tr>
<tr>
<td></td>
<td>Require financial statements</td>
<td>ss 49–50</td>
</tr>
<tr>
<td>Treasurer</td>
<td>Make investments of public money</td>
<td>s 39</td>
</tr>
<tr>
<td>Minister for Home Affairs</td>
<td>Issue <em>Fraud Control Guidelines</em></td>
<td>reg 16A</td>
</tr>
<tr>
<td>Portfolio Minister</td>
<td>Report the involvement of the Commonwealth or a prescribed body with a company</td>
<td>s 39A</td>
</tr>
<tr>
<td></td>
<td>Issue guidelines</td>
<td>s 64</td>
</tr>
<tr>
<td></td>
<td>Refrain from misapplying or misusing public property</td>
<td>s 41</td>
</tr>
<tr>
<td></td>
<td>Refrain from losing public property</td>
<td>s 42</td>
</tr>
<tr>
<td></td>
<td>Refrain from gifting public property</td>
<td>s 43</td>
</tr>
<tr>
<td></td>
<td>Refrain from misusing a Commonwealth credit card</td>
<td>s 60</td>
</tr>
<tr>
<td>Entity</td>
<td>Minister</td>
<td>Activity</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Commonwealth Authority</td>
<td>Finance Minister</td>
<td>Require and receive interim reports</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Receive and require reports, documents and information about operations of the authority and its subsidiaries</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Grant exemption from requirement to align a subsidiary’s accounting period</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Engage a registered company auditor to investigate and report on an exemption application (regarding alignment of a subsidiary’s accounting period)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Give directions about procurement of property or services (including to comply with the Commonwealth Procurement Guidelines)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Make Finance Minister’s Orders</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Make General Policy Orders</td>
</tr>
<tr>
<td></td>
<td>Responsible Minister</td>
<td>Receive an annual report</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Receive a subsidiary’s audit report and financial statements</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Require budget estimates</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Receive information and documents about the involvement with a company, partnership, trust, unincorporated joint venture or other significant business activity</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Be informed of the operations of the authority and its subsidiaries</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Receive and require reports, documents and information about operations of the authority and its subsidiaries</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Receive the annual corporate plan for GBEs</td>
</tr>
</tbody>
</table>

Table 2: Ministerial Controls under the Commonwealth Authorities and Companies Act 1997 (Cth) and Commonwealth Authorities and Companies Regulations 1997 (Cth) in Respect of Commonwealth Authorities, Non-Wholly Owned Commonwealth Companies and Wholly Owned Commonwealth Companies
<table>
<thead>
<tr>
<th>Non-Wholly Owned Commonwealth Company</th>
<th>Responsible Minister</th>
<th>Finance Minister</th>
<th>Responsible Minister</th>
</tr>
</thead>
<tbody>
<tr>
<td>Be informed about changes or significant events affecting the GBE’s corporate plan</td>
<td>s 17</td>
<td>Require interim reports on operations, financial statements and audit</td>
<td>s 38</td>
</tr>
<tr>
<td>Require a GBE’s corporate plan to address specific matters</td>
<td>s 17</td>
<td>Receive documents and information about the operations of the company and its subsidiaries</td>
<td>s 41</td>
</tr>
<tr>
<td>Issue guidelines to a GBE about changes or significant events affecting the GBE’s corporate plan</td>
<td>s 17</td>
<td>Give directions about procurement of property or services (including to comply with the Commonwealth Procurement Guidelines)</td>
<td>s 47A</td>
</tr>
<tr>
<td>Make declarations and class orders about a director’s material personal interest</td>
<td>s 27K</td>
<td>Make Finance Minister’s Orders</td>
<td>s 48</td>
</tr>
<tr>
<td>Make Finance Minister’s Orders</td>
<td>s 48</td>
<td>Make General Policy Orders</td>
<td>s 48A</td>
</tr>
</tbody>
</table>

Non-Wholly Owned Commonwealth Company

Responsible Minister

Receive a copy of the company’s financial report, directors’ report and auditor’s report required by the Corporations Act 2001 (Cth) s 36

Finance Minister

Require interim reports on operations, financial statements and audit be provided to responsible Ministers s 38

Receive documents and information about the operations of the company and its subsidiaries s 41

Give directions about procurement of property or services (including to comply with the Commonwealth Procurement Guidelines) s 47A

Make Finance Minister’s Orders s 48

Make General Policy Orders s 48A

Responsible Minister

Receive a copy of the company’s financial report, directors’ report and auditor’s report required by the Corporations Act 2001 (Cth) together with other required documents s 36

Receive interim reports on operations, financial statements and audit s 38

Grant extension for interim reports on operations, financial statements and audit s 38

Table interim reports on operations, financial statements and audit s 38
<table>
<thead>
<tr>
<th>Action</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct the form of and receive budget estimates</td>
<td>s 39</td>
</tr>
<tr>
<td>Issue guidelines about what constitute significant events</td>
<td>s 40</td>
</tr>
<tr>
<td>Receive information and documents about the involvement with a company, partnership, trust, unincorporated joint venture or other significant business activity</td>
<td>s 40</td>
</tr>
<tr>
<td>Be informed about the operations of the company and its subsidiaries</td>
<td>s 41</td>
</tr>
<tr>
<td>Receive documents and information about the operations of the company and its subsidiaries</td>
<td>s 41</td>
</tr>
<tr>
<td>Receive the annual corporate plan for GBEs</td>
<td>s 42</td>
</tr>
<tr>
<td>Be informed about changes or significant events affecting the GBE’s corporate plan</td>
<td>s 42</td>
</tr>
<tr>
<td>Require a GBE’s corporate plan to address specific matters</td>
<td>s 42</td>
</tr>
<tr>
<td>Issue guidelines to a GBE about changes or significant events affecting the GBE’s corporate plan</td>
<td>s 42</td>
</tr>
<tr>
<td>Minister</td>
<td>Activity</td>
</tr>
<tr>
<td>---------------------</td>
<td>------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Prime Minister</td>
<td>Issue general directions to Agency Heads about the management and leadership of APS employees</td>
</tr>
<tr>
<td></td>
<td>Receive a report from the Merit Protection Commissioner about an Agency Head’s or APS employee’s actions (including a refusal or failure to act)</td>
</tr>
<tr>
<td></td>
<td>Receive a report from the Public Service Commissioner about a Secretary of a Department’s alleged breaches of the Code of Conduct</td>
</tr>
<tr>
<td></td>
<td>Allocate a name to or change the name of any office of Secretary of a Department</td>
</tr>
<tr>
<td></td>
<td>Appoint a person as Secretary of a Department</td>
</tr>
<tr>
<td></td>
<td>Receive a report from the Public Service Commissioner about a vacancy for the position of Secretary of the Prime Minister’s Department</td>
</tr>
<tr>
<td></td>
<td>Receive a report from the Secretary of the Prime Minister’s Department about a vacancy for a position of Secretary of a Department</td>
</tr>
<tr>
<td></td>
<td>Terminate the appointment of a Secretary of a Department</td>
</tr>
<tr>
<td></td>
<td>Receive a report from the Public Service Commissioner about terminating the appointment of a Secretary of the Prime Minister’s Department</td>
</tr>
<tr>
<td></td>
<td>Receive a report from the Secretary of the Prime Minister’s Department about terminating the appointment of a Secretary of any other Department</td>
</tr>
<tr>
<td></td>
<td>Engage a former Secretary of a Department</td>
</tr>
<tr>
<td></td>
<td>Appoint a person as an acting Secretary of a Department</td>
</tr>
<tr>
<td></td>
<td>Make arrangements for an APS employee to perform services for the State as an APS employee and for a State employee to perform services in an Agency as a State employee</td>
</tr>
<tr>
<td></td>
<td>Delegate any of the Prime Minister’s powers to another Minister</td>
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<tr>
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