

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*

¹ See Australian Public Service Board and Department of Finance (Cth), *Financial Management Improvement Program: Diagnostic Study* (1984); Review of Commonwealth Administration, *Report* (1983) ('*Reid Report*'); Commonwealth, Royal Commission on Australian Government Administration, *Report* (1976). See also James Cutt, 'Accountability, Efficiency and the Royal Commission on Australian Government Administration' (1977) 36 *Australian Journal of Public Administration* 333.

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).

³ See Joint Committee of Public Accounts, Parliament of Australia, *An Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997* (1997); Joint Committee of Public Accounts, Parliament of Australia, *An Advisory Report on the Charter of Budget Honesty Bill 1996* (1997); Joint Committee of Public Accounts, Parliament of Australia, *Guarding the Independence of the Auditor-General* (1996); Joint Committee of Public Accounts, Parliament of Australia, *Financial Reporting for the Commonwealth: Towards Greater Transparency and Accountability* (1995); Joint Committee of Public Accounts, Parliament of Australia, *Cash Matters: Cash Management in the Commonwealth* (1995); Joint Committee of Public Accounts, Parliament of Australia, *Accrual Accounting — A Cultural Change* (1995); Joint Committee of Public Accounts, Parliament of Australia, *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector* (1995); Joint Committee of Public Accounts, Parliament of Australia, *An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament* (1994); Joint Committee of Public Accounts, Parliament of Australia, *Managing People in the Australian Public Service: Dilemmas for Devolution and Diversity* (1993); Joint Committee of Public Accounts, Parliament of Australia, *Review of the Independent Auditor — Watching the Watchdog* (1992); Joint Committee of Public Accounts, Parliament of Australia, *The Auditor General: Ally of the People and Parliament* (1989) (responded to in Auditor-General (Cth), *Accountability, Independence and Objectivity: A Response to Report 296 of the Parliamentary Joint Committee of Public Accounts* (1989)); Joint Committee of Public Accounts, Parliament of Australia, *The Form and Standard of Financial Statements of Commonwealth Undertakings: A Discussion Paper* (1982).

(Cth), *Charter of Budget Honesty Act 1998* (Cth) and *Public Service Act 1999* (Cth) ('*Public Service Act*').⁴

These public administration reforms of the 1980s and 1990s (and now the 2000s)⁵ 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.⁶ 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).⁷ 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).

⁵ See Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (2010); Department of Finance and Administration (Cth), *Governance Arrangements for Australian Government Bodies* (2005); John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003).

⁶ Australian Public Service Commission, 'The Australian Experience of Public Sector Reform' (Occasional Paper No 2, 2003) 161. There is an extensive literature about these developments and a considerable and ongoing debate about their merits: see, eg, Warwick Funnell, Robert Jupe and Jane Andrew, *In Government We Trust: Market Failure and the Delusions of Privatisation* (UNSW Press, 2009) (discussing privatisation failures in Australia, New Zealand, the United Kingdom and the United States); John Halligan, *The Centrelink Experiment: Innovation in Service Delivery* (ANU E Press, 2008) (discussing the delivery of social welfare); Richard Hindmarsh, *Edging towards BioUtopia — A New Politics of Reordering Life & the Democratic Challenge* (University of Western Australia Press, 2008) (discussing the regulation of genetically modified organisms).

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;⁸ 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’⁹ — at its simplest, where the executive is responsible to the legislature — emanates from the Westminster system of government¹⁰ and is *reflected* in the *Constitution*¹¹ in ‘practical constitutional understandings not reducible to written law’.¹² As a principle it is ‘part of the

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 5(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 responsive 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*’).

¹⁰ Earlier debates considered conceptions of responsible government to be ideas, precepts or axioms about the 19th century development of government at Westminster and the ‘old’ dominions: see, eg, R S Parker, ‘Responsible Government in Australia’ in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond Publishing, 1980) 11. See also H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 5–6.

¹¹ See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 703–7. See also I C Harris, Department of the House of Representatives (Cth) (ed), *House of Representatives Practice* (5th ed, 2005) 46–50.

¹² *Williams v A-G (NSW)* (1913) 16 CLR 404, 457 (Isaacs J). See also *FAI 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 Unfortunately these

(Jacobs J); *Seas and Submerged Lands Case* (1975) 135 CLR 337, 364–5 (Barwick CJ); *Boilermakers’ Case* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *New South Wales v Bardolph* (1934) 52 CLR 455, 509 (Dixon J), 517–18 (McTiernan J); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 114 (Evatt J); *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 448–51 (Isaacs J); *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 411–15 (Isaacs J); *Engineers’ Case* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ); *New South Wales v Commonwealth* (1915) 20 CLR 54, 89 (Isaacs J). See also George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 1–13, 71–85; Brian Galligan, ‘The Founders’ Design and Intentions regarding Responsible Government’ in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond Publishing, 1980) 1, 2–9; Colin A Hughes, ‘Conventions: Dicey Revisited’ in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond Publishing, 1980) 41, 41–9; L J M Cooray, *Conventions, the Australian Constitution and the Future* (Legal Books, 1979) 18; Quick and Garrahan, above n 11, 301, 388, and the numerous other references to the concept of responsible government throughout the historical introduction and commentaries.

¹³ *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J). Notably, however, ‘the principle of responsible government ... is not merely an assumption upon which the actual provisions are based; it is an integral element in the *Constitution*’: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ), cited with approval in *Bennett v Commonwealth* (2007) 231 CLR 91, 136 [130] (Kirby J).

¹⁴ See *Constitution* ss 6, 49, 62, 64, 83. See also Constitutional Commission, *Final Report* (1988) vol 1, 84–6 [2.177]–[2.186]. For an overview of the various conceptions of responsible government, see Archer, above n 9, 23–30; Geoffrey Lindell, ‘Responsible Government’ in P D Finn (ed), *Essays on Law and Government — Volume 1: Principles and Values* (Law Book, 1995) 75; Malcolm Aldons, ‘Responsible, Representative and Accountable Government’ (2001) 60 *Australian Journal of Public Administration* 34. See also Matthew Groves, ‘Judicial Review and Ministerial Responsibility’ in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 82, 83–90. For a critical analysis of ministerial power, see Mark Aronson, ‘Ministerial Directions: The Battle of the Prerogatives’ (1995) 6 *Public Law Review* 77.

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, *Pape 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

Federal Commissioner of Taxation (2009) 238 CLR 1, 36–41 [54]–[67], 43 [75]–[77] (French CJ), 79–80 [201]–[202] (Gummow, Crennan and Bell JJ), 185 [527]–[528] (Heydon J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ), 184–5 (Dawson J), 228–9 (McHugh J); *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 47–8 (Brennan J), 69–71 (Deane and Toohey JJ); *Seas and Submerged Lands Case* (1975) 135 CLR 337, 364–5 (Barwick CJ); *Boilermakers’ Case* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Engineers’ Case* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ).

¹⁷ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 460 [212] (Gummow and Hayne JJ). See also Aldons, above n 14; David Hamer, ‘Can Responsible Government Survive in Australia?’ in Department of the Senate (Cth), *Republicanism, Responsible Government and Human Rights — Papers on Parliament No 26* (1995) 39; Ian Thynne and John Goldring, ‘Government “Responsibility” and Responsible Government’ (1981) 16 *Politics* 197; G S Reid, ‘Responsible Government and Ministerial Responsibility’ (1980) 39 *Australian Journal of Public Administration* 301, 301–2; R S Parker, ‘The Meaning of Responsible Government’ (1976) 11 *Politics* 178; Geoffrey Marshall, ‘Ministerial Responsibility’ (1963) 34 *Political Quarterly* 256.

¹⁸ See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 402–3 [13]–[15] (Gleeson 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)²² 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)²³ and established the underlying governance arrangements for the employment of those predominantly engaged under the *Financial Management and Accountability Act*.²⁴ 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'.²⁵ It specified the 'responsibilities

Resignations (and the Lack Thereof)' (2002) 61 *Australian Journal of Public Administration* 121; Patrick Weller, 'Disentangling Concepts of Ministerial Responsibility' (1999) 58 *Australian Journal of Public Administration* 62; Bill Blick, 'Ministerial Responsibility in Practice: A Commentary' (1999) 58 *Australian Journal of Public Administration* 58; Elaine Thompson and Greg Tillotson, 'Caught in the Act: The Smoking Gun View of Ministerial Responsibility' (1999) 58 *Australian Journal of Public Administration* 48; Barbara Page, 'Ministerial Resignation and Individual Ministerial Responsibility in Australia 1976-89' (1990) 28 *Journal of Commonwealth and Comparative Politics* 141.

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)).

²⁵ Explanatory Memorandum, *Financial Management and Accountability Bill 1996* (Cth) 1.

and powers necessary for the efficient, effective and ethical use of the resources lawfully available to the Commonwealth to carry out its program²⁶ 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’.²⁷ The central objective of this Act was to devolve financial management to ‘Agencies’²⁸ by giving ‘Chief Executives’²⁹ 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.³⁰ The scheme was substantially altered by the *Financial Management Legislation Amendment Act 1999* (Cth), which introduced accrual budgeting³¹ 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.³² The result of these legislative developments is a

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8344–5 (John Fahey, Minister for Finance).

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 and the Parliamentary Budget Officer’ and that ‘Secretary of a Department’ means

- (a) if the Department is the Department of the Senate — the Clerk of the Senate; or
- (b) if the Department is the Department of the House of Representatives — the Clerk of that House; or
- (ba) if the Department is the Parliamentary Budget Office — the Parliamentary Budget Officer; or
- (c) if the Department is another Department — the Secretary of that Department.

³⁰ See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8345 (John Fahey, Minister for Finance).

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 any person 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 approver⁴¹ 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.

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.

³⁶ *Financial Management and Accountability Act* s 13; *Financial Management and Accountability Regulations* reg 19.

³⁷ *Financial Management and Accountability Act* ss 19, 48.

³⁸ Department of Finance and Deregulation (Cth), *Commonwealth Procurement Guidelines* (2008). See *Financial Management and Accountability Act* s 64; *Financial Management and Accountability Regulations* reg 7.

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 *Financial Management and Accountability Regulations* reg 8.

⁴² *Ibid* reg 10.

⁴³ *Ibid*.

the approval is made.⁴⁴ Special provision is made for ‘contingent liabilities’ and ‘loan guarantees’ that may commit future unappropriated money.⁴⁵ When payment becomes due,⁴⁶ the payment must be made by a person with approval to make the payment (a ‘drawing right’)⁴⁷ debiting an appropriation, subject to various provisions for repayments.⁴⁸ There are various provisions dealing with Agency receipts,⁴⁹ act of grace payments,⁵⁰ waiving debts,⁵¹ and so on.

3 *Borrowing and Investment*

Borrowing, including obtaining an advance on overdraft, is of no effect unless it is authorised by an Act⁵² or constitutes short-term borrowing by the Finance Minister (such as occurs using credit cards and credit vouchers).⁵³ It is *only* the Finance Minister and the Treasurer who can invest public money in an authorised investment⁵⁴ (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).⁵⁵

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’⁵⁶ — must not be misapplied, improperly used or disposed of,⁵⁷ or given away.⁵⁸

⁴⁴ Ibid reg 12.

⁴⁵ Ibid regs 10–10A.

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).

⁴⁷ *Financial Management and Accountability Act* ss 26–7.

⁴⁸ Ibid ss 28–30A.

⁴⁹ Ibid ss 31, 32A; *Financial Management and Accountability Regulations* reg 15.

⁵⁰ *Financial Management and Accountability Act* s 33; *Financial Management and Accountability Regulations* regs 29–30.

⁵¹ *Financial Management and Accountability Act* s 34; *Financial Management and Accountability Regulations* regs 29–30.

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.

⁵³ *Financial Management and Accountability Act* s 38; *Financial Management and Accountability Regulations* reg 21.

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).

⁵⁵ *Financial Management and Accountability Act* s 39(10).

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.

⁶⁵ Ibid s 48. See also *Financial Management and Accountability Orders 2009* (Cth), amending *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2008) 2009* (Cth).

⁶⁶ *Financial Management and Accountability Act* ss 49, 57. See also *Financial Management and Accountability Orders 2009* (Cth), amending *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2008) 2009* (Cth).

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 Regulations*] Regulation 9 that the approval of a spending proposal be 'in accordance with' Commonwealth policies. However, the distinction has been made consciously, on the basis that a specific spending proposal will allow for a more direct consideration of relevant policies in the context of the relevant procurement, 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 responsible 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 Commonwealth 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 significant 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.

⁷⁴ Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2008* (Cth) 8.

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.⁷⁸ 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.⁷⁹ 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.⁸⁰

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';⁸¹ it can be amended or revoked by the Minister.⁸² The power to issue, revoke or amend a drawing right is generally delegated to Chief Executives, with the delegation being accompanied by a direction.⁸³ In effect, however, drawing rights are issued subject to the Finance Minister setting the conditions and limits on their use⁸⁴ and maintaining the authority to revoke them.⁸⁵ 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)⁸⁶ without a drawing right.⁸⁷ As such, the ability to issue and then determine the conditions

⁷⁸ See Commonwealth Interdepartmental Committee on Quasi-Regulation, *Grey-Letter Law: Report* (1997) 1–10.

⁷⁹ See Robert Baldwin and John Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *Public Law* 239, 240–5.

⁸⁰ There remains an ongoing debate about the weight that should be attributed to these policies, and policies more generally, by merits review tribunals and courts: see, eg, Andrew Edgar, 'Tribunals and Administrative Policies: Does the High or Low Policy Distinction Help?' (2009) 16 *Australian Journal of Administrative Law* 143; Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1.

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.

⁸⁷ *Financial Management and Accountability Act* s 26.

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

⁸⁸ Explanatory Memorandum, Financial Management and Accountability Bill 1996 (Cth) 9.

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.

⁹⁰ Department of Finance and Administration (Cth), *Governance Arrangements for Australian Government Bodies*, above n 5, 56–7. See also Australian National Audit Office, 'CAC Boards — Better Practice Guide' (Guidance Paper No 3, July 2003); Australian National Audit Office, 'Principles and Better Practices — Corporate Governance in Commonwealth Authorities and Companies' (Discussion Paper, 1999).

⁹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8348 (John Fahey, Minister for Finance). See also Accounting Policy Branch, Financial Management Group, Department of Finance and Administration (Cth), *Finance Minister's Orders (FMOs) — Requirements and Guidance for the Preparation of Financial Statements of Australian Government Entities* (2005) 5–6, and the subsequent iterations of this document. See generally Australian Public Service Commission, 'The Australian Experience of Public Sector Reform', above n 6, 89–116; Australian National Audit Office, 'CAC Boards', above n 90, 1–3; Australian

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.’⁹² 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.’⁹³

The *Commonwealth Authorities and Companies Act* distinguishes between Commonwealth *authorities*⁹⁴ and Commonwealth *companies*.⁹⁵ A Commonwealth authority is a ‘body that holds money on its own account’⁹⁶ 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.⁹⁷

A further distinction is made between Commonwealth authorities that are government business enterprises (‘GBEs’),⁹⁸ statutory marketing authorities

National Audit Office, ‘Monitoring Board Performance — Better Practice Guide’ (Guidance Paper No 5, 2003) 1–2.

⁹² Commonwealth, Parliamentary Debates, House of Representatives, 12 December 1996, 8344 (John Fahey, Minister for Finance).

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).

⁹⁴ *Commonwealth Authorities and Companies Act* ss 5 (definition of ‘Commonwealth authority’), 7.

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

⁹⁶ Ibid s 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*: s 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* s 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* s 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* s 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’)⁹⁹ and all other Commonwealth authorities. Essentially the GBEs and SMAs are able to invest their ‘surplus money’¹⁰⁰ with less oversight by the Finance Minister than can other Commonwealth authorities,¹⁰¹ although there are some specific additional governance arrangements.¹⁰²

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.’¹⁰³ 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.¹⁰⁴ Notably, some of those bodies classified as GBEs are also Commonwealth companies.¹⁰⁵

The essence of the distinction between Commonwealth authorities and Commonwealth companies is in the sources of their management framework obligations.¹⁰⁶ Commonwealth authorities must comply with the *Commonwealth Authorities and Companies Act* obligations¹⁰⁷ as well as those obligations imposed by their enabling legislation¹⁰⁸ and, where relevant, their founding constitutions and other administrative arrangements.¹⁰⁹ In contrast, Commonwealth companies must comply with the *Corporations Act 2001* (Cth) and their constitutions, and some additional *Commonwealth Authorities and Companies Act* obligations.¹¹⁰

⁹⁹ 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.

¹⁰⁰ ‘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).

¹⁰¹ 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.

¹⁰² See Department of Finance and Administration (Cth), *Governance Arrangements for Commonwealth Government Business Enterprises* (1997).

¹⁰³ *Commonwealth Authorities and Companies Act* s 34(1).

¹⁰⁴ *Ibid* ss 34(1A)–(2).

¹⁰⁵ 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.

¹⁰⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8346 (John Fahey, Minister for Finance).

¹⁰⁷ See *Commonwealth Authorities and Companies Act* pt 3.

¹⁰⁸ See *ibid* s 7.

¹⁰⁹ 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).

¹¹⁰ 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*¹¹¹ 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*.¹¹²

The *Commonwealth Authorities and Companies Act* management framework sets out high-level general management duties¹¹³ and audit and financial reporting requirements,¹¹⁴ and prescribes compliance with certain general policies of the government.¹¹⁵ The management unit of a Commonwealth authority is generally a governing board of one or more 'directors',¹¹⁶ who are subject to directors' duties and must act in the interests of the body.¹¹⁷ The *Commonwealth Authorities and Companies Act* model prescribes the reporting obligations of 'directors' and the conduct obligations of 'officers'.¹¹⁸ The term 'officers' includes 'directors', but also extends to 'senior manager[s] of the

¹¹¹ See *Corporations Act 1989* (Cth), as repealed by *Corporations (Repeals, Consequential and Transitional) Act 2001* (Cth) sch 1 item 2.

¹¹² Joint Committee of Public Accounts and Audit, Parliament of Australia, *Corporate Governance and Accountability Arrangements for Commonwealth Business Enterprises* (1999) 14–15.

¹¹³ *Commonwealth Authorities and Companies Act* ss 21–27P (Commonwealth authorities).

¹¹⁴ *Ibid* ss 8–20 (Commonwealth authorities), 35–44 (Commonwealth companies).

¹¹⁵ *Ibid* ss 28 (Commonwealth authorities), 43 (Commonwealth companies), 48A. See, for examples of such guidelines, Department of Finance and Administration (Cth), *Australian Government Competitive Neutrality Guidelines for Managers*, above n 39; Department of Finance and Administration (Cth), 'Australian Government Competitive Neutrality Guidelines for Managers' (Finance Circular No 2004/01, 2004).

¹¹⁶ 'Director' is defined in *Commonwealth Authorities and Companies Act* s 5 as:

- (a) for a Commonwealth authority that has a council or other governing body — a member of the governing body; or
- (b) for a Commonwealth authority that does not have a council or other governing body — a member of the authority ...

¹¹⁷ These arrangements are generally set out in the legislation establishing the Commonwealth authority. For example, the Australian Law Reform Commission is established by the *Australian Law Reform Commission Act 1996* (Cth) s 5(1) and consists of 'a President; a Deputy President; and at least 4 other members' (s 6(1)) with a range of powers and functions (ss 20–6), and a 'Board of Management' consisting of 'the President; and the Deputy President; and the other full-time members of the Commission' (s 29) whose function is 'to manage the Commission and, in particular, ensure that it performs its functions effectively and economically' (s 28(1)). See also Department of Finance and Administration (Cth), *Governance Arrangements for Australian Government Bodies*, above n 5, 22–3.

¹¹⁸ *Commonwealth Authorities and Companies Act* pt 3 div 2 (directors' reporting obligations), pt 3 div 4 sub-div A, pt 3 div 4A (officers' conduct obligations). Notably, there are some additional disclosure and voting obligations for directors: ss 27F–27J.

authority'.¹¹⁹ The intention of this broad term was to align the *Commonwealth Authorities and Companies Act* with the *Corporations Law* requirements relating to conduct,¹²⁰ and it has been noted that the term potentially captures the activities of some *Commonwealth Authorities and Companies Act* body advisers.¹²¹ The *Commonwealth Authorities and Companies Act* conduct obligations impose, in some circumstances, obligations of care and diligence (including the 'business judgement rule'),¹²² good faith,¹²³ proper use of position¹²⁴ and proper use of information;¹²⁵ certain duties of disclosure for directors;¹²⁶ some restrictions on attendance and voting for directors;¹²⁷ and certain indemnities.¹²⁸ 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'.¹²⁹

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.¹³⁰

(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').

¹²¹ Joint Committee of Public Accounts and Audit, Parliament of Australia, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997* (2000) 16–17.

¹²² *Commonwealth Authorities and Companies Act* ss 22(1)–(2). 'Business judgment' 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.¹³¹ 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).¹³² Commonwealth authorities must maintain a bank account and deposit their moneys into that account.¹³³ ‘Public money’ is money held on account of the Commonwealth rather than the Commonwealth authority.¹³⁴

(b) *Applying Australian Government Policies*

A Commonwealth authority must comply with General Policy Orders to the extent they apply to the authority.¹³⁵ These Orders apply Australian government policies to the particular authority,¹³⁶ although for some authorities the procurement of property or services must comply with the *Commonwealth Procurement Guidelines*.¹³⁷

(c) *Borrowing and Investment*

Commonwealth authorities may invest their surplus money (excluding *Financial Management and Accountability Act* ‘public money’)¹³⁸ in a limited range of investments.¹³⁹ Commonwealth authorities may generally borrow according to their founding legislation, although there may be some limits for credit cards and vouchers.¹⁴⁰

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 sunset: *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]–[29].

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.¹⁴¹ The financial statements must conform to the *Finance Minister's Orders*.¹⁴² The annual report is then tabled in Parliament.¹⁴³ The annual report must include a report of operations,¹⁴⁴ financial statements¹⁴⁵ and the Auditor-General's certification of the financial statements.¹⁴⁶ In addition, there are other reporting obligations, including interim reporting to the responsible Minister,¹⁴⁷ providing budget estimates,¹⁴⁸ reporting various significant events,¹⁴⁹ keeping responsible ministers and the Finance Minister informed generally,¹⁵⁰ and for GBEs, preparing a corporate plan.¹⁵¹

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),¹⁵² have a less formal regulatory, accounting and accountability framework. The *Corporations Act 2001* (Cth) provides the basic framework¹⁵³ and there are various additional obligations for audit,¹⁵⁴ reporting,¹⁵⁵ audit committees,¹⁵⁶ and compliance with *General Policy Orders* to the extent that they are applicable to the company.¹⁵⁷

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.

¹⁴⁴ *Commonwealth Authorities and Companies Act* s 9(1)(a), sch 1 item 1(a). See also *Commonwealth Authorities and Companies (Report of Operations) Orders 2008* (Cth).

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 sunseting.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 (sunseting) 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).

¹⁶⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8348 (John Fahey, Minister for Finance).

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).¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

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).

¹⁶⁸ See generally Australian Public Service Commission, 'The Australian Experience of Public Sector Reform', above n 6, 33–41.

¹⁶⁹ For discussions of the effectiveness of 'people management' in the public sector, see, eg, Australian National Audit Office, 'Managing People for Business Outcomes, Year Two — Benchmarking Study' (Audit Report No 50, 2003); Australian National Audit Office, 'Managing People for Business Outcomes' (Audit Report No 61, 2002); Public Service and Merit Protection Commission, *Re-Engineering People Management: From Good Intentions to Good Practice* (1997); Management Advisory Board and Management Improvement Advisory Committee, 'Achieving Cost Effective Personnel Services' (Report No 18, 1995). Notably, the 'pendulum' on devolution is not uniform and is constantly shifting: see, eg, Chris Aulich, Heba Batainah and Roger Wettenhall, 'Autonomy and Control in Australian Agencies: Data and Preliminary Findings from a Cross-National Empirical Study' (2010) 69 *Australian Journal of Public Administration* 214.

¹⁷⁰ There is a considerable literature on the desirability and success of public sector employment reforms: see, eg, Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (ANU E Press, 2008); Peter Boxall, 'How the Reforms Fit Together: An Australian Perspective' [1998] (88) *Canberra Bulletin of Public Administration* 117.

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.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'.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').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).¹⁷⁴ These amendments subject members of the Australian Public Service ('APS')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).¹⁷⁶ Under the new model, modes of employment under the *Public Service Act* scheme¹⁷⁷ involve a classification¹⁷⁸ of the 'Senior Executive Service'

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).

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

¹⁷³ Department of Education, Employment and Workplace Relations (Cth), 'Australian Government Employment Bargaining Framework' (Supporting Guidance, February 2008) 1–2.

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).

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').

¹⁷⁶ See Commonwealth, *Parliamentary Debates*, Senate, 4 December 2008, 8356–9 (Joe Ludwig, Minister for Human Services); Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189–94 (Julia Gillard, Acting Prime Minister).

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).

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 employees¹⁸⁶ (subject to the *Fair Work Act 2009* (Cth)), the *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 *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 *Public Service Act* there is also a statutory office of Public Service Commissioner¹⁹⁰ 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 Conduct¹⁹⁴ 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 *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).

¹⁹² *Ibid* s 41(1)(e). See also Australian Public Service Commission, *State of the Service Report 2005–06* (2006) 57–70.

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.¹⁹⁶ 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-

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’,²⁰⁵ and responsive to government.²⁰⁶ 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.’²⁰⁷ 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.’²⁰⁸ 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’.²⁰⁹ 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.’²¹⁰

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

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

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.

²¹⁵ See Department of Finance and Administration (Cth), ‘Agency Resourcing 1999–2000’ (Budget Paper No 4, 1999) 1–2. See also Australian National Audit Office, ‘Application of the Outcomes and Outputs Framework’ (Audit Report No 23, 2007) 37–41; Michael Vertigan, *Review of Budget Estimates Production Arrangements* (Department of Finance and Administration (Cth), 1999); Rose Verspaandonk, ‘Accrual Budgeting — State of Play’ (Research Note No 30, Parliamentary Library, Parliament of Australia, 2000); Boxall, above n 170.

²¹⁶ Department of Finance and Administration (Cth), ‘The Outcomes & Outputs Framework’ (Guidance Document, November 2000) 4. See Senate Finance and Public Administration Legislation Committee, Parliament of Australia, *The Format of the Portfolio Budget Statements: Third Report* (2000) 10. See also Australian National Audit Office, ‘Application of the Outcomes and Outputs Framework’, above n 215, 52–3 [2.33]–[2.35].

²¹⁷ Australian National Audit Office, ‘Application of the Outcomes and Outputs Framework’, above n 215, 52 [2.33].

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.²¹⁸ 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.²¹⁹

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.²²⁰ 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.²²¹ 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.²²² An Agency Head is required to 'uphold and promote the APS Values'.²²³ An Agency Head must also 'establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct',²²⁴ 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'.²²⁵ The APS Commissioner may issue directions for the purpose of promoting the APS Values

²¹⁸ Ibid 38 [1.4]; Australian National Audit Office, 'Annual Performance Reporting' (Audit Report No 11, 2003) 27–35; Department of Finance and Administration (Cth), 'The Outcomes & Outputs Framework', above n 216, 5.

²¹⁹ Australian Public Service Commission, 'The Australian Experience of Public Sector Reform', above n 6, 67.

²²⁰ See, eg, Advisory Group on Reform of Australian Government Administration, above n 5, chs 4 (suggesting that performance be driven through revised APS Values), 5 (suggesting that performance management processes needed to build a high performance culture). How performance is actually measured is evolving: see at 13–16, 20–4, 28–31; KPMG, above n 212, 22–4 [3.3]–[3.3.1]; Australian Public Service Commission, *Delivering Performance and Accountability* (2009) 33–40. See also Australian Public Service Commission, *Agency Health: Monitoring Agency Health and Improving Performance* (2007).

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 *Public Service Act* s 12.

²²⁴ Ibid s 15(3).

²²⁵ Ibid s 13(11).

and determining their scope or application.²²⁶ The APS Values and Code of Conduct apply to *all* those employed under the *Public Service Act* in the performance of their duties:²²⁷

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.²²⁸

The APS Values specifically address the relationships between the executive and the Parliament regarding the performance of employees working under the *Public Service Act*.²²⁹ 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'.²³⁰ 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'²³¹ 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.²³²

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'.²³³

- '[T]he APS is openly accountable for its actions, within the framework of ministerial responsibility to the Government, the Parliament and the Australian public'.²³⁴ 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

²²⁶ Ibid s 11. See *Public Service Commissioner's Directions*.

²²⁷ *Public Service Act* ss 15(1), 42(2).

²²⁸ Australian Public Service Commission, *Values in the Australian Public Service*, above n 206, vii.

²²⁹ *Public Service Act* ss 10(1)(a), (e)–(f). See generally Australian Public Service Commission, *Embedding the APS Values* (2003).

²³⁰ *Public Service Act* s 10(1)(a).

²³¹ *Public Service Commissioner's Directions* cls 2.2(1)(a), (2)(a).

²³² Ibid cls 2.2(1)(b), (2)(b).

²³³ Australian Public Service Commission, *Values in the Australian Public Service*, above n 206, 2.

²³⁴ *Public Service Act* s 10(1)(e).

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.

²³⁷ *Ibid* 9.

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.

²⁴⁷ Australian Public Service Commission, 'The Australian Experience of Public Sector Reform', above n 6, 55. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8345 (John Fahey, Minister for Finance).

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

²⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8348 (John Fahey, Minister for Finance). See also Department of Finance and Administration (Cth), *Governance Arrangements for Australian Government Bodies*, above n 5, 56–7; Australian Public Service Commission, 'The Australian Experience of Public Sector Reform', above n 6, 89–116; Australian National Audit Office, *CAC Boards*, above n 90, 1–3; Australian National Audit Office, 'Monitoring Board Performance', above n 91, 1–2.

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

²⁵⁰ Regarding the *Public Service Act*, see Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1999, 4684 (David Kemp, Minister Assisting the Prime Minister for the Public Service). Regarding the *Financial Management and Accountability Act*, see Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8346 (John Fahey, Minister for Finance). Regarding the *Commonwealth Authorities and Companies Act*, see Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8349 (John Fahey, Minister for Finance).

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’,²⁵² expressly 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’.²⁵³ Another clear example is the amendment of the *Financial Management and Accountability Act* to enhance the reporting obligations of Chief Executives.²⁵⁴ 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.²⁵⁵ This amendment was justified as an ‘explicitly articulated’ requirement of ‘responsible government’.²⁵⁶

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,²⁵⁷ 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* (Cth) 9 [72]–[74].

²⁵⁷ See *Financial Management and Accountability Regulations* reg 10.

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.²⁵⁸ 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.

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

Minister	Activity	Source
Finance Minister	Make Special Instructions about special public money	s 16
	Make determination establishing Special Accounts	s 20
	Make <i>Finance Minister's Orders</i>	s 63
	Regulations may authorise issue of guidelines by Ministers	s 64
	Issue drawing right	s 27
	Issue <i>Commonwealth Procurement Guidelines</i>	reg 7
	Issue <i>Commonwealth Grant Guidelines</i>	reg 7A
	Approve future commitments of public money	reg 10
	Specify a threshold for contingent liabilities	reg 10A
	Approve loan guarantees	reg 11
	Approve payments pending probate	reg 30
	Authorising act of grace payments	s 33
	Approve waiving debts	s 34
	Make investments of public money	s 39
Accessing accounts and records	s 48	
Require financial statements	ss 49–50	
Treasurer	Make investments of public money	s 39
Minister for Home Affairs	Issue <i>Fraud Control Guidelines</i>	reg 16A
Portfolio Minister	Report the involvement of the Commonwealth or a prescribed body with a company	s 39A
	Issue guidelines	s 64
	Refrain from misapplying or misusing public property	s 41
	Refrain from losing public property	s 42
	Refrain from gifting public property	s 43
Refrain from misusing a Commonwealth credit card	s 60	

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

Entity	Minister	Activity	Source	
Commonwealth Authority	Finance Minister	Require and receive interim reports	s 13	
		Receive and require reports, documents and information about operations of the authority and its subsidiaries	s 16	
		Grant exemption from requirement to align a subsidiary's accounting period	s 31	
		Engage a registered company auditor to investigate and report on an exemption application (regarding alignment of a subsidiary's accounting period)	s 31	
		Give directions about procurement of property or services (including to comply with the <i>Commonwealth Procurement Guidelines</i>)	s 47A	
		Make <i>Finance Minister's Orders</i>	s 48	
			Make <i>General Policy Orders</i>	s 48A
	Responsible Minister	Receive an annual report	s 9	
		Receive a subsidiary's audit report and financial statements	s 12	
		Require budget estimates	s 14	
		Receive information and documents about the involvement with a company, partnership, trust, unincorporated joint venture or other significant business activity	s 15	
		Be informed of the operations of the authority and its subsidiaries	s 16	
		Receive and require reports, documents and information about operations of the authority and its subsidiaries	s 16	
		Receive the annual corporate plan for GBEs	s 17	

		Be informed about changes or significant events affecting the GBE's corporate plan	s 17
		Require a GBE's corporate plan to address specific matters	s 17
		Issue guidelines to a GBE about changes or significant events affecting the GBE's corporate plan	s 17
		Make declarations and class orders about a director's material personal interest	s 27K
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 <i>Corporations Act 2001</i> (Cth)	s 36
Wholly Owned Commonwealth Company	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 <i>Commonwealth Procurement Guidelines</i>)	s 47A
		Make <i>Finance Minister's Orders</i>	s 48
		Make <i>General Policy Orders</i>	s 48A
		Responsible Minister	Receive a copy of the company's financial report, directors' report and auditor's report required by the <i>Corporations Act 2001</i> (Cth) together with other required documents
		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

	Direct the form of and receive budget estimates	s 39
	Issue guidelines about what constitute significant events	s 40
	Receive information and documents about the involvement with a company, partnership, trust, unincorporated joint venture or other significant business activity	s 40
	Be informed about the operations of the company and its subsidiaries	s 41
	Receive documents and information about the operations of the company and its subsidiaries	s 41
	Receive the annual corporate plan for GBEs	s 42
	Be informed about changes or significant events affecting the GBE's corporate plan	s 42
	Require a GBE's corporate plan to address specific matters	s 42
	Issue guidelines to a GBE about changes or significant events affecting the GBE's corporate plan	s 42

Table 3: Ministerial Controls under the *Public Service Act* and *Public Service Regulations 1999* (Cth) in Respect of Agencies (Departments, Statutory Agencies and Executive Agencies)

Minister	Activity	Source
Prime Minister	Issue general directions to Agency Heads about the management and leadership of APS employees	s 21
	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)	s 33
	Receive a report from the Public Service Commissioner about a Secretary of a Department's alleged breaches of the Code of Conduct	s 41
	Allocate a name to or change the name of any office of Secretary of a Department	s 56
	Appoint a person as Secretary of a Department	s 58
	Receive a report from the Public Service Commissioner about a vacancy for the position of Secretary of the Prime Minister's Department	s 58
	Receive a report from the Secretary of the Prime Minister's Department about a vacancy for a position of Secretary of a Department	s 58
	Terminate the appointment of a Secretary of a Department	s 59
	Receive a report from the Public Service Commissioner about terminating the appointment of a Secretary of the Prime Minister's Department	s 59
	Receive a report from the Secretary of the Prime Minister's Department about terminating the appointment of a Secretary of any other Department	s 59
	Engage a former Secretary of a Department	s 60
	Appoint a person as an acting Secretary of a Department	s 62
	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	s 71
Delegate any of the Prime Minister's powers to another Minister	s 78	

Public Service Minister	Make rules about classifications of APS employees	s 23
	Determine the remuneration and other terms and conditions of employment of APS employees in exceptional circumstances	s 24
	Be consulted by the Merit Protection Commissioner about an Agency Head's or APS employee's actions (including a refusal or failure to act)	s 33
	Receive a report from the Public Service Commissioner on any matter relating to the APS (including matters referred by the Public Service Minister)	s 41
	Refer any matter relating to the APS to the Public Service Commissioner for report	ss 41, 43
	Receive a report from the Merit Protection Commissioner about an inquiry into an Agency Head's or APS employee's actions (including a refusal or failure to act)	s 50
	Receive an annual report from the Merit Protection Commissioner	s 51
	Appoint a person to act as Merit Protection Commissioner	s 55
	Authorise the making of payments in special circumstances connected with a payee's, or another person's, employment by the Commonwealth	s 73
	Delegate any of the Public Service Minister's powers to another Minister	s 78
Delegate to a senior official the Public Service Minister's powers to make rules about classifications of APS employees and make payments in special circumstances	s 78	
Agency Minister	Give notice to an Agency Head who receives non-Commonwealth remuneration for performing duties as an Agency Head about forfeiting that remuneration	s 31
	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)	s 33
	Issue directions to Agency Heads about Heads of Mission	s 39
	Receive a report from the Public Service Commissioner about a Head of an Executive Agency's or Head of a Statutory Agency's alleged breaches of the Code of Conduct	s 41

Receive an annual report from the Public Service Commissioner (including the 'State of the Service' report)	s 44
Determine terms and conditions of appointment of the Public Service Commissioner	s 46
Appoint a person to act as Public Service Commissioner	s 48
Receive a report from the Merit Protection Commissioner about an action of a statutory office holder	reg 7.3
Determine the terms and conditions of appointment of the Merit Protection Commissioner	s 53
Provide suitable directions to the Secretary of a Department: 'The Secretary of a Department, <i>under the Agency Minister</i> , is responsible for managing the Department' (emphasis added)	s 57
Receive assistance from a Secretary of the Department to fulfil the Agency Minister's accountability obligations to the Parliament about the operation and administration of the Department	s 57
Be consulted about the proposed appointment of a person as Secretary of the Department	s 58
Receive an annual report from the Secretary of the Department about the Department's activities during the year	s 63
Receive assistance from the Head of an Executive Agency to fulfil the Agency Minister's accountability obligations to the Parliament about the operation and administration of the Department	s 66
Appoint a person as Head of an Executive Agency	s 67
Receive a report from the Secretary of any Department that is administered by the Agency Minister about a vacancy	s 67
Terminate the appointment of the Head of an Executive Agency	s 67
Receive a report from the Secretary of any Department that is administered by the Agency Minister about terminating the appointment of the Head of an Executive Agency	s 67
Determine the terms and conditions of appointment of the Head of an Executive Agency	s 68
Appoint a person to act as Head of an Executive Agency	s 69

Receive an annual report from the Head of an Executive Agency about the Executive Agency's activities during the year	s 70
Delegate any of the Agency Minister's powers to a senior official	s 78

Table 4: Some of the Policies of the Commonwealth Applying to Procurement under the *Financial Management and Accountability Act 1997 (Cth)* s 44 and *Financial Management and Accountability Regulations 1997 (Cth)* reg 9

Policy Agency Responsible	Policy or Guidance
Attorney-General's Department	<i>Legal Services Directions 2005 (Cth)</i> <i>Statement of Intellectual Property Principles for Australian Government Agencies</i> <i>Protective Security Policy Framework</i> <i>Commonwealth Fraud Control Guidelines</i>
Defence Signals Directorate	<i>Australian Government Information Security Manual</i>
Department of Climate Change and Energy Efficiency	<i>Energy Efficiency in Government Operations</i>
Department of Education, Employment and Workplace Relations	<i>Fair Work Principles</i> <i>National Code of Practice for the Construction Industry; Implementation Guidelines</i> <i>Indigenous Opportunities Policy</i>
Department of Families, Housing, Community Services and Indigenous Affairs	<i>Commonwealth Disability Strategy</i>
Department of Finance and Deregulation	<i>Commonwealth Procurement Guidelines</i> <i>Coordinated Procurement</i> <i>Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort</i> <i>Procurement 30 Day Payment Policy for Small Business</i> <i>Australian Government Foreign Exchange Risk Management Guidelines and Finance Circular</i> <i>Limited Liability in Information and Communications Technology Contracts</i> <i>Guidance on Confidentiality in Procurement</i> <i>Standard Contract Clauses to Provide ANAO Access to Contractors' Information</i>

	<i>Mandatory Publishing Obligations for Procurement Activities</i>
Department of Finance and Deregulation; the Treasury	<i>Australian Government Competitive Neutrality Guidelines for Managers</i>
Department of Foreign Affairs and Trade	<i>Autonomous Sanctions Regulations 2011 (Cth)</i> <i>Obligations under International Agreements in Government Procurement</i>
Department of Innovation, Industry, Science and Research	<i>Australian Industry Participation Plans in Commonwealth Government Procurement</i> <i>ICT Small and Medium Enterprise (SME) Participation Procurement Policy</i>
Department of the Prime Minister and Cabinet	<i>Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies</i> <i>Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters</i>
Department of Sustainability, Environment, Water, Population and Communities	<i>Australian Packaging Covenant</i> <i>National Waste Policy</i> <i>Australian Government ICT Sustainability Plan 2010–2015</i>
Equal Opportunity for Women in the Workplace Agency	<i>Equal Opportunity for Women in the Workplace — Contract Compliance Policy</i>
Infrastructure Australia	<i>National Public Private Partnership Policy Framework and Guidelines</i>
National Archives of Australia	<i>Records Issues for Outsourcing</i> <i>Record Requirements for Agencies</i>
Office of the Australian Privacy Commissioner	<i>Privacy Obligations for Commonwealth Contracts</i>