



Australian Government
Indigenous Business Australia

27 March 2014

Dr Andrew Southcott MP
Chair
Joint Committee of Public Accounts and Audit
Parliament House
CANBERRA ACT 2600

Dear Dr Southcott

Thank you for the opportunity to make a submission to the Committee's inquiry in the development of the rules proposed to be issued pursuant to the *Public Government, Performance and Accountability Act 2013 (Cth)* (the **PGPA Act**). Indigenous Business Australia (**IBA**) appreciates having the opportunity to share its position on the rules development process with the Committee.

Attached to this letter is IBA's submission, which delves into the method by which the Department of Finance has engaged with IBA in the development of the proposed rules, as well as their engagement with other stakeholders within the Indigenous affairs portfolio of which IBA is aware.

We trust that our submission will assist the Committee in its pursuit of its objectives, and would be pleased to discuss issues raised in our submission with you.

Yours sincerely


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IBA submission to the Joint Committee of Public Accounts and Audit into the development of the rules relating to the Public Governance, Performance and Accountability Act 2013

Rules Development Consultation Process

1. The development of the PGPA Act, and the proposed rules pursuant to it, is acknowledged by IBA as being a significant undertaking requiring a substantial amount of time and effort from the Department of Finance (**Finance**) and other Commonwealth entities subject to the new framework. IBA has been actively engaged with Finance through the development of both the Bill and the rules, and we acknowledge Finance's ongoing efforts to widely consult stakeholders on the proposed rules.
2. We note that the Committee is interested in whether stakeholders have been properly consulted during the development of the draft rules, as well as whether any concerns have been adequately addressed. To that end, we note the following for your information:

Ongoing consultation

3. The consultation process for the rules under the PGPA Act has been an ongoing process, with regular updates concerning the release of draft rules placed on Finance's 'Public Management Reform Agenda' website. In all cases, the draft rules have been open to comment for a period of at least one month, and longer at times. We have found this timeframe to be sufficient in which to review the rules and to provide substantive comments to Finance.
4. We have found that Finance has thoughtfully considered IBA's concerns raised throughout the rule making process, and that substantive changes have been made from the initial set of rules proposed on the basis of feedback provided by IBA and other Commonwealth entities.
5. We have generally been impressed in the manner in which Finance has engaged with other Commonwealth entities within the Indigenous affairs portfolio. In particular, from our perspective Finance was active in engaging with the Northern and Central Land Councils to ensure that rules appropriate to their needs were provided to ensure that the PGPA Act did not operate in a manner inconsistent with the *Aboriginal Land Rights (Northern Territory) Act 1976 (Land Rights Act)*. For example, the rules were adjusted (through inclusion of 12(2) of the proposed rules) so that officials employed in the Land Councils that are Aboriginal traditional land owners would not be required to endlessly disclose interests that may have been triggered due to the operation of the Land Rights Act in conjunction with the PGPA Act.

Engagement on future changes

6. The ANAO, in its submission to this inquiry, noted that the changes to the governance and accountability framework for the Commonwealth and its

agencies will occur in stages under the proposed reforms, which will take a number of years to implement. The challenge for Finance will be to ensure that there is consistent and sustained engagement with stakeholders over a relatively long period so that it continues to ensure that the rules developed under the PGPA Act do not adversely affect the operation of Commonwealth entities in an unintended manner.

Current rules

7. Having reviewed the consolidated proposed rules provided to the Committee in Attachment C of Finance's submission, IBA acknowledges that to a reasonable extent its concerns raised during the consultation process have generally been taken into account. However, we have one significant remaining concern, which relates to the drafting of a particular clause in the PGPA Act itself, which is expounded below.

PGPA Act matters still of concern to IBA

8. We wish to raise with the Committee a matter that has caused some concern to IBA arising out of the PGPA Act. Specifically, section 59, which is a rewrite of sections 18 (3) and (4) and section 19 of the CAC Act, is drafted in a manner that causes some confusion on its application to IBA. We had previously raised concerns about this section with Finance prior to the PGPA Bill's passage through parliament. However no amendments were made in light of our comments, as our interpretation of the provision was deemed to be incorrect.
9. Section 59(1) of the PGPA Act states:
 - (1) *A corporate Commonwealth entity must not invest relevant money for which the entity is responsible unless:*
 - (a) *the money is not immediately required for the purposes of the entity; and*
 - (b) *the money is invested:*
 - (i) *on deposit with a bank, including a deposit evidenced by a certificate of deposit; or*
 - (ii) *in securities of, or securities guaranteed by, the Commonwealth, a State or a Territory; or*
 - (iii) *in any other manner approved by the Finance Minister in writing; or*
 - (iv) *for a government business enterprise—in any other manner that is consistent with sound commercial practice.*
10. The Explanatory Memorandum to the PGPA Bill states that 'clause 59 replicates the effect of subsections 18(3) and (4) and section 19 of the CAC Act'. However, the drafting of these words is expressed differently to subsection 18 (3) of the CAC Act, which states:
 - (3) *The authority may invest surplus money:*
 - (a) *on deposit with a bank; or*
 - (b) *in securities of the Commonwealth or of a State or Territory; or*

- (c) *in securities guaranteed by the Commonwealth, a State or a Territory;*
or
- (d) *in any other manner approved by the Finance Minister...*

(5) *in this section:*

surplus money means money of the authority that is not immediately required for the purposes of the authority.

11. In effect, the intent of the clause as drafted in the PGPA Act has changed from the intent of the CAC Act clause. The latter only proscribes investment of funds deemed 'surplus money', that is funds not required for the purposes of the authority; whereas the PGPA Act provides that a corporate Commonwealth entity must not invest any of its funds unless those funds are surplus and only as proscribed by the section. The potential effect is that, notwithstanding the Explanatory Memorandum, the clause operates to restrict investment activity entirely except where the funds are surplus to requirement..

The purpose, functions and powers of IBA

12. IBA is established under the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act). Section 146 provides that IBA's purpose is to assist and enhance Aboriginal and Torres Strait Islander self-management and economic self-sufficiency, as well as to advance the commercial and economic interests of Aboriginal persons and Torres Strait Islanders by accumulating and using a substantial capital asset for the benefit of Aboriginal and Torres Strait Islander peoples.
13. Section 147 provides that IBA's functions are to engage in commercial activities, and to promote and encourage Aboriginal and Torres Strait Islander self-management and economic self-sufficiency. IBA's powers under section 152 are to do all things necessary or convenient in connection with the performance of its functions, including, at subsection (2)(b), to invest money of IBA.

Investment in IBA

14. A significant portion of IBA's work is in investing its funds in pursuit of its functions. According to the Butterworths Australian Legal Dictionary, the word 'invest' means to outlay money with the expectation of financial return through interest, profit or capital growth'. This is a very broad definition, and includes almost all of IBA's activities, including IBA's home and business lending programs, which outlay money with the expectation of financial return through interest earned on the principal loan. IBA's investment program outlays money with the expectation of financial return through interest, profit or capital growth, depending on the circumstances. That the investments are designed to facilitate indigenous economic self-sufficiency and the accumulation of a substantial capital asset does not alter the characteristic of the activity as one of investment.

Available interpretation and restrictions on investment

15. One available interpretation of section 59 of the PGPA Act provides that investment activities can only be undertaken where those funds are surplus to requirement, and only in accordance with those matters described in subsection (1)(b). While we do not believe this is the preferred interpretation (indeed, the Explanatory Memorandum clearly states that the intention of section 59 is to replicate the current CAC Act provisions), there is a risk that IBA's would be in breach of section 59 by continuing to pursue investment activity with IBA's funds. Of course, this equally applies to the operation of other corporate Commonwealth entities that invest their money in pursuit of their functions, including the Reserve Bank, the CSIRO, as well as the research and development corporations.
16. We have received advice that prefers an interpretation whereby section 59 only applies where money is not immediately required for the purposes of the entity. Under this interpretation, then section 59 provides no concern to IBA or other corporate Commonwealth entities that are granted the power to invest under their enabling legislation. We also prefer this interpretation.
17. For removal of doubt, noting the significance of this issue to IBA, our preference would be to see a redrafting of section 59 to better articulate the intention of the Parliament. In particular, a new subsection could provide that the restriction on investment in subsection (1) does not apply in relation to corporate Commonwealth entities that are expressly authorised by an Act to invest money.

Concluding remarks

18. There are a significant number of changes that will be made to the Commonwealth governance and accountability framework over the coming years. We have a great interest in the ongoing development of the framework and welcome the opportunity to contribute to the improvements being made.
19. We urge the Committee to continue to closely monitor the development of the rules, as well as the governance framework at large, so as to ensure that the resulting framework achieves a balance between the effective achievement of the Commonwealth's objectives with the level of accountability, transparency and professional ethical standards of Commonwealth officials expected by the public and the Parliament.