



Governance Review Implementation (Treasury Portfolio Agencies) Bill 2007

Bronwen Jagers
Law and Bills Digest Section

Contents

Purpose.....	2
Background.....	2
The Commonwealth financial framework.....	2
The Uhrig Review	3
The Australian Securities Investment Commission (ASIC).....	4
The Corporations and Markets Advisory Committee (CAMAC).....	4
The Australian Prudential Regulatory Authority (APRA).....	4
Comment on the Bill.....	5
Financial implications.....	5
Main provisions	6
ASIC.....	6
CAMAC	7
APRA	7
Application and transitional provisions.....	8
Technical amendments	9
Concluding comments	9
Endnotes.....	10

Governance Review Implementation (Treasury Portfolio Agencies) Bill 2007

Date introduced: 1 March 2007

House: House of Representatives

Portfolio: Treasury

Commencement: The majority of the Bill commences on 1 July 2007.

Purpose

The Bill seeks to improve the corporate governance of three statutory authorities – the Australian Securities and Investments Commission (ASIC), the Corporations and Markets Advisory Committee (CAMAC) and the Australian Prudential Regulation Authority (APRA) by bringing them under the *Financial Management and Accountability Act 1997*.

Background

The Commonwealth financial framework

Nearly all government bodies fall under the *Financial Management and Accountability Act 1997* (the FMA Act) or the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

The FMA Act focuses primarily on the obligations and responsibilities of Chief Executives and the way officials handle public money, public property and other resources of the Commonwealth. The FMA Act applies to budget-funded authorities managed by a CEO, and establishes various management and reporting responsibilities for the CEO (s. 44–46, 49 and 51), as well as allowing the Minister to give guidelines to the CEO (s. 64). Furthermore, the FMA Act provides an accountability framework for CEOs to manage agency resources.

The CAC Act, on the other hand, requires directors and officers to exercise their powers and duties in the best interests of the body and for a proper purpose. Directors' duties apply to help ensure that prudent decisions are made on the resources that, as a matter of law, the body holds in its own right. The CAC Act applies to authorities that are corporate entities managed by a board. It requires the head of the board to report to the responsible Minister (s. 15–16), and to ensure that the authority's activities comply with government policies (s. 28).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

As at 31 January 2007, there were 94 FMA Act agencies and 99 CAC Act agencies.¹ The Department of Finance and Administration publication [Governance Arrangements for Australian Government Bodies](#) (August 2005) provides further explanation on the FMA Act and CAC Act and a comparison between the two pieces of legislation (Appendix E).

The Uhrig Review

This Bill is designed to bring governance arrangements for ASIC, CAMAC and APRA into line with the model detailed in the [Review of Corporate Governance of Statutory Authorities and Office Holders](#) (the Uhrig Review) conducted by Mr John Uhrig AC in 2003.² A number of similar Acts have been passed by Parliament incorporating Uhrig Review recommendations into a variety of statutory bodies.

The Coalition had flagged its intention to examine statutory authorities and office holders in its 2001 election platform. On 14 November 2002, the Prime Minister, the Hon. John Howard, appointed Mr John Uhrig AC to review the governance practices of statutory authorities and office holders, particularly those agencies which impact on the business community.

The objective of the review was to identify issues concerning existing governance arrangements and to provide policy options for Government to gain the best from statutory authorities and office holders and their accountability frameworks.³

The Prime Minister received the Uhrig Review in June 2003, and it was released by the Minister for Finance and Administration on 12 August 2004.

The Report recommended that two templates should apply to ensure good governance of statutory authorities: agencies should either be managed by a Chief Executive Officer (CEO) or by a board structure. Both templates detail measures for ensuring the boundaries of responsibilities are better understood and the relationship between Australian government authorities, Ministers and portfolio departments are made clear.⁴

Uhrig recommended that for statutory authorities, the selection of the management template and financial frameworks to be applied should be based on the governance characteristics of each statutory authority.⁵ Specifically, Uhrig found that the FMA Act should be applied to statutory authorities where it is appropriate they be legally and financially part of the Commonwealth and do not need to own assets. The CAC Act should be applied to statutory authorities where it is appropriate that they be legally and financially separate from the Commonwealth.

This Bill brings key economic regulators the Australian Securities and Investment Commission (ASIC), and the Australian Prudential Regulatory Authority (APRA), and expert advisory committee the Corporations and Markets Advisory Committee (CAMAC), under the FMA Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Australian Securities Investment Commission (ASIC)

ASIC is a statutory authority established by the *Australian Securities and Investments Commission Act 2001* (ASIC Act). ASIC is funded by the Commonwealth, and also collects fees and charges, which is returned to the consolidated revenue fund. During 2005-06 ASIC raised \$543 million in fees and charges, and had an expenditure of \$218 million.⁶ The ASIC Act requires ASIC to:

- uphold the law uniformly, effectively and quickly
- promote confident and informed participation by investors and consumers in the financial system
- make information about companies and other bodies available to the public, and
- improve the performance of the financial system and the entities within it.⁷

ASIC is currently a CAC Act body, but is prescribed as an FMA Act agency for the purposes of the public money that it holds.⁸

The Corporations and Markets Advisory Committee (CAMAC)

CAMAC is a statutory authority under section 146 of the ASIC Act. Prior to March 2002, it was known as the Companies and Securities Advisory Committee (CASAC). CAMAC comprises part-time members appointed by the Treasurer. The Chairman of ASIC is a member of the Committee by virtue of s. 147 of the ASIC Act.

Subsection 148(1) of the ASIC Act sets out CAMAC's functions which are, on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as the Committee thinks fit, about any matter connected with:

- (a) a proposal to make corporations legislation or to amend that legislation
- (b) the operation or administration of that legislation
- (c) law reform in relation to that legislation
- (d) companies or a segment of the financial products and financial services industry,
or
- (e) a proposal for improving the efficiency of the financial markets.⁹

The Australian Prudential Regulatory Authority (APRA)

APRA is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry. APRA is

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

funded largely by the industries that it supervises. It was established on 1 July 1998 by the *Australian Prudential Regulation Authority Act 1998* (the APRA Act). APRA currently supervises institutions holding approximately \$2.5 trillion in assets for 20 million Australian depositors, policyholders and superannuation fund members.¹⁰

In his Second Reading speech for the Bill, the Parliamentary Secretary to the Treasurer stated:

...the three agencies will hold money and property on behalf of the Commonwealth, rather than in their own right. The agencies will also have the power to enter into contracts on behalf of the Commonwealth. In addition, ASIC and APRA will retain the power to enter into contracts on their own behalf, however the intention is that this power will only be used for regulatory purposes (for example, regulatory agreements).

It is important to note that the above changes will not adversely affect the operational capabilities and independence of the statutory bodies. As noted in the Uhrig Review, it is the authority's legislative framework (and not its financial framework), which establishes the level of operational independence required to exercise its statutory responsibilities effectively.¹¹

Comment on the Bill

There does not appear to have been any comment from political parties or interest groups on this Bill. The Australian National Audit Office (ANAO) has been conducting a series of audits on government agencies and their compliance with the FMA Act governance and reporting requirements. For example, in January 2005 the ANAO tabled a report on [*Investment of Public Funds*](#), which looked at investment of public funds by FMA Act and CAC Act bodies. Amongst the findings was that in the six sample FMA Act agencies audited, there were shortcomings in the management of investment of public funds, and that some FMA Act agencies were holding investments not authorised by the relevant legislation. The ANAO also found that consistent governance and reporting processes had yet to be developed by all audited agencies.¹²

Over the past 18 months the Joint Committee of Public Accounts and Audit has reviewed a number of ANAO reports regarding financial management and reporting within government agencies, and has noted a general decline in standards.

Financial implications

The Explanatory Memorandum states that there is no financial impact.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Main provisions

Schedule 1 makes amendments to the ASIC Act, the Corporations Act and the APRA Act in order for ASIC, CAMAC and APRA to conform to the requirements of the FMA Act. **Schedule 2** provides for application and transitional provisions, and **Schedule 3** makes some minor consequential amendments.

ASIC

Part 1 of Schedule 1 makes amendments to the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) and the *Corporations Act 2001* (the Corporations Act) in order for ASIC to come under the FMA Act.

Items 1-6 insert new definitions and amendments to the ASIC Act to bring ASIC under the FMA Act. **Item 7** states that any real or personal property held by ASIC is held for and on behalf of the Commonwealth. Any money received by ASIC is received for and on behalf of the Commonwealth. **Item 8** states that ASIC's financial liabilities will become the Commonwealth's liabilities.

Item 9 inserts **new section 10A** into the ASIC Act, which provides that the Chairperson of ASIC is not subject to direction by ASIC in relation to their performance of functions or exercise of powers under the FMA Act or the *Public Service Act 1999*. This is a standard provision that ensures that the Chairperson's personal obligations under the FMA Act and the Public Service Act are kept separate from the collegiate decision-making processes which otherwise govern ASIC.¹³ **Items 44 and 51** later in the Bill make the same provision for the CAMAC Convenor and the APRA Chair.

Item 12 inserts new finance and reporting requirements into the ASIC Act to ensure compliance with the FMA Act. **New section 133** establishes the Companies and Unclaimed Moneys Special Account, under the FMA Act. The special account is a ledger account recording a right to draw money from the consolidate revenue fund. **Section 134** sets out the type of money that must be credited to the Special Account, and **section 135** sets out the purposes of the Special Account.

New section 136 sets out the annual reporting requirements, according to the FMA Act. Under the FMA Act, the Chairperson of ASIC, as its Chief Executive, will be personally responsible and accountable for managing the agency in a way which promotes the efficient, ethical and effective use of Commonwealth resources.

New section 137 ensures that ASIC's general immunity to taxation will be retained, stating that ASIC is not subject to taxation under the laws of the Commonwealth or of a State or Territory. **Subsection 137 (2)** provides that the regulations may provide that this does not apply in relation to a specified law. This is consistent with the previous taxation provisions in the ASIC Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Items 13 to 39 make amendments to the Corporations Act. Currently, under subsection 601AD(2) of the Corporations Act, a company's property on deregistration vests in ASIC. Under the proposed amendments to the Corporations Act, a distinction will be made: non-trust property will vest in ASIC; and trust property will vest in the Commonwealth (new subsections 601AD(1) and 601AD(2)) of the Corporations Act. The Explanatory Memorandum states 'in practice these amendments will maintain the status quo in relation to this area of the law, as ASIC will perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to property held on trust by the Commonwealth'.¹⁴

Item 24 inserts **new subsections 610AE(1) and (1A)**, providing that when trust property vests in the Commonwealth, the Commonwealth will be granted a discretion to continue to act as trustee or to apply to a court for the appointment of a new trustee. The Explanatory Memorandum states that 'in practice, ASIC acting on behalf of the Commonwealth will choose how to exercise this discretion'.¹⁵ Where the Commonwealth continues to act as trustee, subsection 610(1A) provides that it must credit the money to a Special Account, or otherwise sell or dispose of the property as it thinks fit, and credit the proceeds to a Special Account. A new Special Account, established under section 20 of the FMA Act, will be created for this purpose.

CAMAC

Part 2 of Schedule 1 amends the ASIC Act to enable CAMAC to come under the FMA Act.

Item 42 adds a new paragraph to section 146 of the ASIC Act, to provide that any real or personal property held by CAMAC is held for and on behalf of the Commonwealth. Any money received by CAMAC is received for and on behalf of the Commonwealth. **Item 43** inserts **new section 146A**, which provides that CAMAC's financial liabilities will become the Commonwealth's liabilities.

Item 44 inserts **new section 147A**, which mirrors that of item 9 regarding direction by CAMAC to its Convenor (see item 9 above).

Item 46 repeals sections 159 to 168 of the existing ASIC Act and inserts new sections relating to taxation and reporting requirements, as outlined for ASIC above.

APRA

Part 3 of Schedule 1 amends the APRA Act to bring APRA under the FMA Act. Currently, APRA is a CAC Act body and holds money in its own name. This Bill removes references to 'APRA's money', as it will now hold public money and public property for and on behalf of the Commonwealth. APRA's financial liabilities will become the Commonwealth's financial liabilities (**item 50**).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 49 alters the contracting powers of APRA, allowing APRA to enter contracts for and on behalf of the Commonwealth, in respect of public money and public property. Under **new subsection 11(3)** of the APRA Act, APRA may also enter into contracts in its own right. The Explanatory Memorandum notes that it is intended that APRA will use this power for regulatory agreements, rather than for operational administrative purposes.¹⁶

Items 53 to 58, 60-61, and 67 deal with changes to employment practices. Currently the power to employ staff and engage consultants rests with APRA. In practice this will continue, although the Bill transfers the employment powers from APRA to the Chair. This is because under the FMA Act, the Chair will be personally responsible for managing the affairs of the Agency in a way that promotes the proper use of the Commonwealth's resources. It is important to note that although it will fall under the FMA Act, APRA's employment arrangements will not be subject to the Public Service Act. The Explanatory Memorandum states that this 'permits a high degree of flexibility in some employment practices in order to assist APRA to attract and maintain highly skilled staff in the highly competitive financial services employment market.'¹⁷

Item 58 requires the APRA Chair to determine the APRA Values and the APRA Code of Conduct, and for the Chair and APRA members and staff to uphold and promote the Values and Code of Conduct. This is in line with other government agencies which do not fall under the Public Service Act. There is no requirement that the APRA Values and Code of Conduct be the same as the APS Values and Code of Conduct.

Items 62 to 65 make changes to the financial and taxation arrangements in Part 5 of the APRA Act, similar to the changes for the ASIC Act, outlined above. The changes include the establishment of an APRA Special Account, credits to the Account, and the purposes of the Account (**item 63**).

Item 66 sets out the annual reporting requirements for APRA under the FMA Act.

Application and transitional provisions

Schedule 2 of the Bill includes application and transitional provisions which are designed to ensure a smooth transition for ASIC, CAMAC and APRA to the FMA Act.

Item 2 of Schedule 2 provides that any real or personal property or money that is held by ASIC or CAMAC, or financial liabilities, that exist immediately prior to the commencement of the Act is taken, immediately after commencement, to be held by ASIC or CAMAC for and on behalf of the Commonwealth. **Item 11** makes a similar provision for APRA.

Items 3 to 5 relate to property held on trust by ASIC prior to the commencement, which after commencement will be taken to be held by ASIC for and on behalf of the Commonwealth. **Items 6 and 7** deal with the transfer of registration certificates for land and other assets after commencement of the Act. **Item 8** states that any court of tribunal

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

proceedings pending immediately before commencement in relation to property held in trust, to which ASIC was a party, then following commencement the Commonwealth shall be substituted for ASIC as a party to the proceedings.

Item 12 provides that staff and consultants appointed by the Chair of APRA prior to the Act's commencements will continue their appointment under the new FMA Act arrangements.

Items 14 and 15 clarify the reporting requirements for the three agencies. If an agency was required to provide a report (whether a financial statement or otherwise) under the CAC Act, then that agency must provide a report for so much of the period as occurs before the commencement time (14). If a similar report is required under the new FMA Act reporting requirements, then a single report will suffice. **Item 15** clarifies that the new annual reporting requirements will apply from 2007-08 onwards. **Item 16** ensures that any agency record-keeping obligations under the CAC Act will continue to apply to those records after the commencement of the new Act.

Item 17 provides the 'Constitutional safety net' – that if property is acquired under this Schedule otherwise than on just terms, the Commonwealth will be liable to pay a reasonable amount of compensation. If agreement cannot be reached, proceedings can be instituted in a court to determine a reasonable amount of compensation.

Item 19 provides that the Minister may delegate all or any of his or her powers under the Schedule, in relation to any Agency, to the Agency head. The delegate must comply with any directions of the Minister when exercising or performing powers or functions under a delegation.

Technical amendments

Schedule 3 contains technical amendments to the ARPA Act.

Concluding comments

As noted above, this Bill is one of a series introduced by the government to implement the Uhrig Report recommendations. The ANAO has found, over a number of reports, some shortcomings in government agencies' adherence to FMA Act requirements.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Endnotes

1. Department of Finance and Administration, *Chart of FMA Act and CAC Act agencies*, available at: http://www.finance.gov.au/finframework/docs/FMA_CACFlipchart31January2007.pdf, accessed 6 March 2007.
2. J. A. Uhrig, AC, Review of Corporate Governance of Statutory Authorities and Office Holders, June 2003, available at: http://www.finance.gov.au/GovernanceStructures/docs/The_Uhrig_Report_July_2003.pdf.
3. Ibid.
4. Sen. the Hon. N. Minchin (Minister for Finance and Administration), Australian Government Government Response to Uhrig Report, media release 12 August 2004, <http://www.finance.gov.au/scripts/Media.asp?Table=MFA&Id=550>.
5. Uhrig, op.cit., p. 12, point 6.
6. ASIC *Annual Report 2005-06*, available at: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_Annual_Report_2006_1-17.pdf/\\$file/ASIC_Annual_Report_2006_1-17.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_Annual_Report_2006_1-17.pdf/$file/ASIC_Annual_Report_2006_1-17.pdf), accessed 20 March 2006.
7. ASIC internet site: <http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+at+a+glance?opendocument>, accessed 6 March 2007.
8. Part 2 of Schedule 1 to the *Financial Management and Accountability Regulations 1997* outline ASIC's FMA role in regard to public moneys.
9. CAMAC internet site: <http://www.camac.gov.au/CAMAC/camac.nsf/0/933AA8F92002C11DCA256B6B0023077D?opendocument>, accessed 9 March 2007.
10. APRA internet site: <http://www.apra.gov.au/aboutApra/>, accessed 6 March 2007.
11. Hon. Chris Pearce MP, Parliamentary Secretary to the Treasurer, 'Second Reading Speech: Governance Review Implementation (Treasury Portfolio Agencies) Bill 2007', House of Representatives, *Debates*, 1 March 2007.
12. Australian National Audit Office, Report no. 22, 2004-05: *Investment of Public Funds*, Parliament of Australia, 18 January 2005.
13. Explanatory Memorandum, p. 17.
14. Explanatory Memorandum, p. 12.
15. *ibid.*
16. Explanatory Memorandum, p. 19.
17. Explanatory Memorandum, p. 23.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Copyright Commonwealth of Australia 2007

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2434.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.