



Financial Framework Legislation Amendment Bill (No. 1) 2007

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Financial Framework Legislation Amendment Bill (No. 1) 2007

Date introduced: 10 May 2007

House: House of Representatives

Portfolio: Finance and Administration

Commencement: In most cases, on Royal Assent. Otherwise, within six months if not proclaimed earlier.

Purpose

The main purpose of the Financial Framework Legislation Amendment Bill (No. 1) 2007 (the Bill) is to amend the [Financial Management and Accountability Act 1997](#) (FMA Act) to clarify aspects of its administration. In particular, the Bill would amend section 31 of the FMA Act to make it possible to amend appropriations by regulation, rather than by determination, as is now the case.

Background

The FMA Act is the main Act governing the financial activities of agencies including the collection of public money, the maintenance of accounting records, control and management of public property, the responsibilities of chief executives of agencies in regard to the control and management of public money and property, and the power of the Finance Minister to make regulations and delegate powers. The *Financial Management Legislation Amendment Act 1999* amended the FMA Act to facilitate the adoption of accrual budgeting by all Commonwealth budget-funded agencies.

The Bill is the third in a series designed to improve administration and financial management in agencies to which the FMA Act applies. The first Act—the [Financial Framework Legislation Amendment Act 2005](#)—amongst other things, amended the wording in a number of Acts to replace deeming provisions in the FMA Act and align their wording with the FMA Act. The Bills Digest for this Act can be found [here](#). The second Act—the [Financial Framework Legislation Amendment Act \(No. 1\) 2006](#)—amended several Acts in several respects including in respect of Special Accounts. The Bills Digest for the second Act can be found [here](#).

Section 31 agreements

Section 31 agreements were previously called ‘annotated appropriations’, which were authorised under section 35 of the *Audit Act 1901*. The use of section 35 receipts led to

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concerns about accountability. The 1989–90 Budget provided, for the first time, details of annotated appropriations.

The Bill contains provisions that deal with so-called section 31 (of the FMA Act) agreements. These agreements have come under scrutiny, including by the Australian National Audit Office (ANAO).¹

Appropriations items in annual appropriation Acts may be marked ‘net appropriation’. Where an appropriation is marked ‘net appropriation’, section 31 of the FMA Act allows an agreement (known as a ‘net appropriation agreement’ or a ‘section 31 agreement’) to be made with the Finance Minister, for the purposes of that appropriation. The net appropriation provisions of the annual appropriation Acts provide that, if a net appropriation agreement applies to an appropriation item, then the amount of that appropriation is taken to be increased, in accordance with the agreement, and on the conditions set out in the agreement. The increase cannot be more than the relevant receipts covered by the agreement. In short, the effect on a net appropriation is to increase the agency’s budget.

The effect of these provisions is that, where an agency has both an appropriation marked ‘net appropriation’ in an annual appropriation Act and a net appropriation agreement, then the amount of the appropriation will be increased by an amount equivalent to amounts the agency receives, where those amounts are ‘relevant receipts’ covered by the agency’s net appropriation agreement. As a result, the agency will have the legal authority to retain and spend those additional amounts that it receives.

As noted, the ANAO has investigated the administration of section 31 agreements. The following summarises the ANAO’s findings:

The objective of this performance audit was to assess agencies’ management of net appropriation agreements to increase available appropriations. Net appropriation arrangements are a feature of the Australian Government’s financial framework under Section 31 of the *Financial Management and Accountability Act 1997* (FMA Act). They provide a means by which an agency’s appropriation item in the annual Appropriation Acts can be increased by amounts received from non-appropriation sources, thereby enabling the agency to retain and spend those amounts.

The ANAO conducted a detailed examination of six FMA Act agencies, including Finance. Finance was also included in the audit in its capacity as the central agency with broad responsibility for the management of the financial framework, and the co-signatory to all agreements. The ANAO also examined 231 agreements made in respect of FMA Act agencies between 1 January 1998 and 30 June 2005, and agencies’ financial reporting of the use of Section 31 of the FMA Act to increase their appropriations.

The audit concluded there were widespread shortcomings in the administration of net appropriation arrangements. The ANAO was of the view a number of agencies had

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failed in their responsibility to have in place demonstrably effective Section 31 arrangements that support additions made to annual appropriations and the subsequent expenditure of those amounts. The audit also concluded the current presentation of budget estimates does not assist in providing users of Portfolio Budget Statements with a clear understanding of the extent to which the relevant agency expects to increase its annual appropriation for amounts collected under the authority of Section 31 agreements. Further, the ANAO found that agency financial statements have not accurately reflected the use of Section 31 arrangements.

The audit acknowledged that two Finance Circulars issued by Finance prior to the tabling of the audit report will assist with the proper management of net appropriation agreements in the future. Consistent with the recommendations of the report, Finance is currently examining mechanisms to simplify the financial framework and anticipates that any steps taken towards simplification will have a positive effect in terms of the broader framework issues raised by the audit. All five recommendations in the ANAO report that were directed towards Finance have been, or are currently being, implemented.²

The Senate Standing Committee on Finance and Public Administration drew on the ANAO's report when it examined section 31 agreements in its report titled [*Transparency and accountability of Commonwealth public funding and expenditure*](#). The Committee's conclusions and findings follow:

3.58 The Committee accepts that the government attempts to achieve a measure of transparency before the event by mandating the disclosure of estimated receipts in the PBSs and PAES, but notes that ANAO reported that the presentation of those estimates may not assist users of the documents to understand the extent to which an agency expects to increase its annual appropriations through the mechanism of Section 31 Agreements. The Committee notes that agencies are required to disclose in their annual financial statements the increase in annual appropriations resulting from Section 31 receipts but also notes that ANAO found that a number of agencies had overstated or misstated their receipts.

3.59 Given the significant role played by Section 31 Agreements in the transfer of funds between different categories of appropriations, the administrative shortcomings discovered by ANAO and the apparent confusion among the government's legal advisors about the uses to which the funds in Special Accounts may be applied, the Committee is concerned about Section 31 Agreements. The evidence leads it to question whether Section 31 Agreements are the most appropriate vehicles for authorising increases in agencies' annual appropriations by the amounts they receive from non-appropriations sources.

3.60 In that context, Finance, in answer to a question from the Committee, stated that since the publication of the audit report it had been considering whether the central role in net appropriations should be returned from agency agreements to the Appropriation Acts. It identified the issues involved as follows:

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... there are a variety of agencies and therefore a variety of receipts under the individual agreements. By implication, the impact of taking it back into the appropriation acts would mean that a generic set of issues or types of receipts would need to be agreed on. So we would be looking at the variety of the different types of receipts and the effect that would create upon agencies. We would look at whether it is viable to do it that way or whether there are alternative mechanisms to doing it as part of the annual acts.

3.61 The Committee appreciates the complexity of the issues involved in any change to the system for managing net appropriations. However, the Committee emphasises the point that the concerns it has outlined above in relation to Section 31 Agreements make it crucial that Finance, in consultation with ANAO and other relevant bodies, address this matter with a view to removing the ambiguity and looseness of the current system and improving the transparency and compliance of net appropriation transfers.

Recommendation 4

3.62 The Committee recommends that the central role in the management of net appropriations should be returned to the Appropriation Acts so as to ensure that these significant transfers of funds are fully transparent to the Parliament. In making this recommendation the Committee is aware that the management of net appropriations is complicated and that the Department of Finance and Administration is investigating other options. If a procedure other than returning the central role to the Appropriations Acts is proposed, the Committee would expect that the Parliament and its committees would be consulted. In particular, the Committee would expect Finance to report on any proposed alternative approach this calendar year.

Financial implications

There are no financial implications because the changes the Bill proposes are essentially administrative.

Main provisions

Changes to the FMA Act

Repayments by the Commonwealth

Item 4 of Schedule 1 deals with repayments by the Commonwealth. Item 4 retitles the heading to section 28—which is now ‘Appropriations for repayments required or permitted by law’—to read ‘Repayments by the Commonwealth’. Item 4 also repeals subsection 28(1) and substitutes a **new subsection 28(1)**. In effect, the new subsection

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authorises an appropriation where the Commonwealth has received money, some or all of which has to be repaid, but the repayment is not authorised elsewhere. **Item 14** explains that the new subsection applies to amounts the Commonwealth has received both before and after the new subsection commences.

Repayments to the Commonwealth

Item 6 repeals section 30 and substitutes a **new section 30**. Item 6 retitles the heading to section 30—which is now ‘Appropriation to be reinstated for amounts repaid’—to read ‘Repayments to the Commonwealth’.

Section 30 deals with the reinstatement of appropriations. It provides that when an appropriation has been made but an agency subsequently receives a repayment of all or part of the amount appropriated, the amount repaid is again available for appropriation. New section 30 makes a similar provision that where the Commonwealth pays an amount but some or all of the amount is repaid, the ‘appropriation is increased by an amount equal to the amount repaid’.

The Explanatory Memorandum states:

The amendment makes clear that the section applies to ‘notional’ transactions.

Further:

The amendment will also clarify that the section *also* applies to payments within and between agencies.³ (emphasis added)

The latter indicates that the intent of **new section 30** is that it applies not just to payments within and between agencies where no cash is actually transferred, but also to situations where, for example, a member of the public receives a payment but subsequently repays some or all of the amount. In the former case, ‘payment’ involves agencies raising entries in their books to account for the transaction. In the latter case, where cash is actually transferred, a book entry is also required. (In accounting terms, this could presumably be achieved by crediting the repayment against the account to which the original payment was debited). In both cases, the effect is to reduce the appropriation by the amount of the repayment and the appropriation has to be reinstated, notionally, to its original amount. **Item 15** explains that **new section 30** applies to amounts the Commonwealth has received both before and after **new section 30** commences.

The **Note** in **new section 30** refers to **new section 32A**. **New subsection 32A(2)** deals with the timing of repayments and appropriations referred to in new section 30. New subsection 32A(2) provides that appropriations are increased when they are recorded in agencies’ books.

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Recoverable GST

Section 30A deals with ‘appropriations to take account of recoverable GST’. When agencies pay GST on their purchases of goods and services, their appropriations are reduced by the amount of the GST. The purpose of section 30A is to increase appropriations by the amount of GST. The logic is that the GST on agency purchases is a tax the Commonwealth pays to itself; not increasing appropriations by the amount of the GST reduces the value of the appropriation. Under section 30A, the increase in the appropriation can take place at different times. **New section 30A** repeals subsections 31A(1)–(6) and substitutes **new subsections 30A(1) and (2)**. Like subsections 31A(1)–(5), new subsections 30A(1) and (2) provide for appropriations to be increased by the amount of the GST. However, **new subsection 32A(3)** standardises the timing of appropriation increases by providing that the increases occur when the GST is entered into the agency’s books.

Section 31 agreements

Item 8 repeals section 31—which is titled ‘Agreements for “net appropriations”’—and substitutes **new section 31, ‘Relevant agency receipts’**.

New section 31 does not mention the term ‘net appropriations’. Rather, **new subsection 31(1)** states that the section applies if an agency receives an amount of a kind prescribed by the regulations for the purpose of this section. According to the Explanatory Memorandum, this will increase parliamentary scrutiny:

Whereas the instruments currently made under section 31 are exempt from disallowance, the regulations proposed to be made under the amended arrangements would be disallowable. Parliamentary scrutiny would therefore be enhanced.⁴

New subsection 31(2) states that the amount specified in the most recent departmental item for the agency is taken to be increased by an amount equal to the amount received by the agency. **New subsection 31(3)** provides that a departmental item means a departmental item in an Appropriation Act. In Appropriation Acts, the definition of a departmental item is the total amount set out in a Schedule under the heading ‘Departmental Outputs’. In short, the effect of new section 31, like existing section 31, is to increase the agency’s budget for departmental expenses.

New subsection 32A(1) specifies when appropriations that operate through Special Accounts take effect, by providing that debits and credits to Special Accounts take effect at the time when they are entered into an agency’s books.

Transfer of agency functions

The Bill repeals section 32—titled ‘Adjustment of appropriations on change of Agency functions’—and substitutes **new section 32, ‘Transfer of Agency functions’**. The main

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changes are in **new subsections 32(2)** and **32(3)**, which fall under the sub-heading ‘Adjustments to appropriations’. New subsection 32(2) provides that the Finance Minister may issue a determination to amend Schedules to Appropriations Acts in a specified way, and that the amendment must relate to the transfer of functions. New subsection 32(3) provides that each relevant Appropriation Act has effect as if its Schedule were amended in accordance with the determination.

New subsection 32(7) provides that while the Finance Minister’s determination is a legislative instrument, neither the disallowance nor the sunseting provisions of the *Legislative Instruments Act 2003* apply to the determination. This does not represent a change—directions under the current section 32 are not subject to the disallowance and sunseting provisions.

Delegation of powers

The FMA Act contains provision for the delegation of powers. Section 62A gives power to the Treasurer to delegate functions to officials, section 62 provides certain delegation powers to the Finance Minister, while section 53 bestows on Chief Executives of agencies powers to delegate to officials. **Item 11** inserts **new subsection 53(1AA)**, which distinguishes between functions delegated to the Chief Executive under section 62 or 62A, and those that have not been so delegated. In the latter case, the Chief Executive may give directions to the person to whom powers are delegated, and that person must comply with those directions.

Item 12 repeals subsection 53(2) and inserts a **new subsection 53(2)**. The latter provides that where the Chief Executive is acting under directions given under section 62 or 62A, and the Chief Executive in turn delegates those powers to another person, the Chief Executive must give to that person directions that correspond with those given under section 62 or 62A, and may also give to that person additional directions that are consistent with the already-existing directions.

Changes to the *Legislative Instruments Act 2003*

The Bill proposes amendments to the [Legislative Instruments Act 2003](#) that are consequential to the proposed changes to the FMA Act. Section 44 of the Legislative Instruments Act deals with legislative instruments not subject to disallowance, and contains a list of these instruments. Section 54 of the Legislative Instruments Act deals with legislative instruments not subject to sunseting, and contains a list of these instruments.

Items 19 and **21** delete references to section 31 agreements in subsections 44(2) and 54(2) respectively, since section 31 agreements will no longer exist. **Items 20** and **22** delete references to section 32 in subsections 44(2) and 54(2) respectively, since directions given under section 32 will no longer exist.

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Concluding comments

In the case of section 31 agreements, the changes the Bill proposes do not seem to return the management of net appropriations to the Appropriation Acts as the Finance and Public Administration Committee recommended.

One might also ask whether the proposed determinations under section 32 of the FMA Act should be listed in sections 44 (disallowance) and 54 (sunsetting) of the Legislative Instruments Act, where many other such instruments are listed. It would simplify matters if there was a consistent approach to placing these matters either in the Legislative Instruments Act or in the enabling legislation.

Endnotes

1. Australian National Audit Office, *Performance Audit Management of Net Appropriations Agreements*, Audit Report No. 28 2005–06.
2. Department of Finance and Administration, [Annual Report 2005–2006](#), Department of Finance and Administration, Canberra, 2006, p. 110.
3. *Explanatory Memorandum*, paragraph 17, p. 3.
4. *Explanatory Memorandum*, paragraph 19, p. 4.

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