



Financial Framework Legislation Amendment Bill 2010

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Financial Framework Legislation Amendment Bill 2010

Date introduced: 30 September 2010

House: House of Representatives

Portfolio: Finance and Deregulation

Commencement: Clauses 1 to 3 and anything in the Bill not covered by the table in clause 2 commence on the day of Royal Assent. Schedules 1, 3, 4, 6, 10 and 11 commence on the day after Royal Assent. Schedules 2, 7 and 9 commence on 1 July 2011. The remaining provisions commence on various other dates.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

This Bill lapsed on the proroguing of Parliament in July 2010. It has been re-introduced without any significant changes.

Purpose

The Financial Framework Legislation Amendment Bill 2010 (the Bill) has three main purposes:

- to repeal 20 redundant special appropriations provisions including six Acts in full
- to establish governance arrangements for interjurisdictional institutions operating under the [Financial Management and Accountability Act 1997](#) (FMA Act) and the [Commonwealth Authorities and Companies Act 1997](#) (CAC Act), and
- to change the governance arrangements for several Commonwealth bodies, notably the Australian Law Reform Commission and the Australian Institute of Criminology.

Background

Financial Management and Accountability Act 1997 and Commonwealth Authorities and Companies Act 1997

The FMA Act and the CAC Act govern the management and accountability of Commonwealth agencies and authorities.¹ The FMA Act:

1. The Department of Finance and Deregulation maintains a 'flipchart' of FMA Act agencies and CAC Act bodies. See the Department of Finance and Deregulation, departmental website, viewed 14 October 2010, <http://www.finance.gov.au/publications/flipchart/docs/FMACACFlipchart.pdf>

... provides the framework for the proper management of public money and public property by the Executive arm of the Commonwealth. Public money and public property is defined in the Act as money and property in the custody or control of the Commonwealth.²

The principal matters that the FMA Act covers include:

- the responsibilities and powers of the Minister for Finance and Deregulation
- the collection and custody of public money and the control and management of public property
- the accounting framework, Parliamentary appropriations and certain payments matters
- borrowing and investment powers of the Finance Minister and the Treasurer
- special responsibilities of Chief Executives of Agencies for the control and management of public money and public property
- audit of the financial statements of the Commonwealth as a whole and of individual Commonwealth Agencies by the Auditor-General, and
- delegation of powers or functions of the Finance Minister, the Treasurer and Chief Executives.³

Examples of FMA Act bodies are the Attorney-General's Department, Treasury, and the Australian Federal Police.

The CAC Act regulates certain aspects of:

- the corporate governance, financial management and reporting of Commonwealth authorities (authorities), which are in addition to the requirements of their enabling legislation; and
- the corporate governance and reporting of Commonwealth companies (companies) which are in addition to the requirements of the *Corporations Act 2001*.⁴

The principal matters the CAC Act covers are:

- reporting by an authority or a company to a Minister and, through a Minister, to Parliament
- contents of the annual report of operations of an authority
- audit of financial statements of an authority or a company by the Auditor-General
- banking and investments powers of authorities
- submission to the responsible Minister of budget estimates each financial year by authorities and companies other than Government Business Enterprises and partly-owned companies

2. Department of Finance and Deregulation, departmental website, viewed 14 October 2010, <http://www.finance.gov.au/financial-framework/fma-legislation/fma-act.html>

3. Ibid.

4. Department of Finance and Deregulation, departmental website, viewed 14 October 2010, <http://www.finance.gov.au/financial-framework/cac-legislation/cac-act.html>

- compliance of authorities and wholly-owned companies with general policies of the Government, and
- conduct of directors and officers of authorities, including the civil consequences of the directors and officers contravening civil penalty provisions.⁵

Examples of CAC Act bodies are the Australian War Memorial, Screen Australia, and the Australian Broadcasting Corporation.

CAC Act bodies are legally separate from the Commonwealth. Before 2008–09, CAC Act bodies were funded ‘directly’ through the annual appropriation Acts and special appropriations. But in recognition of the fact that CAC Act bodies are legally separate from the Commonwealth, the 2008–09 Budget changed the system of payments to CAC Act bodies. The Explanatory Memorandum for Appropriation Bill No. 1 2008–09 contained the following explanation of the change:

A CAC Act body is defined in clause 3 to be a Commonwealth authority or Commonwealth company within the meaning of the CAC Act. Many CAC Act bodies receive funding directly from appropriations. However, these bodies are legally separate from the Commonwealth and as a result, do not debit appropriations or make payments from the Consolidated Revenue Fund. The Bill is the first annual appropriation bill since 1999 to clearly recognise CAC Act bodies with a separate item.⁶

Amounts are now appropriated to FMA Act departments for the purposes of making payments to relevant CAC Act bodies. The department pays these amounts to the relevant CAC Act body upon request by that body. For example, funding for the Australian Broadcasting Corporation and the Special Broadcasting Corporation appears as a ‘payment to CAC Act bodies’ in the statement of administered income and expenses of the Department of Broadband, Communications and the Digital Economy. Put another way, CAC Act bodies are funded ‘indirectly’ through the relevant departments.

On the other hand, bodies such as the Australian Competition and Consumer Commission and the Australian Human Rights Commission which come under the FMA Act are also ‘statutory agencies’ (also called bodies corporate) under the *Public Service Act 1999* but depend on the Commonwealth Government for funding. In this context, ‘bodies corporate’ are bodies that are:

- legally separate from the Commonwealth
- not financially separate from the Commonwealth in that they are funded ‘directly’ through the Budget and not indirectly through the relevant departments the way CAC Act bodies are, and
- subject to the FMA Act.

5. Ibid.

6. Explanatory Memorandum, Appropriation Bill (No. 1) 2008–09, p. 9, viewed 14 October 2010, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2973_ems_b2a52566-472b-4af6-855b-a9309d7ce3a5/upload_pdf/317130.pdf

Examples of bodies corporate are the Australian Communications and Media Authority and the Great Barrier Reef Marine Park Authority.

Special appropriations and Operation Sunlight

A 'special appropriation' is:

... a provision within an Act that provides authority to spend money for particular purposes, for example, to finance a particular project or to make social security payments.⁷

Examples of expenditure under special appropriation Acts are grants to the states under the *Federal Financial Relations Act 2009*, and age and disability pensions. Special appropriations account for more than 80 per cent of total Commonwealth expenditure.

Operation Sunlight is:

... the Government's reform agenda to improve the openness and transparency of public sector budgetary and financial management and to promote good governance practices.⁸

As part of its response to Operation Sunlight, the Government is reviewing special appropriations. According to the second reading speech, the Bill is a consequence of this process.⁹

Committee consideration

As at the time of writing this Bills Digest, the Bill had not been referred to a committee for inquiry and report.

Financial implications

There are no financial implications.¹⁰

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7. Department of Finance and Deregulation, departmental website, viewed 14 October 2010, <http://www.finance.gov.au/budget/budget-process/appropriation-bills.html>
 8. Department of Finance and Deregulation, departmental website, viewed 14 October 2010, <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/operation-sunlight/index.html>
 9. G Gray, 'Second reading speech: Financial Framework Legislation Amendment Bill 2010', House of Representatives, *Debates*, 30 September 2010, pp. 282-283, viewed 14 October 2010, http://parlinfo.parlInfo/download/chamber/hansardr/2010-09-30/toc_pdf/7770-3.pdf;fileType=application%2Fpdf#search=%22Financial%20framework%22
 10. Explanatory Memorandum, Financial Framework Legislation Amendment Bill 2010, p. 4.

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Standing appropriations

The Bill repeals 20 redundant special appropriation provisions including six special appropriation Acts entirely. The Bill itself does not appropriate any money.

Main issues and key provisions

The Bill contains 11 Schedules. This Digest deals with each Schedule in turn.

Schedule 1—Amendment of the *Australian Human Rights Commission Act 1986*

The [Australian Human Rights Commission Act 1986](#) (AHRC Act) established the Australian Human Rights Commission (AHRC). As noted above, the AHRC is subject to the FMA Act and is a body corporate. According to the Explanatory Memorandum, the purpose of Schedule 1 is to clarify the body corporate status of the AHRC.¹¹ While the AHRC is a legally separate organisation, it is part of the Commonwealth in the sense that it is funded ‘directly’ through the Budget.

Part 1—Amendment

Section 7 of the AHRC Act deals with the establishment of the AHRC. **Item 1** inserts **proposed subsection 7(4)** which provides that any real or personal property that the AHRC holds is held on behalf of the Commonwealth, while **proposed subsection 7(5)** similarly provides for any money that the AHRC has received.

Part 2—Transitional provisions

Part 2 contains two transitional provisions. **Item 2** provides that any real or personal property that the AHRC held before Schedule 1 commences is taken to be held for and on behalf of the Commonwealth.

Item 3 provides that the amendments in Schedule 1 do not affect the AHRC’s right to sue.

Schedule 2—Amendment of the *Australian Law Reform Commission Act 1996*

The Australian Law Reform Commission (ALRC) was first established in 1975. It currently operates under *Australian Law Reform Commission Act 1996* (ALRC Act). In terms of its operations:

11. Explanatory Memorandum, op. cit., p. 3.

The ALRC conducts inquiries - also known as references - into areas of law at the request of the Attorney-General of Australia. Although the ALRC cannot initiate its own inquiries, it is independent of government and is able to undertake research, consultations and legal policy development; and to make recommendations to the Parliament, without fear or favour.

The ALRC makes recommendations to government so that government can make informed decisions about law reform, but the ALRC's recommendations do not automatically become law. However, the ALRC has a strong record of having its advice taken up. Over 85 per cent of the ALRC's reports have been either substantially or partially implemented - making it one of the most effective and influential agents for legal reform in Australia.

The ALRC's functions in relation to matters referred to it by the Attorney-General are to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:

- bringing the law into line with current conditions and ensuring that it meets current needs;
- removing defects in the law;
- simplifying the law;
- adopting new or more effective methods for administering the law and dispensing justice; and
- providing improved access to justice.¹²

Under section 6 of the ALRC Act, the ALRC is to consist of a President, a Deputy President, and at least four other members. However, it currently consists of only one full-time Commissioner as President (Professor Rosalind Croucher) and three part-time Commissioners. This issue was touched upon in the ALRC's most recent annual report:

The ALRC received notice of a substantial budget reduction in the coming years—as did many other Government agencies—and this will necessitate a re-thinking of our inquiry processes to use our available resources in the best ways possible, to ensure that our ability to provide timely, straightforward and sound advice to Government is not compromised. The ALRC will streamline its operations, for example by producing one consultation document, not two, where we can, and further develop online resources and communication tools. One immediate consequence of the budget reduction is that the Attorney-General has not appointed any new full-time Commissioners, preferring instead to trial the appointment of inquiry-specific part-time Commissioners who are able to bring a particular expertise to the ALRC's current inquiry work. The appointment of Magistrate Anne Goldsbrough to the Family Violence Inquiry was a result of this new approach.¹³

The ALRC Act also provides for a Board of management whose 'function is to manage the Commission and, in particular, ensure that it performs its functions effectively and economically.'¹⁴ It consists of the President, Deputy President, and full-time members of the ALRC. However, given the

12. ALRC website, <http://www.alrc.gov.au/about>, viewed 15 October 2010.

13. ALRC 2009-10 Annual report, p. 6, viewed 15 October 2010, <http://www.alrc.gov.au/sites/default/files/pdfs/publications/AR.pdf>

14. Section 28.

current composition of the ALRC, the Board only consists of Professor Croucher.¹⁵ The Board is to be replaced by a management advisory committee (see **item 33** below).

Part 1—Amendments

Currently, the Australian Law Reform Commission is subject to the CAC Act. The purpose of Schedule 2 is to amend the [Australian Law Reform Commission Act 1996](#) (ALRC Act) to:

... enable the Law Reform Commission (LRC) to become a prescribed agency under the FMA Act and a statutory agency for the purposes of the *Public Service Act 1999* (Public Service Act).¹⁶

A ‘prescribed agency’ is an agency established by regulation under the FMA Act. The FMA Act provides financial management authority to the agency, and requires accountability by the chief executive of the agency. There are more than 60 prescribed agencies, most of which are statutory agencies under the *Public Service Act 1999*.¹⁷

Items 1 to 8 amend some definitions in section 3 of the ALRC Act. According to the Explanatory Memorandum:

These amendments are required due to the proposed transition of the management structure to an executive management model, and to broaden the definition of “judicial office”.¹⁸

Specifically, **items 1, 2, 3** and **4** repeal respectively the definitions of ‘Board’, ‘Board member’, ‘Deputy President’, and ‘Division’ because these will not be needed under the proposed new structure.

The ALRC Act provides that appointment to the ALRC does not affect the tenure et cetera of a person already in judicial office. **Item 5** expands the definition of ‘judicial office’ in two ways. First, the term is extended to include magistrates.¹⁹ Second, eligible courts include state or territory courts in addition to federal courts.

Section 5 of the ALRC Act deals with the establishment of the ALRC. **Item 10** repeals subsections 5(2), 5(3) and 5(4). According to the Explanatory Memorandum:

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15. Note that according to the ALRC’s 2009-10 annual report, ‘the Executive Director attends all Board of Management meetings and staff representatives attend Board of Management meetings at the open invitation of the Board.’ op. cit., p. 53.
 16. Ibid., p. 2.
 17. For a categorisation of agencies, see the Australian Public Service Commission website, viewed 14 October 2010, <http://www.apsc.gov.au/apsprofile/agencies.htm>
 18. Explanatory Memorandum, op. cit., p. 12.
 19. Note that one of the current part-time members of the ALRC is a magistrate.

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These subsections are no longer required as the Law Reform Commission will become legally and financially part of the Commonwealth as a result of becoming a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act).²⁰

Section 6 of the ALRC Act deals with the constitution of the ALRC. **Item 11** substitutes a **new paragraph 6(1)(b)** for paragraphs 6(1)(b) and (c). Consequently, the ALRC will comprise the President and not more than six other members, instead of a President, Deputy President and at least four other members. As mentioned above, the ALRC currently only has four members.

All ALRC members are currently appointed by the Governor-General. **Items 12-13** will change this so that the part-time ALRC members will be appointed by the Attorney-General 'from time to time...to enable the Commission to perform its functions'. Full-time members will continue to be appointed by the Governor-General.

Existing section 7 deals with the qualifications of persons to be appointed as ALRC members. There are four separate types of qualifications, one of which must be met in order to be appointed. **Item 14** replaces existing paragraph 7(2)(a) (in which the qualification is being a Federal or Supreme Court judge) with the qualification of being the 'the holder of a judicial office', which includes judges of lower courts and magistrates.

Section 8 of the ALRC Act deals with full-time and part-time appointments. **Item 16** substitutes a **new subsection 8(1)** which provides that the President must be appointed as a full-time member. **Item 19** provides for a minimum term of appointment of 6 months and maximum of 5 years for an ALRC member, although they can be reappointed at the end of the term. The current maximum term of appointment is 7 years, although again reappointment is permitted.

Item 17 substitutes 'may' for 'must' in subsection 8(2). According to the Explanatory Memorandum, the effect:

... is to enable members to be appointed as either full-time or part-time members having regard to the range and volume of work being undertaken by the Law Reform Commission.²¹

Section 17 of the ALRC Act deals with the termination of appointments and section 18 with resignations. **Item 26** replaces sections 17 and 18 with new sections. **New section 17** lists reasons for termination of full-time appointments. They include:

- misbehaviour, or physical or mental incapacity (**new subsection 17(1)**)
- bankruptcy (**new paragraph 17(2)(a)**), and
- where a full-time member engages in paid employment outside the duties of the member's office without the Attorney-General's approval (**new subsection 17(3)**).

20. Ibid., p. 13.

21. Explanatory Memorandum, op. cit., p. 13.

Similarly, **item 26** establishes **new section 17A** which deals with the termination of part-time appointments. Termination of part-time members will be by the Attorney-General rather than the Governor-General.

Section 24 of the ALRC Act deals with how the ALRC is to perform its functions. Paragraph 24(1)(b) provides that it must ensure that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with the International Covenant on Civil and Political Rights. **Item 29** deletes the reference to the International Covenant on Civil and Political Rights and substitutes Australia's international obligations that are relevant to the matter. According to the Explanatory Memorandum:

The purpose of this amendment is to ensure that the Law Reform Commission considers all of Australia's international obligations relevant to a reference.²²

Item 30 deletes existing subsection 24(2)—which requires the ALRC to take account of Australia's relevant international obligations. It is a redundant provision because of item 29. Item 30 also removes subsection 24(3)—which requires the ALRC to take account of the cost of access to and the dispensation of justice—and introduces a **new subsection 24(2)**. This provides that the ALRC, when formulating recommendations, must have regard to the effect that the recommendations may have on the costs of getting access to, and dispensing, justice (**new paragraph 24 (2)(a)**) and persons and businesses who would be affected by the recommendations (including, for example, the economic effect) (**new paragraph 24 (2)(b)**). This last element is potentially a significant requirement, aimed at ensuring the ALRC has regard to the broader implications of its decisions.

Section 26 of the ALRC Act requires the ALRC to comply with certain requirements and directions. It requires it to comply with the directions given by the Attorney-General under section 20(3) and 22(2). These directions are quite limited in scope. **Item 31** inserts **new subsection 26(2A)** which provides that as CEO of the ALRC, the President must act in accordance with any policies determined, and comply with any directions given, in writing, by the Attorney-General.²³ This is a potentially significant widening of the Attorney-General's powers of direction.

Item 33 repeals sections 27 to 32, which deal with the current management structure, and inserts a **new section 27** which deals with the new management advisory committee. **New subsection 27(1)** provides that the Attorney-General may establish a committee—the management advisory committee—to advise the President on matters that are relevant to the proper discharge of the Commission's functions. However, the management advisory committee must not attempt to compromise the independence or impartiality of the Commission in any way (**new subsection 27(2)**). **New subsection 27(3)** provides that the Attorney-General is to appoint the members of the management advisory committee while **new subsection 27(4)** empowers the Attorney-General to dissolve the management advisory committee at any time. **New subsection 27(5)** provides that the

22. Ibid., p. 15.

23. The President is not subject to any direction that would come within the scope of section 19 of the Public Service Act.

President may decide any matters about the management advisory committee that the ALRC Act does not cover.

Existing section 34 provides that the ALRC President is its Chief Executive Officer (CEO), and is, under the Board, responsible for the management of the Commission. **Item 34** substitutes a **new section 34** which provides that the President is the CEO of the ALRC. As mentioned above, the ALRC Board is deleted by **item 33**.

Section 36 deals with ALRC meetings. **Item 35** repeals subsection 36(1) and substitutes a new version. It provides that the President must convene at least two meetings each financial year (**new paragraph 36(1)(a)**) and any other meetings that the President thinks necessary for the efficient performance of the Commission's functions (**new paragraph 36(1)(b)**).

Subsection 36(2) currently provides that the President must convene a meeting on receiving a written request from at least three other members. **Item 36** amends subsection 36(2) by deleting the 'at least three' members requirement and substituting 'a majority of the' members.

Section 39 of the ALRC Act requires members to disclose certain interests. **Items 40** and **42** amend subsections 39(1) and (4) respectively to replace 'a material personal' interest with 'an' interest. According to the Explanatory Memorandum, this is for consistency with the FMA Act.²⁴

Item 41 inserts the phrase 'of the Commission' after 'the meeting' in subsection 39(2) thus ensuring that a disclosure must be recorded in the minutes of the meeting of the LRC in which the interest is disclosed.

Item 43 repeals subsection 39(5) and inserts **new subsections 39(5)** and **(6)**. **New subsection 39(5)** provides that a determination made under subsection 39(3)—which requires a member with an interest to not participate in deliberations and decisions in which the member has an interest—to be recorded in the minutes of the meeting. **New subsection 39(6)** provides that subsection 39(1) applies to interests whether direct or indirect, and whether or not pecuniary (**new paragraph 39(6)(a)**) and whether acquired before or after the member's appointment (**new paragraph 39(6)(b)**).

Item 44 inserts a **new section 40** into the ALRC Act dealing with disclosing interests to the Attorney-General. It provides that the President must give written notice to the Attorney-General of all interests, pecuniary or otherwise, that the President has or acquires and that conflict, or could conflict, with the proper performance of the President's functions.

Item 45 repeals Division 3 of Part 4, which currently comprises sections 40 to 42, and deals with divisions of the ALRC. It will become redundant as a result of the restructuring of the composition of the ALRC contained in the Bill, particularly the removal of divisions.

24. Ibid., p. 17.

Item 46 repeals section 43 which deals with the appointment of staff and substitutes **new section 43**. **New subsection 43(1)** provides that the staff of the Commission are to be engaged under the *Public Service Act 1999* while **new subsection 43(2)** provides that for the purposes of that Act, the President and the staff together constitute a Statutory Agency (**new paragraph 43(2)(a)**) and that the President is the Head of that Statutory Agency (**new paragraph 43(2)(b)**).

Item 49 repeals Part 5 and substitutes a new Part 5, which still deals with finance. **New subsections 45(1)** and **45(2)** establish the Law Reform Special Account as a Special Account for the purposes of the FMA Act. As with other special accounts, this allows receipts (credits) and expenditure (debits) associated with the LRC to pass through the Law Reform Special Account. **New subsections 45(3)** and **(4)** respectively list what must be credited and what may be debited to the Law Reform Special Account.

Item 50 repeals section 50, which deals with protection from civil actions. According to the Explanatory Memorandum:

This section will no longer be required as a consequence of Item 10, which will remove the Law Reform Commission's body corporate status. The Law Reform Commission will be legally part of the Commonwealth and is thus afforded Crown immunity.²⁵

Part 2—Transitional provisions

Section 9 of the ALRC Act deal with durations, terms and conditions of appointments. **Item 19** amends subsection 9(1) which deals with the period of appointments. It replaces the current general requirement that a member hold office for not longer than seven years with a requirement that the appointment be of at least six months but not longer than five years. **Item 51** provides that the amendment of subsection 9(1) does not apply to an appointment made before Schedule 2 commences.

Items 52 and **53** ensure the continuation of the ALRC as currently constituted in respect of members, consultants and other matters. For example, **item 52** provides that it applies even though Schedule 2 amends or repeals provisions of the ALRC Act. The effect of **item 52** is to ensure that appointments of members and consultants, and references in Acts to the Board and Board decisions, continue in force. Similarly, **item 53** in essence ensures that the service of current employees of the ALRC (the old Commission) will be recognised under the reconstituted ALRC (the new Commission) when Schedule 2 commences.

Items 54, 55, 56, 58 and **59** assign from the ALRC to the Commonwealth various assets, liabilities, instruments, proceedings and contracts. For example, **item 58** provides that it applies to any proceedings, to which the ALRC was a party, that were pending in any court or tribunal immediately before Schedule 2 commences (**new subsection 58(1)**) and that when **Schedule 2** commences, the

25. Ibid., p. 18.

Commonwealth is substituted for the Commission as a party to the proceedings (**new subsection 58(2)**).

In similar vein, **item 60** provides that if an Act appropriates funds to the department that administers the ALRC Act and the department pays the funds to the ALRC, the appropriation Act continues to apply after Schedule 2 commences.

Item 62 is a catch-all provision that enables the Governor-General to make regulations dealing with transitional issues.

Schedule 3—Amendment of the *Australian Postal Corporation Act 1989*

According to the Explanatory Memorandum, the purpose of the amendments in **Schedule 3** is:

... to update cross-references which [the [Australian Postal Corporation Act 1989](#)] makes to the CAC Act. These updates are required following the passage of amendments made (through the *Commonwealth Authorities and Companies Amendment Act 2008*) to consultation over, and the notification of, general policies of the Government. The amendments would realign Australia Post's obligations to comply with General Policy Orders under the CAC Act and to report on compliance with those requirements.²⁶

The wording of the provisions in Schedule 3 is, for the most part, identical. In particular, **items 1 to 4** all require Australia Post to comply with General Policy Orders, that are made under section 48A of the CAC Act, and which apply to Australia Post and its directors under section 28 of the CAC Act. **Items 1 to 4** deal with different aspects of Australia Post's operations. **Item 1** deals with general government obligations, **item 2** with financial targets, **item 3** with extra general matters to be included in annual reports, and **item 5** with extra financial matters to be included in annual reports.

Section 50 of *Australian Postal Corporation Act 1989* provides that except as otherwise provided by that Act or any other Act, Australia Post and its board are not subject to direction by or on behalf of the Commonwealth Government. **Item 5** changes 'Commonwealth' to 'Australian'.

Schedule 4—*Australian Wine and Brandy Corporation Act 1980* amendments

Schedule 4 amends the [Australian Wine and Brandy Corporation Act 1980](#) to rename the 'Australian Wine and Brandy Corporation' as the 'Wine Australia Corporation'. This is consistent with international branding of the body as 'Wine Australia'.²⁷

26. Ibid., p. 4.

27. Ibid., p. 4.

Part 1—Amendment of the *Australian Wine and Brandy Corporation Act 1980*

Items 1 to 11 substitute ‘Wine Australia’ for ‘Australian Wine and Brandy’.

Part 2—Consequential amendments

Part 2 amends four Acts: the *Freedom of Information Act 1982*, the *Primary Industries (Customs) Charges Act 1999*, the *Primary Industries (Excise) Levies Act 1999* and the *Safety, Rehabilitation and Compensation Act 1988* to reflect the change in the name to the Wine Australia Corporation.

Schedule 5—Amendment of the *Commonwealth Authorities and Companies Act 1997*

According to the Explanatory Memorandum:

Schedule 5 covers several amendments to the CAC Act, including allowing for regulations to establish better governance arrangements for interjurisdictional authorities under the CAC Act.²⁸

Item 1 amends section 5 of the CAC Act—which deals with definitions—by inserting a definition for the term ‘general law’. This is defined to mean the principles and rules of the common law and equity. The words ‘under the general law’ replace ‘at common law or in equity’ in **items 5, 6, 7, 8** and **9**. **Items 5 to 9** replace the phrase ‘at common law and equity’ with the revised expression ‘under the general law’ wherever the former phrase appears in the CAC Act.

Part 3 of the CAC Act deals with the reporting and other obligations for Commonwealth authorities.

Item 10 inserts **new Part 3A—Interjurisdictional authorities**. According to the Explanatory Memorandum, this is:

... to allow for regulations to apply to interjurisdictional Commonwealth authorities. Part 3A provides an enhanced ability for the Commonwealth and participating State and Territory jurisdictions to be jointly involved in the governance of interjurisdictional Commonwealth authorities. A similar provision is being made for interjurisdictional FMA Act agencies in the FMA Act (refer Item 5 in Schedule 7).²⁹

New subsection 33A(1) deals with whom the regulations may prescribe as interjurisdictional authorities while **new subsection 33A(2)** deals with the matters that the regulations may cover. A Commonwealth authority may be prescribed as an interjurisdictional authority (**new paragraph 33A(1)(a)**), persons who comprise an interjurisdictional authority may be prescribed (**new paragraph 33A(1)(b)**), and a minister of a state or territory can be a prescribed minister (**new paragraph 33A(1)(c)**). The Explanatory Memorandum notes that a participating state or territory minister

28. Ibid., p. 2.

29. Ibid., p. 23.

would ordinarily be the minister who is allocated responsibility for administrative oversight of the authority's functions.³⁰

Under **new subsection 33A(2)**, regulations may include requirements that directors: provide interim reports (**new paragraph 33A(2)(a)**), give written particulars of proposals (**new paragraph 33A(2)(b)**), and keep state or territory ministers informed of the authority's operations (**new subparagraph 33A(2)(d)(i)**). State or territory ministers may give written guidelines to the directors of an interjurisdictional authority (**new paragraph 33A(2)(c)**).

Section 40 of the CAC Act requires Commonwealth companies to notify the responsible minister of significant events. For example, subsection 40(1)(a) requires a wholly-owned Commonwealth company to notify the responsible minister of the formation of a new company. **Item 11** repeals subsections 40(2) and 40(3) of the CAC Act and substitutes a **new subsection 40(2)**. This provides that the responsible minister may issue written guidelines to directors and that directors must use these guidelines when deciding whether subsection (1) covers a proposal. The Explanatory Memorandum states:

Subsection 40(2) is repealed, as it suggests that a responsible Minister for a Commonwealth company may not be interested in the formation of a company by a Commonwealth company. Instead there is legitimate scope for clearer reporting on the use of company structures and/or subsidiaries in the Commonwealth's context, consistent with the move of section 45 of the CAC Act to section 39A of the FMA Act. Guidelines may also explain the amount of notice that a Minister may require in relation to being able to respond to information about a specific proposed significant event.³¹

Section 47A of the CAC Act requires companies to comply with government procurement requirements. **Item 13** inserts **new subsection 47A(6A)** into section 47A to make the Finance Minister's directions to CAC Act bodies on procurement a legislative instrument. However, neither section 42 (disallowance) nor part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the directions. While, at first blush, this status may seem incongruous, section 44 of the *Legislative Instruments Act 2003* provides that certain legislative instruments are exempt from disallowance under that Act. But they still need to be tabled in Parliament if they are required to be registered in the Federal Register of Legislative Instruments. Item 41 of the table in subsection 44(2) specifies that 'Ministerial directions to any person or body' are not generally subject to disallowance procedures under section 42 of that Act.

Section 48A of the CAC Act deals with general policy orders. **Item 16** inserts **new section 48B** which permits a minister to delegate certain powers and functions to a Secretary of a Department of State under various sections of the CAC Act. For example, **new paragraph 48B(1)(b)** delegates—under paragraphs 16(1)(b) and 16(1)(c)—requests for reports, documents and information from a

30. Ibid.

31. Ibid., p. 24.

Commonwealth authority by the minister responsible for the authority, and by the Finance Minister respectively.

Schedule 6—Amendment of the *Competition and Consumer Act 2010*

The Australian Competition and Consumer Commission (ACCC) was previously subject to the CAC Act but is now subject to the FMA Act. The purpose of **Schedule 6** is:

... to clarify the body corporate status of the Australian Competition and Consumer Commission (ACCC) under the FMA Act. This is consistent with other bodies corporate that are now under the FMA Act, in particular where the body had previously been under the CAC Act and has been moved to the FMA Act, consistent with the Australian Government's *Governance Arrangements for Australian Government Bodies* policy (Governance Policy).³²

In essence, **Schedule 6** ensures that any property that the ACCC held or any money that it received while subject to the CAC Act was on the Commonwealth's behalf.

Part 1—Amendment

Item 1 amends the *Competition and Consumer Act 2010* by adding **new subsections 6A(3), 6A(4) and 6A(5)**. The theme of these new subsections is that where the ACCC holds certain assets, it does so on the Commonwealth's behalf. **New subsection 6A(3)** provides that any real or personal property that the ACCC holds is held for and on behalf of the Commonwealth while **new subsection 6A(4)** provides that money that the ACCC receives is on behalf of the Commonwealth. **New subsection 6A(5)** provides that a right to sue is taken not to be personal property for the purposes of **new subsection 6A(3)**.

Part 2—Transitional provisions

Part 2 contains two provisions. **Item 2** relates to property that the ACCC holds, and provides that any real or personal property that the ACCC held before **Schedule 10** commences is taken, after **Schedule 10** commences, to be real or personal property that the ACCC holds for and on behalf of the Commonwealth.

Item 3 deals with the right to sue and provides that Schedule 10 does not affect the ACCC's right to sue.

32. Ibid., p. 8.

Schedule 7—Amendment of the *Criminology Research Act 1971*

The amendments in **Schedule 7** have two main purposes. The first is to merge the Criminology Research Council (CRC) with the Australian Institute of Criminology (AIC).

As part of this process, a new Criminology Research Advisory Council (CR Advisory Council) will be established to advise the merged body, and the Board of Management of the AIC and the CRC will be abolished.

The second purpose of Schedule 7 is to move the merged body to the FMA Act.

The AIC was established in 1973 and operates under the *Criminology Research Act 1971* (CR Act). In terms of its operations:

The Institute seeks to promote justice and reduce crime by undertaking and communicating evidence-based research to inform policy and practice.³³

Under section 8 of the CR Act, the AIC has a Board of management, which ‘is charged with the general direction of the Institute’.

Part III of the CR Act also establishes a Criminology Research Council, whose members are appointed to represent the Commonwealth, states and territories. The main functions of the Council are to control and administer the AIC’s research fund and determine research project priorities under that fund.

The amendments in the Bill abolish the AIC Board and Criminology Research Council and create a new Criminology Research Advisory Council.

Part 1—Amendments

Section 4 of the CR Act deals with the interpretation of that Act. **Item 1** inserts into section 4 a new definition namely that of ‘Advisory Council’. This is the CR Advisory Council established under **new section 33** by **item 17**. According to the Explanatory Memorandum:

The CR Advisory Council will be responsible for advising the Director on a number of issues set out in new section 33 and will provide an important forum for representation of stakeholder views in relation to the work of the AIC. The CR Advisory Council will include representatives from the Commonwealth and all States and Territories.³⁴

Items 2, 3 and 4 respectively repeal the definitions of the Board of management of the AIC, the CRC, and the Criminology Research Fund in the CR Act. These definitions will no longer be required because the Board and the CRC are to be abolished.

33. Australian Institute of Criminology website, viewed 15 October 2010, http://www.aic.gov.au/en/about_aic.aspx.

Existing section 5 deals with the establishment of the AIC. **Item 5** repeals subsections 5(2) to (4) and replaces them with **new subsection 5(2)**. It provides for the AIC to consist of the Director (**new paragraph 5(2)(a)**) and the staff of the AIC (**new paragraph 5(2)(b)**).

Section 6 of the CR Act lists the AIC's functions. These are extensive, with 12 separate functions. **Item 6** repeals section 6 and inserts **new section 6** which specifies the AIC's revised functions. They include promoting justice and reducing crime by conducting criminological research (**new subparagraph 6(a)(i)**), and administering programs for awarding grants and engaging specialists for criminological research that is relevant to the public policy of the states and territories (**new subparagraph 6(c)(i)**). Note however the existing section 6 functions are largely transferred to become functions of the AIC Director under section 16.

Section 15 deals with the appointment of the AIC Director, who is currently appointed by the Governor-General. **Under item 10**, the appointment is now to be made by the Attorney-General. Likewise termination is to be by the Attorney-General, rather than the Governor-General, as is currently the case.

Item 11 repeals section 16 of the CR Act, which deals with the functions of director of the AIC, and substitutes **new section 16**. The Explanatory Memorandum notes that **new section 16** gives the director more extensive functions than is now the case.³⁵ Further:

Consistent with the enabling Acts of many other FMA Act agencies, new section 16 will transfer a number of the current functions of the AIC to the Director. The amendments are based on current section 6 (which provides the functions of the AIC under the CAC Act) and will also set out the circumstances under which the Director must take into account the views of the new CR Advisory Council before providing certain approvals, including payments of grants and engaging specialists relating to criminological research and related activities.³⁶

Section 23 of the CR Act deals with the appointment of staff to the AIC. **Item 15** repeals section 23 and substitutes **new section 23**. **New subsection 23(1)** creates two categories of employee: those employed under the *Public Service Act 1999* (**new paragraph 23(1)(a)**) and those employed for a particular project (**new paragraph 23(1)(b)**). The latter provision is intended to allow the temporary employment of researchers on projects.

Item 17 inserts **new Part III** which provides for the establishment and operation of the CR Advisory Council to replace the AIC board and the CRC:

Replacing the AIC Board and the CRC with the new CR Advisory Council will provide an important forum for representation of stakeholder views in relation to the work of the AIC. The new CR Advisory Council will be established under new section 33 in Part III to advise the Director in relation to the general policy and the strategic direction of the AIC, strategic research and

34. Ibid., p. 27.

35. Ibid., p. 28.

36. Ibid.

information dissemination priorities in criminology, and applications for research grants. The Advisory Council will include representatives from the Commonwealth, States and Territories who will be nominated by the relevant Attorney-General for that jurisdiction.³⁷

Item 18 repeals section 50, which exempts from tax laws, the AIC, the CRC, and the Criminology Research Fund. **Item 18** inserts four new sections. **New section 46** establishes the Criminology Research Special Account. Special accounts are essentially ledger accounts in which all payments (debits) and receipts (credits) are recorded that relate to a particular activity or body. **New subsection 46(3)** specifies the items that must be credited to the special account. They include, for example, budget appropriations (**new subparagraph 46(3)(a)**). **New subsection 46(4)** lists items that may be debited to the special account such as the cost of running the AIC (**new subparagraph 46(4)(a)**).

New subsection 47(1) allows the AIC to charge for its services. **New subsection 47(2)** provides that charges must be related to the cost of providing services. This is to ensure that charges are not a tax.³⁸

Part 2—Transitional provisions

Item 19 ensures continuity in appointments by providing for the current members of the CRC and the director of the AIC to become members of the CR Advisory Council (**subitems 19(2)** and **19(3)** respectively). **Item 19** also provides for policy continuity. For example, **subitem 19(5)** provides that a decision that the board of the CRC has made and that is in force before **subitem 19(5)** commences, remains in force as if it had been made by the Director. **Subitem 20** contains similar provisions for employees.

Items 21 and **22** deal respectively with the vesting of AIC property and money, and financial liabilities. The effect of **items 21** and **22** is that AIC assets and financial liabilities transfer to the Commonwealth.

Item 25 provides that it applies to any legal proceedings to which the AIC was a party that were pending before **Schedule 6** commences (**subitem 25(1)**) and that when **Schedule 7** commences, the Commonwealth becomes the party to the proceedings (**subitem 25(2)**) in place of the AIC.

Item 27 ensures that appropriations that have been paid to the government department that administers the CR Act and which the department subsequently passed on to the AIC or the CRC, continue to apply after **Schedule 7** commences, that is, as if the appropriations had been made to the AIC.

37. Ibid., p. 29.

38. Ibid., p. 30.

Item 29 deals with regulations that may be necessary to enable the transition to the new arrangements. **Subitem 29(1)** provides that the Governor-General may make regulations prescribing matters of a transitional nature as required by Part 2 or which are needed to give effect to Part 2.

Schedule 8—Amendment of the *Financial Management and Accountability Act 1997*

As noted above, the FMA Act deals with the governance and proper handling of public finances by bodies to which the FMA Act applies. According to the Explanatory Memorandum, **Schedule 8** has several purposes. One is to remove:

... a note regarding the effect of the FMLA Act 1999 [*Financial Management Legislation Amendment Act 1999*] (covering the introduction of “Special Accounts”, which replaced former “components” of two statutory “Funds”). The text in numerous Acts was corrected by the FFLA Act 2005 [*Financial Framework Legislation Amendment Act 2005*] and the FFLA Act 2006 [*Financial Framework Legislation Amendment Act 2006*], so there is no longer any need for a note to refer to a deeming provision on Special Accounts that appears in the FMLA Act 1999.³⁹

Another purpose is to allow:

... for regulations to establish better governance arrangements for interjurisdictional FMA Act agencies.⁴⁰

Part 2 of the FMA Act is titled ‘General provisions about definitions and offences’. **Item 1** changes the title of Part 2 to ‘General provisions about definitions’.

Section 5 of the FMA Act contains a definition of ‘Special Account’. The note to this definition contains a reference to the *Financial Management Legislation Amendment Act 1999* which converted components of former funds into special accounts. The note is redundant so **item 2** repeals it. Section 31 of the FMA Act is titled ‘Relevant Agency receipts’. **Item 2** changes this title to ‘Retaining prescribed receipts’.

Part 5 of the FMA Act is titled ‘Borrowing and investment’. **Item 3** changes this to ‘Borrowing, investment and involvement in companies’. According to the Explanatory Memorandum, this reflects the addition of **new section 39A** (see below) to Part 5, which deals with the responsibility to inform Parliament about the involvement in a company as transferred from section 45 of the CAC Act.⁴¹

Item 4 inserts **new section 39A** which lists the matters about which the minister must inform Parliament of Commonwealth involvement in a company or a prescribed body.

39. Ibid., p. 2.

40. Ibid.

41. Ibid., p. 33.

These matters include the formation of a company (**new paragraph 39A (1)(a)**) and the acquisition or disposal of shares in a company (**new paragraph 39A(1)(b)**).

Item 5 inserts a **new Part 6A** which deals with interjurisdictional agencies. This contains **new section 43A** which lists the matters that regulations governing interjurisdictional agencies may cover. For example, **new subsection 43A(1)(a)** allows an agency to be prescribed as an interjurisdictional agency while **new subsection 43A(1)(c)** allows a state or territory Minister to be prescribed for an interjurisdictional agency. **New subsection 43A(2)** provides for the making of regulations governing reports, documents, and information relating to the operations of an agency, that the Chief Executive of an interjurisdictional agency may be required to provide.

Schedule 9—Amendment of the *National Transport Commission Act 2003*

The National Transport Commission (NTC) is a statutory corporation which is now subject to only certain CAC Act provisions. The main purpose of **Schedule 9** is to subject the NTC entirely to the CAC Act.

Section 5 of the NTC Act deals with the establishment of the NTC. **Item 1** adds a note at the end of subsection 5(2) to the effect that the CAC Act applies to the NTC.

Section 19 of the NTC Act deals with the termination of appointment of members. Subsection 19(2)(b) provides for the dismissal of a member should that member contravene the disclosure of interests provisions in section 31 without reasonable excuse. **Item 2** repeals subsection 19(2)(b) and substitutes a **new subsection 19(2)(b)** which provides that the Minister may terminate the appointment of a member if that member fails, without reasonable excuse, to comply with obligations under section 27F or 27J of the CAC Act which deal with interests.

Schedule 10—Amendment of the *Parliamentary Service Act 1999*

The purpose of amending the [Parliamentary Service Act 1999](#) is to amend section 66, which deals with payments in special circumstances by the Presiding Officers. Subsection 66(6) provides that ‘Payments under this section are to be made out of money appropriated by the Parliament for the purposes of this section’. **Item 1** repeals subsection 66(6) while **item 2** adds a note which states that ‘Payments under this section are to be made out of money appropriated by the Parliament’. According to the Explanatory Memorandum, the purpose of the amendment is to ensure that payments made under subsection 66(6) of the *Parliamentary Service Act 1999* are not special appropriations.⁴²

42. Ibid., p. 37.

Schedule 11—Repeals

Schedule 11 repeals redundant Acts and provisions that are special appropriations. According to the Explanatory Memorandum:

... this is consistent with the Government's response, in December 2008, to former Senator Andrew Murray's report, *Operation Sunlight – Overhauling Budgetary Transparency* (specifically recommendation 12), which committed to a regular review of special appropriations.⁴³

Part 1—Acts repealed

Part 1 of Schedule 11 repeals six Acts. The Explanatory Memorandum explains the reasons for the repeal of each Act.

Part 2—Provisions repealed

Part 2 repeals provisions in various Acts. The Explanatory Memorandum explains adequately the reasons for the repeal of each provision.

Concluding comments

One of the purposes of the Bill is to move certain government bodies from the CAC Act to the FMA Act. In particular, the Bill proposes to bring two prominent bodies— the Australian Institute of Criminology, and the Australian Law Reform Commission—from the CAC Act to the FMA Act. The Explanatory Memorandum states that this proposed transfer is consistent with the transfer of governance arrangements of a number of other CAC Act bodies to the FMA Act in recent years.⁴⁴ This raises the question of what criteria are used to determine whether a body should fall under the FMA Act or the CAC Act.

Guidelines prepared in 2005 by the then Department of Finance and Administration provide guidance in this respect:

It is preferable that bodies operate under the Financial Management and Accountability Act 1997 (FMA Act). These bodies are financially part of the Commonwealth, holding public money that can only be spent under the authority of an appropriation from the Australian Parliament. The FMA Act should especially apply to primarily budget-funded bodies, regulators and bodies that raise public money under a Commonwealth law.

Staff of FMA Act agencies should be employed under the Public Service Act 1999, unless there is a persuasive case for a different staffing regime. The FMA Act and the Public Service Act reflect executive management structures. Consequently, a board-like structure for an FMA Act agency

43. Ibid., p. 2.

44. Ibid.

should only have an advisory function to assist the Chief Executive, or be used where collective statutory decision-making requires a commission.

If it appears that a governing board will be essential for a body's effective governance, then it would be appropriate for the body to operate under the Commonwealth Authorities and Companies Act 1997 (CAC Act). These bodies are both legally and financially separate from the Commonwealth. The extent of Government control over a Commonwealth authority depends on its establishing legislation. However, Ministers retain responsibility for legislation in their portfolio and this will, typically, include the right to access information that helps with the oversight of this legislation. Ministers are also entitled to expect advice and assistance from their departments in this role.⁴⁵

While the above states a preference for having bodies subject to the FMA Act, and the Explanatory Memorandum identifies the bodies that will subsequently be subject to the FMA Act rather than the CAC Act, no explanations are given for the reasons for the movements. It would be useful if the Government were to state these reasons. On partially related matter, Parliament should also ensure that the changes to the governance structure, functions and composition of the Australian Law Reform Commission in particular are given close examination.

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45. Department of Finance and Administration, *Governance arrangements for Australian Government bodies*, August 2005, p. x, viewed 14 October 2010, <http://www.finance.gov.au/financial-framework/governance/docs/Governance-Arrangements-for-Australian-Government-Bodies.pdf>