

Other amendments and issues relating to the Bill

Proposed amendments to the *Aboriginal and Torres Strait Islander Commission Act 1989* ¹

- 5.1 Section 61 of the ATSIC Act requires ATSIC to prepare budget estimates on a cash basis. Items 4 to 9 of Schedule 2 contain amendments to section 61 to require ATSIC to prepare budget estimates on an accrual basis. The proposed amendments will align the ATSIC Act with the requirements under the FMOs made under the FMA and CAC Acts.
- 5.2 The Committee asked ATSIC how it will be affected by the proposed amendment. ATSIC replied:

That will affect us positively, because we have been under a regime where it has been a cash based ministerial estimates

1 The Bill also includes amendments to the ATSIC Act that are a consequence of the FMLA Act (discussed generally in Chapter 2) and for the purpose of transferring approval powers from the Treasurer to the Finance Minister (discussed generally in Chapter 3).

system with our Minister. We have sought this change in order to go to our Minister on an accrual basis so as to show expenditure incurred rather than money spent.²

Other proposed amendments to the *Financial Management and Accountability Act 1997* ³

Membership of Advisory Committees that report on large waivers, etc

- 5.3 Items 134 and 135 of Schedule 2 amend section 59 of the FMA Act. The section specifies the membership of Advisory Committees that are required, under subsections 33(2) and 34(2) of the FMA Act, to report to the Finance Minister on proposals for an act of grace payment or the waiving of a debt, each in excess of \$100,000.
- 5.4 Paragraph 59(1)(b) and subsection 59(2) are dated because they refer the departments which existed prior to the amalgamation of the Department of Finance and the Department of Administrative Services in 1997.
- 5.5 The proposed amendment to paragraph 59(1)(b) replaces the reference to ‘the Secretary of the Department of Finance’ with a reference to ‘the Secretary of the Department of Finance and Administration’.
- 5.6 Subsection 59(2) currently specifies that the third member of an Advisory Committee is the Chief Executive of the Department of Administrative Services in circumstances where there is no Agency responsible for the matter, or the responsible Agency is one of the other two permanent members of the Committee (that is, the Australian Customs Service and the Department of Finance and Administration).
- 5.7 The proposed amendment to subsection 59(2) replaces the reference to ‘the Chief Executive of the Department of Administrative Services’ with a reference to ‘a Chief Executive nominated by the Finance Minister’.

2 Mr Paul Barrett, ATSIIC, *Transcript*, p.63.

3 The Bill also includes amendments to the FMA Act relating to Special Accounts. These are discussed in Chapter 4.

Delegations by the Treasurer and directions applying to delegations made by the Treasurer or the Finance Minister

- 5.8 Items 130, 131, 132 and 133 of Schedule 2 amend section 53 of the FMA Act to:
- clarify that a Chief Executive may delegate to an official in any Agency, powers or functions that have been delegated to the Chief Executive by the Treasurer; and
 - require a Chief Executive, when subject to directions relating to the exercise of a power or function delegated by the Treasurer or the Finance Minister, to give the corresponding directions to a second delegate. This amendment will align the FMA Act with the subsection 78(9) of the *Public Service Act 1999*.

Other proposed amendments to the *Commonwealth Authorities and Companies Act 1997* ⁴

- 5.9 The Bill provides amendments to the CAC Act to harmonise offence provisions relating to the conduct of officers (Division 4 of Part 3 of the CAC Act) with the Criminal Code. The conduct of officers provisions in the CAC Act are aligned with the *Corporations Act 2001* (Corporations Act). The proposed amendments to the CAC Act follow the alignment of the Corporations Act with the Criminal Code.
- 5.10 The main amendment is contained in Item 87 of Schedule 2 of the Bill. This item restructures subsection 27C(4) of the CAC Act to separate the physical element of the offence (a person being a director of an Authority while a disqualification order is in force against the person) from the defence to the offence (the leave of the Court for the person to be a director). The amendments include a note under subsection 27C(4A) that the defendant bears an evidential burden of proof.

⁴ Chapter 3 contains a discussion of the proposed amendment to the CAC Act to transfer from the Treasurer to the Finance Minister the power to approve certain types of investments of surplus money by certain types of Authorities.

Proposed amendment to the *Native Title Act 1993*

- 5.11 Item 149A inserts a new subsection 206(2) of the *Native Title Act 1993* to clarify that the duties of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund include examination of the annual report of the Indigenous Land Corporation prepared under section 9 of the CAC Act. This amendment reinstates the arrangement that applied prior to the amendments to the ATSIC Act that were a consequence of the commencement of the CAC Act on 1 January 1998.

Conclusion

- 5.12 The Committee is of the view that the proposed amendments to section 61 of the ASTIC Act, sections 53 and 59 of the FMA Act, section 27C of the CAC Act and to section 206 of the *Native Title Act 1993* would improve the financial framework by updating and clarifying, and aligning provisions with budget estimates requirements and the Criminal Code.

Retrospectivity issues

Discussion

- 5.13 The Committee asked if any parts of the Bill apply retrospectively.⁵

- 5.14 Finance replied:

I understand that for legislation to apply retrospectively there needs to be an express statement to that effect ...There is no express statement in this Bill that it applies retrospectively.⁶

- 5.15 The Clerk of the Senate commented:

That refers to explicit retrospectivity, where something in a Bill is explicitly backdated to a date before the commencement of the Bill. But I think [the question] is using the term 'retrospectivity' in a broader sense – namely,

5 *Transcript*, pp.32, 51 and 60.

6 Mr Marc Mowbray-d'Arbela, Finance, *Transcript*, p.32.

something that in some sense affects the way something operated before. When an explanatory memorandum says, 'We're clarifying something' ...you immediately think that is a form of retrospectivity, because it is affecting the way things operated before the Act came into effect ...Some of the provisions of the Bill appear to do that – and I say 'appear' because that is subject to explanations such as we have just had as to what they actually mean.⁷

5.16 After the hearing Finance advised:

It was stated at the hearing that it is the intention of Finance and OPC that the draft Bill would not apply retrospectively in any specific item, or in its effect overall. Finance has consulted with the AGS (and the OPC) and can confirm that the ... Bill is not retrospective, either in any specific instances or generally as a result of the amendments.

[The Bill contains] three savings provisions [that] provide that decisions or actions, made or done prior to commencement of the proposed Act will continue to apply.

However, these savings provisions do not provide the ...Bill with a retrospective effect. They are included to ensure that the wording of the Bill does not change the effect of any actions that had previously been taken under:

- existing Special Accounts established in legislation;
- existing determinations of the Finance Minister establishing Special Accounts; and
- approvals made by the Treasurer or the Treasurer's delegate.^{8 9}

Conclusion

5.17 The Committee is satisfied that the Bill does not provide for any retrospective effect.

7 The Clerk of the Senate, *Transcript*, p.32.

8 Finance, *Submission No.17*, p.54.

9 The three savings provisions are at the following places in the Bill:

- section 4 covers matters in Part 2 of Schedule 1 (Special Accounts and references to the CRF);
- Item 187 of Schedule 2 covers provisions that formerly referred to the Treasurer that are being amended to refer to the Finance Minister;
- Item 188 of Schedule 2 covers determinations made by the Finance Minister that establish Special Accounts under subsection 20(1) of the FMA Act.

Proposed amendments to the *Child Support (Registration and Collection) Act 1988*

Background

- 5.18 Items 139 to 144 of Schedule 1 of the Bill include amendments to the Child Support Act to replace references to ‘Reserve’, ‘transferred to the Reserve’, and ‘paying to the Consolidated Revenue Fund’ with references to ‘Account’, ‘credited to the Account’ and ‘debited from the Account’ respectively.¹⁰

Discussion

- 5.19 The Department of Family and Community Services (FACS) made the following comments about the Child Support Act:¹¹

CSA [the Child Support Agency] has sought the advice from OPC and is satisfied that the amendments proposed to the Child Support Act by the Bill do not change the effect of the existing provisions, and the operation of the Special Account created by the Child Support Act.

However, as part of considering these amendments, the CSA has sought legal advice as to the comprehensiveness of the financial framework provisions of the Child Support Act generally.

This advice has raised the need for an amendment to the existing framework...[as]... no general provision exists to enable the repayment to Consolidated Revenue of amounts drawn under an appropriation for other purposes, eg repayment of payer overpayments, where the payment has already been disbursed to the payee of a liability. An amendment enabling such debiting of the Account generally is required.

The legal advice indicates that the legislative difficulty may have arisen from amendments made by the FMLA Act.¹²

CSA will seek the assistance of the Department of Finance in making any such amendment as part of the legislative process

10 These types of amendments are discussed generally in Chapter 2.

11 Under the AAO, FACS is responsible for the Child Support Act. The Child Support Agency (CSA) is part of FACS.

12 FACS, *Submission No.10*, p.23.

for finalising the Financial Management and Accountability framework.¹³

- 5.20 Finance responded that, in the context of in consultation with portfolio Ministers about the Bill, the Minister for Family and Community Services had agreed to the proposed amendments to the Child Support Act in the Bill. The further amendment proposed by FACS would:

... broaden the types of debits that may be made from the Child Support Account, to assist with some operational requirements of the [CSA] and clarify what may have been a minor unanticipated effect of the deeming provisions that were part of the FMLA Act ...¹⁴

- 5.21 Finance added that the proposed amendment was not necessarily a direct consequence of the FMLA Act so it will not necessarily be appropriately placed in Schedule 1 of the Bill. Consultations with the CSA concerning an appropriate amendment were continuing for the purpose of providing instructions to OPC.¹⁵

Conclusion

- 5.22 The Committee supports an appropriate amendment to the Child Support Act being included in the Bill to address the concerns raised by FACS in its submissions to the inquiry.
- 5.23 The Committee notes that it would be notified of the amendment prior to introduction of the Bill in Parliament.

Proposed amendments to the *Australian Land Transport Development Act 1988*

- 5.24 Items 80 to 118 of Schedule 1 of the Bill includes amendments to the ALTD Act to replace references to 'Reserve', 'paid into the Reserve' and 'paid out of the Reserve', with references to 'Account', 'credited to the Account' and 'debited from the Account and paid by the Commonwealth' respectively.¹⁶

13 FACS, *Submission No.8*, p.15.

14 Finance, *Submission No.17*, p.48.

15 Finance, *Submission No.17*, p.48.

16 These types of amendments are discussed generally in Chapter 2.

- 5.25 The Committee asked whether the Bill contains amendments to the ALTD Act which will change the way the Act operates. The Committee noted that the Bill contained provisions that allows expenditure to be switched between:
- national, arterial and local roads;
 - states and organisations;
 - road and rail projects; and between
 - roads and urban land transport.¹⁷
- 5.26 To help explain that no changes are made to the ALTD Act in the Bill, other than the consequential amendments arising from the FMLA Act, Finance produced a marked-up version of the ALTD Act which highlighted the references that would be changed by the Bill.¹⁸
- 5.27 Finance also provided details, obtained from the Department of Transport and Regional Services, of the operational arrangements for expenditure on projects under the ALTD Act.¹⁹
- 5.28 Appendix L contains a copy of the marked-up version of the ALTD Act and the operational arrangements applying under the ALTD Act.

Conclusion

- 5.29 The Committee notes that proposed amendments to the ALTD Act in the Bill do not alter the operations of the ALTD Act.

Proposed amendments to the *Safety, Rehabilitation and Compensation Act 1988*

- 5.30 In Audit Report No.18, 2002-03, ANAO noted that current practice of Comcare Australia (Comcare) for making compensation payments to Commonwealth employees was not aligned with the requirements of the SRC Act. ANAO recommended that Comcare review the process for administering compensation payments under the SRC Act.²⁰

17 *Transcript*, pp.51–2.

18 Finance, *Submission No.17*, pp.72–119.

19 Finance, *Submission No.17*, pp.120–2.

20 ANAO, Report 18, *Management of Trust Monies*, 2002-03, pp.37-38, recommendation 2.

- 5.31 At the hearing of the Committee's inquiry on *Review of Auditor-General's reports, second and third quarters 2002-03*, Comcare commented that there were significant advantages to both employees and employers in maintaining the existing process.²¹
- 5.32 At the hearing Finance agreed to consider the Committee's proposal that the Bill include an amendment to the SRC Act.²²
- 5.33 In a later submission, Finance advised that it will propose amendments to the SRC Act be included in the Bill to:
- provide that the payment of compensation made by the employer has been made by the employer as agent of Comcare;
 - provide that the payment discharges the liability under Division 3 of Part II of the SRC Act;
 - require Comcare to reimburse the employer the amount of the payment made;
 - ensure that section 116 of the [SRC] Act does not preclude the granting of sick leave before liability is accepted; and
 - define 'an employer' for the purposes of the amendment.²³

Conclusion

- 5.34 The Committee supports amendments to the SRC Act being included in the Bill to align the SRC Act with current good practice whereby Comcare makes compensation payments to agencies.
- 5.35 The Committee notes it would be notified of the amendments prior to introduction of the Bill in Parliament.

21 Auditor-General's Reports Review, *Transcript*, 30 April 2003, p.3.

22 Auditor-General's Reports Review, *Transcript*, 30 April 2003, p.4.

23 Finance, *Submission No.17*, pp.45–6.

