The Senate

Finance and Public Administration Legislation Committee

Public Governance and Resources Legislation Amendment Bill (No. 1) 2015 [Provisions]

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Membership of the Committee

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Senator the Hon Joseph Ludwig	ALP, QLD
Senator Bridget McKenzie	NAT, VIC
Senator Dean Smith	LP, WA
Senator Janet Rice	AG, VIC

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Chapter 1

Introduction

1.1 On 12 February 2015, the Parliamentary Secretary to the Treasurer, Ms Kelly O'Dwyer MP, introduced the Public Governance and Resources Legislation Amendment Bill (No. 1) 2015 (bill) into the House of Representatives.[1]

1.2 On 5 March 2015, pursuant to the Selection of Bills Committee report, the Senate referred the provisions of the bill to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 23 March 2015.[2]

Objectives of the bill

1.3 The bill proposes amendments to 33 Commonwealth Acts to address matters of a governance or resource management nature.[3] According to the Parliamentary Secretary's second reading speech:

> The bill is part of a broader Public Management Reform Agenda and represents the next stage in the Government's approach towards streamlining and simplifying resource management and governance arrangements across the Commonwealth.[4]

1.4 The bill follows on from the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (PGPA (C&T) Act). According to the Explanatory Memorandum:

> [The PGPA (C&T) Act] implemented a range of amendments to the enabling legislation of Commonwealth entities and companies to harmonise their operation with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) from 1 July 2014.[5]

1.5 In its submission the Department of Finance (Finance) referred to the amendments by the PGPA (C&T) Act:

> [These] amendments reflected the variety of governance and operational arrangements across the Commonwealth, with the nature of amendments required to individual enabling legislation varying from entity to entity. The policy approach has been to align entities' enabling legislation with the PGPA Act wherever possible, with the intention being to implement a more consistent and coherent resource management framework, without

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1 House of Representatives, *Votes and Proceedings*, No. 95 – 12 February 2015, p. 1108.

2 *Journals of the Senate*, No. 82 – 5 March 2015, pp 2257-2258.

3 Explanatory Memorandum (EM), p. 5.

4 Ms Kelly O'Dwyer MP, Parliamentary Secretary to the Treasurer, *House of Representatives Hansard*, 12 February 2015, pp 2-3.

5 EM, p. 5.

impinging on the statutory obligations of entities to the parliament and to the community.[6]

1.6 Finance continued:

> Due to the complexity in the legislative program, with contingent amendments potentially requiring multiple scenarios to be accommodated and limited time to resolve issues, for example in relation to the restructuring of Environment and Employment portfolio bodies, not all amendments were able to be addressed in the PGPA (C&T) Act. As a result, some entities have been subject to interim transitional arrangements, developed in consultation with entities and portfolio departments. Importantly, entities' capacity to meet their statutory obligations has not been compromised.
>
> The Bill addresses some of these outstanding matters.[7]

Summary of the bill

1.7 The bill includes:

- technical amendments that would further improve the operation of the PGPA Act, including a provision to support the administration of GST obligations of non-corporate Commonwealth entities;
- amendments to provisions within the PGPA (C&T) Act that would streamline transitional arrangements supporting the implementation of the PGPA Act;
- amendments to the enabling legislation of Commonwealth entities intended for inclusion in the PGPA (C&T) Act but unable to proceed at that time; and
- amendments to improve and clarify the governance and resource management arrangements of the enabling legislation of Commonwealth entities that have been identified in consultations with those entities during and since the development of the PGPA (C&T) Act.[8]

Conduct of the inquiry

1.8 Details of the inquiry, including links to the bill and associated documents, were placed on the committee's website at: www.aph.gov.au/senate_fpa.

1.9 The committee also directly contacted a number of relevant organisations to notify them of the inquiry and invite submissions by 16 March 2015. The committee received four submissions and these are listed at Appendix 1.

1.10 The committee decided to prepare its report on the basis of submissions received and available information. The committee thanks those who assisted by providing submissions to the inquiry.

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6 *Submission 4*, p. 4.

7 *Submission 4*, p. 4.

8 EM, p. 5.

Consultation on the bill

1.11 The EM explains the consultation process for the PGPA Act and notes the PGPA (C&T) Act was developed in consultation with Commonwealth entities over the course of 2013-14:

> [M]any of the amendments included in this Bill were identified during those consultations. The period following the passage of the [PGPA and PGPA (C&T)] Acts has also provided an opportunity for reflection and consultation on the operation of the provisions of the Acts and associated rules. In this context, the Bill has been developed to take opportunities to make further improvements to the operation of the resource management framework.[9]

1.12 The EM states that the bill has been prepared in consultation with affected Commonwealth entities:

> Following nominations for amendments from entities, draft legislative amendments were developed by the Office of Parliamentary Counsel.
>
> The advice of the Australian Government Solicitor has also been sought as the drafting of the Bill progressed, to ensure both the efficacy of proposed provisions and alignment with policy intent.[10]

Discussion of the bill

Amendments in Schedules 3 and 4

1.13 The amendments in Schedules 3 and 4 of the bill propose changes to the *Clean Energy Regulator Act 2011* (CER Act) and the *Climate Change Authority Act 2011* (CCA Act) to confirm governance arrangements for the Clean Energy Regulator and the Climate Change Authority.

1.14 Schedule 3 of the bill amends the CER Act and the CCA Act to provide that the Clean Energy Regulator and the Climate Change Authority are not bodies corporate and do not have a separate legal identity from that of the Commonwealth:

> [The Clean Energy Regulator and the Climate Change Authority] already hold assets and incur liabilities only for and on behalf of the Commonwealth. They do not require body corporate status to perform their statutory functions. Accordingly, the proposed amendments confirm the status of the CER and CCA as non-corporate Commonwealth entities.[11]

1.15 The amendments in Schedule 4 amend the CER Act and the CCA Act to 'list the relevant roles, membership, functions and powers of each entity for the purposes of the PGPA Act'.[12]

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9 EM, p. 7.

10 EM, p. 7.

11 EM, p. 14.

12 EM, p. 16.

1.16 In its submission the Clean Energy Regulator stated that it had been consulted on the proposed amendments to its enabling legislation and 'fully supports them'.[13]

1.17 The Clean Energy Regulator provided the following information by way of background:

> [T]he Clean Energy Regulator was identified as one of several 'hybrid' Commonwealth entities under the *Financial Management and Accountability Act 1997*. The Clean Energy Regulator was both a body corporate legally separate from the Commonwealth, and subject to the financial management rules that applied to Commonwealth entities without legal separation. In other words, the Clean Energy Regulator possessed characteristics of both a body corporate and a non-body corporate.
>
> In the development of the PGPA Act, the Clean Energy Regulator, along with other hybrid entities, was invited to express a preference to transition to being either a non-corporate or corporate Commonwealth entity. The Clean Energy Regulator preferred to transition to a non-corporate Commonwealth entity because this provided the better match to the Clean Energy Regulator's existing governance and resourcing model.[14]

1.18 The Clean Energy Regulator advised:

> The Clean Energy Regulator does not require corporate status to fulfil its functions and exercise its powers as an independent regulator. The Clean Energy Regulator's independence is secured by the enabling Act, particularly section 41 which provides that the Minister for the Environment may only give directions of a general nature.[15]

1.19 The Clean Energy Regulator stated:

> In our view, the Bill merely proposes legislative arrangements for the Clean Energy Regulator that were intended to be in place before 1 July 2014.
>
> …
>
> As the intended legislative arrangements were not made before 1 July 2014, the Clean Energy Regulator defaulted to being a corporate Commonwealth entity under the PGPA Act. Temporary arrangements to reflect the Clean Energy Regulator's preference and provide for its intended non-corporate status were put in place by the *Public Governance, Performance and Accountability Legislation Amendment Rule 2014* (the Rule). The temporary arrangements in the Rule lapse on 30 June 2015. The Bill would make those arrangements permanent. If the amendments proposed by the Bill are not made, the Clean Energy Regulator would need to make significant changes to its governance practices.[16]

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13 *Submission 3*, p. 1.

14 *Submission 3*, pp 1-2.

15 *Submission 3*, p. 2.

16 *Submission 3*, pp 1-2.

Amendments in Schedule 5

1.20 It its deliberation on the bill, the committee considered the proposed amendments to the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

1.21 Items 8 and 9 of Schedule 5 propose amendments to section 136 of the ASIC Act, which deals with the preparation of an annual report, so that the requirements for the annual report of ASIC align, to the extent possible, with those under section 46 of the PGPA Act.[17]

1.22 Subsection 136(3) of the ASIC Act provides that the 'Minister must cause a copy of each annual report to be tabled in each House within 15 sitting days of that House after the day on which the Minister receives the report'. Item 9 of Schedule 5 repeals subsection 136(3) 'as this is now covered by section 46 of the PGPA Act'.[18]

1.23 Section 46 of the PGPA Act:

- sets out the requirement for the accountable authority of a Commonwealth entity to prepare an annual report and give the annual report to the entity's responsible Minster for presentation to the Parliament (subsection 46(1));
- provides the timeframe for when the annual report must be given to the responsible Minister (subsection 46(2));[19]
- states that the annual report must comply with any requirements prescribed by the rules (subsection 46(3)); and
- that any rules made for the purposes of subsection 46(3) must be approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit (subsection 46(4)).

1.24 Section 46 of the PGPA Act does not appear to set out the timeframe in which the responsible Minister is to table an entity's annual report in Parliament.[20]

1.25 The committee notes that the Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies, dated 29 May 2014, and approved by the Joint Committee of Public Accounts and Audit provides:

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17 EM, p. 17.

18 EM, p. 17.

19 The timeframe is: the 15th day of the fourth month after the end of the reporting period for the entity; or the end of any further period granted under subsection 34C(5) of the *Acts Interpretation Act 1901*.

20 A similar issue would appear to arise in relation to item 25 of Schedule 6, which amends the *Industrial Chemicals (Notification and Assessment) Act 1989*. Item 25 of Schedule 6 repeals a requirement for the responsible Minister to table a copy of an annual report on the operation of that Act before each House of Parliament within 15 sitting days of that House after its receipt by the Minister. The proposed amendment is that the annual report prepared by the Secretary of the Department and given to the Minister under section 46 of the PGPA Act for a period must include a report on the operation of the *Industrial Chemicals (Notification Assessment) Act 1989*.

> A copy of the annual report is to be presented to each House of the Parliament on or before 31 October in the year in which the report is given. If Senate Supplementary Budget Estimates hearings are scheduled to occur prior to 31 October, it is best practice for annual reports to be tabled prior to those hearings.[21]

1.26 The Requirements for Annual Reports are reviewed annually to take account of changes to reporting requirements prescribed in legislation, arising from new policy, or recommendations in Parliamentary, Australian National Audit Office or other reports. It is anticipated that the next review of the Requirements for Annual Reports will contain significant revisions for the 2014-15 financial year due to the commencement of the PGPA Act.[22]

Amendments in Schedule 6

1.27 Schedule 6 of the bill contains amendments which have been identified by entities and are of a governance or resource management nature.[23] The committee received submissions from the Australian National Audit Office (ANAO) and the Reserve Bank of Australia, whose enabling legislation are subject to proposed amendments in Schedule 6.

Amendments to the Auditor-General Act 1997

1.28 Section 36 of the *Auditor-General Act 1997* (Auditor-General Act) deals with the confidentiality of information obtained during the course of 'performing an Auditor-General function'.[24] Subsection 36(3) provides that a person who receives a 'proposed report, or an extract from a proposed report' must not disclose any of the information in the report, or extract, except with the consent of the Auditor-General.[25]

1.29 The amendment to the Auditor-General Act in Schedule 6 of the bill:

> [W]ould repeal and substitute subsection 36(3) of the [Auditor-General Act] to ensure that exemptions from disclosing information currently accorded to proposed reports, prepared under section 19 of the [Auditor-General] Act [extend to] drafts and extracts of proposed reports and to any

21 Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies*, approved by the Joint Committee of Public Accounts and Audit under subsections 63(2) and 70(2) of the *Public Service Act 1999*, 29 May 2014 (Requirements for Annual Reports), Part 1, guideline 4 – Timeline.

22 See Requirements for Annual Reports, p. i.

23 EM, p. 22.

24 The main functions and powers of the Auditor-General are set out in Part 4 of the Auditor-General Act.

25 Proposed reports are prepared pursuant to section 19 of the Auditor-General Act.

> other report (including drafts) created for the purposes of preparing a proposed report under section 19 of the [Auditor-General] Act.[26]

1.30 In its submission, the ANAO explained the background and purpose of the proposed amendment:

> It is a long-standing and well accepted practice for a performance audit to involve the preparation by the ANAO of an interim audit report, or part thereof, prior to the subsequent preparation of a proposed report pursuant to Section 19 of the [Auditor-General] Act. An interim report is designed to confirm factual information with public sector agencies and other key stakeholders, and to outline tentative audit findings and conclusions for discussion with the recipient(s). As such, these documents have an important role in the preparation of a performance audit report, both in terms of obtaining an agreed understanding of the facts and providing the opportunity for the relevant parties to comment on the issues arising from the audit. While our practice over many years has been to provide these reports to entities on an in-confidence basis, they do not have any legal status, as the [Auditor-General] Act currently refers only to proposed reports, the confidentiality of which is protect by section 36(3) of the [Auditor-General] Act.
>
> The proposed amendment…has the effect of protecting the report's confidentiality in the same way as a proposed report is [currently] protected by section 36(3) of the [Auditor-General] Act.[27]

1.31 The ANAO's submission noted that the proposed amendment has the support of the Joint Committee of Public Accounts and Audit and has been agreed to by the Prime Minister.[28]

Amendments to the Reserve Bank Act 1959

1.32 Items 28 and 29 of Schedule 6 amend the *Reserve Bank Act 1959* (RBA Act):

> The proposed amendments seek to ensure that disclosure requirements for members of the Reserve Bank Boards be varied to allow for their responsibilities in relation to monetary policy decisions, and the Bank's role in financial system stability, to be consistent with the former arrangements

26 EM, p. 22. Item 4 of Schedule 6 provides that the amendments made to the Auditor-General Act by the bill apply in relation to 'any disclosure of information, in a report or extract, that occurs after this item commences, whether the report or extract was received before or after this item commences'.

27 *Submission 2*, p. 1.

28 *Submission 2*, p. 1.

> under the [RBA Act] and the [*Commonwealth Authorities and Companies Act 1997*] class order issued by previous Treasurers.[29]

1.33 The Reserve Bank stated:

> [T]he amendments modify the material personal interests disclosure regime under the [PGPA Act] to appropriately recognise the policy roles of the two Boards of the Reserve Bank.
>
> [T]he amendments are in precisely the same terms as those currently in force until 30 June 2015, under the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Rule 2014*.[30]

1.34 In its submission, the Reserve Bank indicated its support for the amendments.[31]

Committee view

1.35 The committee notes the consultation which has occurred on the bill and that no issues have raised in submissions in relation to the bill.

1.36 The committee is concerned about the amendments to the annual reporting requirements under the ASIC Act (item 9 of Schedule 5). The committee would suggest Finance consider whether there is a need to issue a supplementary Explanatory Memorandum to reflect that subsection 136(3) of the ASIC Act, which is proposed to be repealed by this bill, is not covered by section 46 of the PGPA Act, as stated in the Explanatory Memorandum. The committee also believe any supplementary Explanatory Memorandum should outline, if the timeframe currently set out in section 136(3) of the ASIC Act is to be repealed, whether this requirement will be provided for elsewhere in legislation, or whether the intention is to rely on the timeframe in the Requirements for Annual Reports.

1.37 The committee notes that the government has indicated amendments to the bill which seek to standardise post-2004 superannuation arrangements for Parliamentarians, to bring these arrangements in line with the public service. The committee understands that these amendments have bipartisan support.[32]

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29 EM, p. 25. The 'Reserve Bank Boards' are the Reserve Bank Board and the Payments System Board. The Reserve Bank of Australia's website states that under a class order made by the Treasurer in 2001, members of the Reserve Bank Board must furnish a confidential statement of material personal interests to the Treasurer annually, and notify any substantial change since their previous annual statement. Compliance with this class order enables members to discuss and decide monetary and financial system stability policies, and matters relating to indemnities to members of the Reserve Bank Board and Payments Systems Board, notwithstanding a material personal interest in the outcome. The class order does not extend to other matters that may come before the Reserve Bank Board, see Code of Conduct for Reserve Bank Board Members, available at: www.rba.gov.au/about-rba/code-conduct-rba-board-members.html (accessed 17 March 2015).

30 *Submission 1*, p. 1.

31 *Submission 1*, p. 1.

32 Mr Angus Taylor MP, *House of Representatives Hansard*, 17 March 2015, pp 65-66.

Recommendation 1

1.38 The committee recommends that the Senate pass the bill.

Senator Cory Bernardi

Chair

APPENDIX 1

Submissions received by the committee

Submissions

1 Reserve Bank of Australia

2 Australian National Audit Office

3 Clean Energy Regulator

4 Department of Finance