

## **Proposed transfer of approval powers from the Treasurer to the Finance Minister**

### **Approval powers proposed for transfer**

#### **Background**

3.1 Schedule 2 of the Bill includes amendments to 27 Acts to transfer approval powers of the Treasurer to the Finance Minister. These Acts are listed in Appendix H. The approval powers relate to:

- borrowing and other money raising from financial markets by entities that are legally separate from the Commonwealth, for example:
  - ⇒ the Australian Broadcasting Corporation;
  - ⇒ the Australian Nuclear Science and Technology Organisation; and
  - ⇒ the Defence Housing Authority;
- the investment of surplus money by Authorities that are not Government Business Enterprises or Statutory Marketing Authorities, other than for investment on deposit with a bank or in securities of, or guaranteed by, the Commonwealth, a State or a Territory;<sup>1</sup> and
- the provision of Commonwealth guarantees, including a guarantee to an entity, placing limits on a guarantee given by an entity to a third party, and providing a guarantee to a subsidiary of an entity. The guarantees are usually in relation to the repayment of borrowing and interest due on the borrowing.

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<sup>1</sup> This approval power is contained in paragraph 18(3)(d) of the CAC Act.

- 3.2 The Committee asked which entities, other than CAC bodies, were covered by the proposal to transfer approval powers from the Treasurer to the Finance Minister.<sup>2</sup>
- 3.3 Finance advised the entities were the:
- Albury-Wodonga Development Corporation;
  - Co-operative Farmers and Graziers Direct Meat Supply Limited;
  - High Court of Australia;
  - Queensland Fisheries Management Authority;
  - Administration of Norfolk Island; and
  - Holders of a pastoral homestead lease or an agricultural lease, granted under an Ordinance of the Northern Territory of Australia relating to Crown lands, but not including a company (under section 3 of the *Northern Territory (Lessees' Loans Guarantee) Act 1954*).<sup>3</sup>

## Discussion

- 3.4 Finance identified the following benefits from the transfer of approval powers from the Treasurer to the Finance Minister:

It will co-locate in one central portfolio financial oversight powers of Commonwealth entities, particularly Budget-dependent entities. In particular, more efficient and effective decision-making will be possible about whether an entity should borrow, or otherwise raise money for investment purposes, from the Commonwealth or from financial markets.

It will align guarantee powers with Regulation 14 of the *Financial Management and Accountability Regulations 1997*. This regulation gives the Finance Minister the power to authorise loan guarantees on behalf of the Commonwealth.

It will align the borrowing approval powers with the powers already given to the Finance Minister in section 36 of the *Health Insurance Commission Act 1973* (as amended on 4 September 2002) and in section 62 of the *Sydney Harbour Federation Trust Act 2001* (commenced on 21 September 2001).<sup>4</sup>

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2 *Transcript*, p.36.

3 Finance, *Submission No.17*, p.67. The Acts covering these entities are separately identified in Appendix H.

4 Finance, *Submission No.9*, pp.2–21.

3.5 Treasury stated:

Treasury is supportive of the proposals to transfer the powers of approval over borrowing, provision of borrowing guarantees and money raising from the Treasurer to the Minister for Finance and Administration. Such a transfer of responsibilities would be consistent with the Minister for Finance and Administration's financial oversight role of these entities.

It should be noted that the Treasurer's power to provide guarantees for borrowings undertaken by Commonwealth entities is subject to the Government's clear policy of not issuing further formal Commonwealth guarantees for commercial entities. This policy reflects the implementation of competitive neutrality principles to government business arrangements and these principles need to continue to be observed.<sup>5</sup>

3.6 The Committee asked why Treasury had raised the issue of competitive neutrality in the context of the transfer of guarantee powers. Treasury responded:

It is simply to reinforce the notion of the current policy, and to be alert to the fact that these foreign guarantees probably are not used very often. While they may be on the statute book, in practice they have not been used; they have to be used consistent with the competitive neutrality principles.<sup>6</sup>

3.7 The Committee asked if guarantees had been granted in the past without the approval of the Treasurer.<sup>7</sup> Treasury replied:

Schedule 2 of the Financial Framework Legislation Amendment Bill 2003 currently lists 20 Acts that are not the administrative responsibility of Treasury, but for which the Treasurer has the power to guarantee borrowing by Commonwealth entities. Ten of these 20 Acts provide for the Treasurer to delegate this power to officials. In practice, delegations are exercised only rarely. For the one instance among these Acts where a delegation to officials has been observed there has not been any subsequent action by officials to grant or provide a borrowing guarantee.<sup>8</sup>

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5 Treasury, *Submission No.7*, p.14.

6 Mr Robert Sturgiss, Treasury, *Transcript*, p.37.

7 *Transcript*, p.37.

8 Treasury, *Submission No.16*, p.38.

3.8 The Committee asked if any consideration had been given during the drafting of the Bill to establish accountability requirements for the approval of guarantees to clients and reporting such guarantees to the Committee and to Parliament, or was it considered sufficient to report them in annual reports.

3.9 Finance responded:

The question was: has any consideration been given to separately reporting them to this Committee? The answer is no. They are, of course, picked up in the contingent liabilities, the consolidated financial statements [CFS] and the statement of risks which is published.<sup>9</sup>

## Delegation powers proposed for the Finance Minister

### Background

3.10 Under the current legislation the Treasurer has delegation powers in 10 out of the 27 Acts in which the Treasurer has approval powers. Details are provided in Appendix I. In all of the Acts, except one, in which the Treasurer has a delegation power, the power is to a person performing the duties of an office in Treasury.<sup>10</sup>

3.11 The Bill provides the Finance Minister with delegation powers both in relation to all of the powers transferred from the Treasurer, and in relation to the Finance Minister's existing powers under the *Health Insurance Commission Act 1973* and the *Sydney Harbour Federation Trust Act 2001*.

3.12 The Bill provides a delegation power in each Act to an official within the meaning of the FMA Act. Section 5 of the FMA Act defines an official as a person who is in an Agency or is part of an Agency.

### Discussion

3.13 Finance explained the reasons for providing the delegation powers:

The case for providing a delegations power is that it can make for more efficient public administration, for example where the

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<sup>9</sup> Mr Jonathan Hutson, Finance, *Transcript*, p.37.

<sup>10</sup> The one exception is the *Northern Territory (Lessees' Loans Guarantee) Act 1954*. Under section 5 of that Act the Treasurer may delegate to 'a person'.

approval sought is of the same type as an earlier approval given, or where the approval represents a continuation of a previous approval. ... Delegations made by the Finance Minister would typically be made to an official of the Department of Finance and Administration.<sup>11</sup>

Not all Acts currently have a delegation capacity for the Treasurer. Our view was that there was no strong rationale for that inconsistency. Accordingly, now that we are co-locating the powers to the Finance Minister, there will also always be a delegation capacity for the Finance Minister.<sup>12</sup>

3.14 Mr Kennedy pointed out:

As a matter of law it would probably have been open to the Treasurer to authorise officers of his department to exercise this power on his behalf. In exercising that power, they would be doing it for and on behalf of the Treasurer. The delegation power, which is included now with the substitution of the Finance Minister, allows the conferral of power to be done more formally and to include specific conditions.<sup>13</sup>

3.15 The Committee asked the ANAO whether it had a view about the additional delegation of powers for the Finance Minister proposed in the Bill.<sup>14</sup>

3.16 ANAO responded:

Delegations are formal mechanisms which provide convenience and practicalities in the exercise of a power but which should also address the risks and responsibilities inherent in that power. Delegations should be made to persons or positions at an appropriate level of responsibility. As a matter of sound risk management, these factors should be considered in making delegations.<sup>15</sup>

3.17 The Committee asked ATSIC if it had a view about relying on a delegate in Finance or in the Department of Immigration and Multicultural and

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11 Finance, *Submission No.9*, p.21.

12 Mr Marc Mowbray-d'Arbela, Finance, *Transcript*, p.38.

13 Mr Maurice Kennedy, *Transcript*, p.39.

14 *Transcript*, p.39.

15 ANAO, *Submission No.13*, p 32.

Indigenous Affairs for placing financial limits on ATSIC providing guarantees to third parties under section 15 of the ATSIC Act.<sup>16</sup>

3.18 ATSIC responded:

The transfer of approval power from the Treasurer to the Minister of Finance and Administration, and the subsequent sub delegation to an official, in relation to the setting of a monetary limit on the Commission's power to give guarantees as outlined in Section 15(2) of the ATSIC Act, should not adversely impact on the Commission's operations, assuming the delegate is agreeable to maintaining at least the current limit of \$5 million set by the Treasurer.<sup>17</sup>

3.19 The Wheat Export Authority, which is a statutory authority subject to the CAC Act (Authority), stated that the delegation provided under the CAC Act should be to 'officers' rather than to 'officials' because only the former term was used in the CAC Act.<sup>18</sup>

3.20 This view was supported by the Australian Broadcasting Corporation, which is also an Authority. It stated that under the CAC Act there was a definition of 'officer' but no definition of 'official'. The Corporation pointed out that the term 'official' refers to the FMA Act. The Corporation requested that the Committee consider the proposed reference to the FMA Act in the *Australian Broadcasting Corporation Act 1983*.<sup>19</sup>

3.21 Finance advised:

...under the FMA Act the Finance Minister is able to delegate the Minister's powers or functions (other than the power to make Finance Minister Orders) only to an official, as defined for the purposes of the FMA Act. The Finance Minister does not have a power, under the CAC Act, to delegate the Finance Minister's existing powers or functions to an officer.<sup>20</sup>

It would not be appropriate to provide the Finance Minister with a power to delegate the approval powers to an officer, as defined under the CAC Act, for the following reasons:

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16 *Transcript*, p.40.

17 ATSIC, *Submission No.14*, p.33.

18 Wheat Export Authority, *Submission No.2*, p.3.

19 Australian Broadcasting Corporation, *Submission No. 5*, p.9.

20 In section 5 of the CAC Act an officer of an Authority is defined as a director of the Authority, or any other person who is concerned in, or takes part in, the management of the Authority.

- Delegation to an ‘officer’ under the CAC Act could place that person into a position where there is a conflict of interest.
- [Authorities] have statutory independence from the Commonwealth. This independence might be interpreted, or perceived, as giving an officer independence in relation to the powers or functions delegated by the Finance Minister.<sup>21</sup>

3.22 After the hearing, Finance consulted the Attorney-General’s Department (AGD) about the appropriateness of providing the Finance Minister with a delegation power under each of the relevant Acts in Schedule 2 of the Bill. Finance subsequently advised:

Finance has reviewed the appropriateness of including a delegation power under the *Co-operative Farmers and Graziers Direct Meat Supply Limited (Loan Guarantee) Act 1978*. Under section 5 of that Act, a guarantee to the company may only be given if the Treasurer of the State of Victoria gives a like guarantee. Under these arrangements where a State Minister is involved in giving the guarantee under this Act, it would be more appropriate for the power of the Finance Minister, and not a delegated official, to be used in deciding whether the Commonwealth should provide a guarantee to the company.

Accordingly, Finance has instructed OPC to remove from the ...Bill the delegation power provided under the *Co-operative Farmers and Graziers Direct Meat Supply Limited (Loan Guarantee) Act 1978*.<sup>22</sup>

3.23 The Committee would be notified of the amendment prior to introduction of the Bill in Parliament.

## Definition of the ‘Finance Minister’

3.24 Many items in Schedule 2 of the Bill replace references to the ‘Minister for Finance’, in several Acts, with references to the ‘Finance Minister’. These amendments complement the amendments being made in the same Acts to transfer approval powers from the Treasurer to the Finance Minister. In each Act a definition of the Finance Minister is inserted as the Minister who administers the FMA Act.

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<sup>21</sup> Finance, *Submission No.17*, p.66.

<sup>22</sup> Finance, *Submission No.17*, p.67.

## Conclusion

- 3.25 The Committee considers that the proposed amendments to transfer approval powers from the Treasurer to the Finance Minister and to provide the Finance Minister with powers to delegate to officials, within the meaning of the FMA Act, would improve the financial framework by providing more uniform, and therefore more efficient, approval processes.
- 3.26 The Committee accepts Finance's argument that the delegation should not be to an 'officer' as defined under the CAC Act.
- 3.27 The Committee also agrees with Finance's proposal that the Finance Minister not be given a delegation power in relation to the Minister's powers and functions under the *Co-operative Farmers and Graziers Direct Meat Supply Limited (Loan Guarantee) Act 1978*.
- 3.28 The proposed replacement of references to 'Minister for Finance' with references to 'Finance Minister' would improve consistency of terminology across a number of Acts.