

The Senate

Foreign Affairs, Defence and
Trade Legislation Committee

Provisions of the Australian Trade Commission
Legislation Amendment Bill 2006

May 2006

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Secretariat

Dr Kathleen Dermody
Committee Secretary
Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: + 61 2 6277 3535

Fax: + 61 2 6277 5818

Email: fadt.sen@aph.gov.au

Internet: www.aph.gov.au/Senate/committee/fadt_ctte/index.htm

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Recommendations

Recommendation 1

3.15 The committee recommends that the government provide parliament with a statement of reasons for abolishing Austrade's board which recognises the initial justification for establishing the board in 1985 and the changed circumstances giving rise to the proposed legislation.

Recommendation 2

3.48 The committee recommends that the bill be passed.

Chapter 1

Introduction

Background to the bill

1.1 On 30 March 2006, the Minister for Trade, the Hon Mark Vaile MP, introduced the Australian Trade Commission Legislation Amendment Bill 2006 (the Bill) in the House of Representatives. On the same day, the Senate adopted the Selection of Bills committee report No. 3 of 2006 which recommended that the provisions of the bill be referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 2 May.

Purpose of the bill

1.2 The Australian Trade Commission (Austrade) is responsible for assisting Australian firms develop export markets and international business. The intention of the legislation is to move Austrade from a statutory authority under the *Commonwealth Authorities and Companies Act 1997* to a statutory agency which will be part of the Commonwealth and subject to the *Public Service Act 1999* and a prescribed agency under the *Financial Management and Accountability Act 1997*.

1.3 Under the proposed changes, Austrade will cease to have body corporate status, a CEO will be established to replace the board which is to be abolished and staff of the newly structured Commission will be employed under the Public Service Act. According to Explanatory Memorandum, the proposed changes 'do not amend the functions or objectives of the Australian Trade Commission, or service delivery to Australian business or the community'. The bill includes transitional arrangements to ensure these governance changes do not disrupt service delivery. The Minister told the House:

The changes are of an operational and enabling nature. The amendments do not impact Austrade's functions, nor Austrade's delivery of export promotion and facilitation services to Australian business. Austrade will continue to be focused on assisting Australian businesses to enter and develop export markets.¹

1.4 These amendments are part of the government's response to the Review of the Corporate Governance of Statutory Authorities and Office Holders, (the Uhrig Report) which examined and reported on improving the structures and the governance practices of Commonwealth statutory authorities.

1.5 The changes are intended to improve governance and accountability in the Australian Trade Commission.

1 Mr Mark Vaile, second reading speech, House *Hansard*, 30 March 2006, p. 1.

Submissions

1.6 The committee advertised the inquiry in the *Australian* on Wednesday, 5 and 12 April 2006, and on the committee's website. It also wrote to a number of government agencies, organisations and individuals alerting them to the inquiry and calling for submissions to be lodged preferably by 13 April. In particular, the committee made contact with a number of people who had criticised the Uhrig report to determine whether any of their initial concerns about the implementation of its recommendations applied to Austrade. It also wrote to a number of organisations interested in corporate governance to canvass their views on the provisions of the bill. The committee received 5 submissions which are listed in Appendix 1.

Acknowledgement

1.7 The committee thanks those who assisted with the inquiry.

Chapter 2

Background to the proposed changes to Austrade

2.1 Austrade is only one of many statutory authorities established by the Commonwealth Parliament.

What is a statutory authority?

2.2 A statutory authority in the Commonwealth sphere is a generic term for a body established through legislation for a public purpose.¹ Such bodies undertake functions of government or provide services to the community on behalf of government. There are over 160 Commonwealth statutory authorities, many of which do not share the same characteristics. Differences are found in their governance structures, their status as legal entities separate from the Commonwealth, the extent of their independence from political influence and departmental controls, their level of accountability to government and the Parliament and the financial management legislation that applies to them.² Enabling legislation enunciates the specific set of arrangements under which a statutory authority will operate.³

2.3 Mr Shaun Gath noted that the statutory authority has been a favoured legal structure in Australian public administration. He wrote, however, that a statutory authority is, in some senses, a strange legal entity. In his view:

It is neither the 'fish' of a department of state nor is it the 'fowl' of a traditional company. Rather, it is an entity vested with corporate form (and hence a capacity to contract and interact with other persons in a legally-binding way) by, or pursuant to, an act of Parliament other than through the incorporation provisions of the *Corporations Act 2001*.⁴

2.4 In recent years concerns have been expressed about the proliferation of statutory authorities, the appropriateness of their structure for their given functions, the selection process for board members and office holders, their relationship with the

1 Australian Government, Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, August 2005, p. 4.

2 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 16.

3 See *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 16.

4 Shaun Gath, 'Good Governance and Whole of Government: The Challenge of Connecting Government', *Public Administration Today*, July–October 2005, p. 18. See also Christos Mantziaris, *Ministerial Directions to Statutory Corporations*, Parliament of Australia, Parliamentary Library, Research Paper 7 1998–99, 8 November 1998, p. 3. He wrote that statutory corporations possess governance structures which are idiosyncratic.

relevant Commonwealth department and their minister and the financial framework and accountability regime governing such bodies.⁵

2.5 During the election campaign in October 2001, the Prime Minister, the Hon John Howard MP, acknowledged that the government has 'an obligation to ensure its dealings with Australian business are efficient, fair and transparent'. He announced that a re-elected Coalition government would 'focus on improving the structures and the governance practices of its Statutory Authorities and Office Holders, with particular attention being paid to those that impact on the business community'.⁶

The Uhrig Report

2.6 In November 2002, the government commissioned a review of the corporate governance of statutory authorities and office holders. The main objective in undertaking this review was to improve the performance of statutory authorities and office holders and their accountability frameworks.⁷ Mr John Uhrig, a well known business leader and former Chairman of Rio Tinto and Westpac, was appointed to conduct the review. He was to analyse the existing governance arrangements for statutory authorities and office holders and to identify reforms that might assist in improving the performance of these bodies, without compromising their statutory status.⁸ The review was to address the selection process for board members and office holders, the mix of experience and skills required by boards, their development and their relationship to government.⁹

2.7 The terms of reference expected the review to develop a broad template of governance principles and arrangements that the government might wish to extend to statutory authorities and office holders. In determining the most appropriate structure and governance arrangements, it was to have regard to the 'unique status of the Commonwealth as owner or shareholder, as the sovereign government and the source of regulatory authority.'

5 In general this concern accompanied similar concerns sparked by a number of high profile corporate failures in the private sector. See introduction to Parliamentary Joint Committee on Corporations and Financial Services, *CLERP (Audit Reform and Corporate Disclosure) Bill 2003, Part 1, Enforcement, executive remuneration, continuous disclosure, shareholder participation and related matters*, June 2004, pp. 1–3.

6 Prime Minister, 'Securing Australia's Prosperity', 15 October 2001.

7 The Hon John Howard, Prime Minister of Australia, Media release, 'Review of corporate governance of statutory authorities and office holders', 14 November 2002.

8 Press release, the Prime Minister, the Hon. John Howard, 14 November 2002 and *Securing Australia's Prosperity*, 2001 and Media Release, Senator the Hon Nick Minchin, Minister for Finance and Administration, 'Australia Government Response to Uhrig Report', 12 August 2004.

9 The Hon John Howard, Prime Minister of Australia, Media release, 'Review of corporate governance of statutory authorities and office holders', 14 November 2002.

2.8 The government wanted statutory authorities and office holders assessed against these principles and then to implement reforms that would be taken on a whole-of-government basis.¹⁰

2.9 The review produced two governance templates which clearly delineated between statutory authorities whose major activities were commercial and those undertaking regulatory and service provision operations.

Board template

2.10 In considering whether boards would provide effective or appropriate governance for statutory authorities, the Uhrig Report found that for a board to perform effectively, the government must delegate to it the full power to act. It stated:

In addition to internal strategy setting, the board should be responsible for the supervision of management, the oversight of risk and the ability to appoint and terminate the CEO. In situations where it is feasible to delegate the full power to act, such as commercial operations, a board will provide an effective form of governance.¹¹

2.11 Thus, the board template was judged to be better suited to operate under a management structure that requires powers akin to those of a publicly-listed company board.¹² In Mr Uhrig's view, a board did not provide the appropriate governance structure for statutory authorities operating as service providers or regulators.¹³

2.12 He noted that there are a number of circumstances in which Parliament and government may choose not to provide a wide-ranging power to act, instead, establishing a narrow set of outputs to be delivered by a statutory authority. He explained that:

In these circumstances a parallel can be drawn to closely held companies where a limited delegation of power, and the influence of a limited number of parties controlling the entity, indicate that an independent board may not provide the best governance. In circumstances where government is not providing a broad delegation it is likely that holding either chief executives or commissioners directly accountable for performance will produce better governance.¹⁴

10 The Hon John Howard, Prime Minister of Australia, Media release, 'Review of corporate governance of statutory authorities and office holders', 14 November 2002.

11 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 35.

12 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 54.

13 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 54.

14 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, Executive Summary, p. 5.

2.13 The report recommended that governance boards should be utilised in statutory authorities only where they can be given the full power to act.

2.14 Mr Uhrig then sought to identify an alternative governance structure for statutory bodies where it was deemed not proper or possible for the minister to delegate full responsibility. The Uhrig Report developed an executive management template to accommodate such statutory bodies.

Executive management template

2.15 The executive management template has a more limited governance structure headed by a Chief Executive Officer (CEO) who is directly responsible to the relevant minister. It recognises that the role of the Minister in the governance of some statutory authorities may be considered to be equivalent to that of a single owner of an organisation who would retain the right to direct the management on critical success factors, making a board redundant.¹⁵ It assumes that full delegation of power is not appropriate and that the executive management group will be governed by the minister with support and advice from the department. The CEO bears the full responsibility and accountability for the governance and management of his or her agency.

2.16 Mr Uhrig explained in full:

Where it is not feasible for the Minister and/or Parliament to delegate the full power to act, a governance board is not practical. This is particularly the case in those authorities where Ministers play a key governance role through the determination of policy and strategy. In these statutory authorities the issues to be addressed are limited to the efficient and effective performance of the activities specified through legislative parameters. This is essentially a management-oriented task. The optimum governance structure for most non-commercial authorities is that of an executive management that reports directly to the responsible Minister. The executive management structure may be headed by either one or more commissioners or a CEO. An executive management structure provides a direct line of communication between the Minister and those performing legislated functions, and the clearest and most direct line of accountability to the Minister.¹⁶

2.17 He stated:

Bearing in mind the accountability of Ministers under the Commonwealth system of government (derived from the Westminster system) for many of the functions performed, it is impractical to delegate full power to act in governance terms, particularly to individuals who are neither accountable through elections nor through employment in the public service. The

15 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 35.

16 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 67.

responsibility of governments to govern and the role of Ministers in supervising authorities highlight the importance of establishing governance arrangements that reflect these requirements.¹⁷

The Uhrig Report also looked at the financial framework governing statutory authorities.

The Commonwealth Authorities and Companies Act 1997(CAC) and the Financial Management and Accountability Act 1997 (FMA)

2.18 The two relevant pieces of legislation covering the financial management of Commonwealth bodies are the CAC Act and the FMA Act. They are structured differently and impose different requirements on officers. When introduced into Parliament in 1996, the then Minister for Finance, the Hon John Fahey MP, spelt out the distinction between the two pieces of legislation:

In relation to financial administration, every Commonwealth body falls into one of two categories, according to the basic legal financial status that each body has. It either has the legal capacity, in its own right, by virtue of its incorporating legislation, to acquire ownership of money or other assets coming into its possession; or the body will function only as a financial and custodial agent for the legal entity that is the Commonwealth, without acquiring separate legal ownership of the money and assets it deals with on the Commonwealth's behalf.¹⁸

2.19 Thus, the CAC Act applies to the operations of bodies that are intended to be financially autonomous incorporated Commonwealth bodies that can acquire legal ownership of money in their own right. This act contains reporting, accountability and other rules that apply to Commonwealth authorities and companies. On the other hand, the FMA Act applies to bodies that are, financially, agents of the Commonwealth. It establishes the regulatory, accounting and accountability framework for dealing with and managing the money and property of the Commonwealth.¹⁹

2.20 The Uhrig Report also noted the significant differences between the CAC and the FMA acts. These included:

- CAC Act authorities are bodies corporate with separate legal identities to the Commonwealth and hold money and other assets in their own right.
- CAC Act authorities do not have to comply with government policy, including as it relates to the use of resources (for example, Commonwealth

17 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 35.

18 John Fahey, Second Reading Speech, Financial Management and Accountability Bill 1996, 12 December 1996, p. 8344.

19 John Fahey, Second Reading Speech, Financial Management and Accountability Bill 1996, 12 December 1996, p. 8344.

procurement policy), unless specifically required under sections 28 and 44 of the CAC Act.

- The CAC Act is drafted to accommodate a board structure, whilst the FMA Act assumes an executive management structure.
- The FMA Act provides for clear lines of accountability to the Minister for Finance and Administration in relation to use of public money and other Commonwealth resources.²⁰

2.21 These differences have direct implications for the appropriate governance structure for statutory authorities. The Uhrig report found that the FMA Act provides an appropriate framework for the proper management of public money and property where these assets are owned or held by the Commonwealth.²¹ It stated:

The Act is concerned with bodies that form part of the core Commonwealth financial framework and in comparison to the CAC Act, allows government to more readily direct aspects of the financial management framework of an entity.

The structure of an authority subject to the FMA Act is generally not well suited to the inclusion of a governing board as the Act vests authority and places responsibility on a single chief executive as the head of the statutory authority. It can however, accommodate an advisory board structure where the board might advise the chief executive in a non-binding manner or with a relationship where it is subordinate to the chief executive.²²

2.22 The Uhrig report recommended that the financial frameworks generally be applied based on the governance characteristics of a statutory authority, that is:

- The Commonwealth Authorities and Companies Act 1997 be applied to statutory authorities where it is appropriate they be legally and financially separate from the Commonwealth and are best governed by a board. They fit the Board template.
- The Financial Management and Accountability Act 1997 be applied to statutory authorities where it is appropriate they be legally and financially part of the Commonwealth and do not need to own assets. (Typically, this would mean Budget-funded authorities.). They fit the executive management template.

2.23 In enunciating the government's principles for determining the most appropriate structure and governance arrangements for Australian government bodies,

20 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 45.

21 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 70.

22 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 71.

the Department of Finance reinforced the findings of the Uhrig Report. It stated clearly that the government's policy shows a preference to curb unnecessary growth of government bodies. It advised that if there is a persuasive policy reason to form a new body, 'it is preferable that bodies operate under the 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.²³

Criticism of the Uhrig Report

2.24 The Uhrig report came under some fierce criticism, mainly from a number of academics.²⁴

2.25 One of the main criticisms relevant to this inquiry is that the report failed to take account of the many different functions and tasks carried out by statutory authorities in the public sector. Professor Wettenhall stated that the report showed 'a very limited appreciation of the great variety of public tasks that are undertaken by statutory authorities and other types of non-departmental public body in this country'.²⁵ He was concerned about the generalisation arising from a study of just eight cases.²⁶ It should be noted that Austrade was not one of these cases. Professor John Halligan and Bryan Horrigan also referred to concerns about the 'amenability of all Australian public sector entities to pigeon-holing neatly within one of the two basic 'Board' and Executive Management' templates.²⁷

Independence of statutory authorities

2.26 Another major criticism of the Uhrig report was the lack of consideration given to the appropriate degree of independence allowed to statutory authorities. Mr Paddy Gourley was of the view that the report paid 'inadequate attention to the need for independence of functions performed by statutory authorities and the course now

23 Department of Finance and Administration, Executive Summary, *Governance Arrangements for Australian Government Bodies*, August 2005.

24 See for example, *Public Sector Informant*, 'Recommendations not worth the wait', 7 September 2004; John Halligan and Bryan Horrigan, *Reforming Corporate Governance in the Australian Federal Public Sector*, Corporate Governance ARC Project, Issues Paper Series no. 2, December 2005, p. 10. See also Professor Roger Wettenhall, *Submission P1*.

25 Roger Wettenhall, 'Statutory Authorities, the Uhrig Report, and the Trouble with Internal Inquiries', *Public Administration Today*, December–February 2004/05, p. 66.

26 Roger Wettenhall, 'Parliamentary Oversight of Statutory Authorities: a Post-Uhrig Perspective', *Australasian Parliamentary Review*, vol. 20, no. 2, Spring 2005, p. 45.

27 John Halligan and Bryan Horrigan, *Reforming Corporate Governance in the Australian Federal Public Sector: From Uhrig to Implementation*, University of Canberra, Corporate Governance ARC Project, Issues Paper Series, no. 2, December 2005, p. 28.

being consequentially pursued by the Government risks their politicisation'.²⁸ Professor Wettenhall also commented that the report 'grossly underestimated the need of several groups of authorities other than the commercials and multi-ownership cases for a degree of independence from ministers that must take them far from direct ministerial governance'.²⁹ Professor John Halligan and Professor Bryan Horrigan asked:

How do you balance any need for operational autonomy and independence for a statutory body with both departmental oversight and appropriate ministerial policy influence and direction of it?³⁰

2.27 The relevance of this question with regard to Austrade is taken up in the following chapter.

Government response to the Uhrig Report

2.28 The government supported the two templates developed by Mr Uhrig. According to the Minister for Finance and Administration, Senator the Hon Nick Minchin:

Both templates detail measures for ensuring the boundaries of responsibilities are better understood and that the relationship between Australian Government authorities, Ministers and portfolio departments is clear.³¹

2.29 He announced that the government would implement the governance templates recommended in the report. The aim was to establish 'effective governance arrangements for statutory authorities' and achieve 'clarity in roles and responsibilities'. Ministers were directed to assess the statutory authorities within their portfolios against the governance templates. Senator Minchin explained that the selection of the appropriate template would depend on the degree to which the authority 'has been delegated full power to act'.³²

2.30 Deputy Prime Minister and Minister for Trade, Mr Mark Vaile MP, assessed Austrade against the principles and recommendations of the Uhrig Report. The assessment found that Austrade as primarily a service delivery organisation that is

28 Paddy Gourley, former public servant, 'All quiet, sort of, on the Uhrig front, *Public Sector Informat*, December 2005.

29 Roger Wettenhall, 'Statutory Authorities, the Uhrig Report, and the Trouble with Internal Inquiries', *Public Administration Today*, December–February 2004/05, p. 67.

30 John Halligan and Bryan Horrigan, *Reforming Corporate Governance in the Australian Federal Public Sector: From Uhrig to Implementation*, University of Canberra, Corporate Governance ARC Project, Issues Paper Series, no. 2, December 2005, p. 14.

31 Media Release, Senator the Hon Nick Minchin, Minister for Finance and Administration, 'Australia Government Response to Uhrig Report', 12 August 2004.

32 Media Release, Senator the Hon Nick Minchin, Minister for Finance and Administration, 'Australia Government Response to Uhrig Report', 12 August 2004.

largely budget funded aligns closely with the executive management template. The joint submission from DFAT and Austrade noted:

In accordance with that template, the assessment's key recommendations were to: change Austrade's governance arrangements from a governing board structure to an executive management structure; change Austrade's financial framework from the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to that of a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA); and employ Austrade staff under the *Public Service Act 1999* (PS Act).³³

2.31 Subsequently, on 5 January 2006, the Minister announced that Austrade would move to executive management.³⁴ The following chapter examines the specific provisions of the bill enabling that transition in light of the recommendations of the Uhrig report and the criticism levelled at its findings.

33 *Submission P3*, p. 1.

34 Governance Implementation Update (Uhrig Report) *How is the Assessment Process Progressing?*, 2006/01–February 2006.

Chapter 3

Provisions of the Bill

3.1 In keeping with the findings of the Uhrig report, the provisions of the bill are designed to restructure the commission to fit the executive management template. Both the explanatory memorandum and the minister in his second reading speech note that the changes introduced in the bill form part of the implementation of the government's response to the Uhrig review. The Minister for Trade told the House:

The government is reviewing all statutory agencies in the context of the review recommendations, to ensure that we have the most effective accountability and governance structures across the whole of government.¹

Abolition of Austrade's board and the creation of a CEO

3.2 The Australian Trade Commission is a body corporate created under the *Australian Trade Commission Act 1985*. The act also establishes an Australian Trade Commission Board which consists of:

- a Chairperson;
- a Deputy Chairperson;
- the Managing Director;
- the Managing Director of Export Finance and Insurance Corporation (EFIC);
- government members; and
- such number of other members, being not fewer than 4 nor more than 6, as the Minister determines, in writing, to be appropriate.²

3.3 Members of the board, other than the Managing Director and the Managing Director of EFIC, are appointed by the Minister and hold the office as part-time members. The Managing Director and Deputy Managing Director hold office on a full-time basis and at the pleasure of the Board.³

3.4 The bill repeals the Commission's body corporate status and its ability to acquire, hold and dispose of real and personal property.⁴ The CAC Act is no longer to apply to the Commission.⁵ The Explanatory Memorandum made plain that:

1 Mr Mark Vaile, Minister for Trade, Second Reading Speech, the Australian Trade Commission Legislation Amendment Bill 2006, House of Representatives *Hansard*, 30 March 2006.

2 Section 12 of the *Australian Trade Commission Act 1985* (the act).

3 Section 52 of the Act.

4 Proposed subsections 7(2), (3) and (4), item 7 of the bill.

5 Proposed subsections 7(2), (3) and (4), item 7 of the bill.

The Commission is not a body corporate and has no legal personality separate from the Commonwealth.⁶

3.5 New section 7 proposes to remove the governing board and create in its stead a statutory agency without such a board.⁷ In keeping with the executive management governance structure, section 7 is to establish a CEO as the head of the body.⁸ Proposed subsection 60(2) clearly stipulates that the CEO and the staff of the Commission together constitute a Statutory Agency.⁹

Response to the intention to remove the Austrade board

3.6 Professor Wettenhall noted that the intention to abolish the board is consistent with Mr Uhrig's recommendation but he could find no particular explanation of the need for change. He looked at the initial grounds for establishing Austrade in 1985 as a corporate board with a governing board. He noted that at that time, the government had extensive consultations with a broad cross-section of business leaders and major industry organisations on the proposed structure and activities of the Commission. In considering the structure of the Commission in 1985, significant weight was given to the value of having an independent authority with a board drawn largely from the private sector. Indeed, the then Minister for Trade told the House:

By establishing the Australian Trade Commission as a body corporate, the Bill will enable the Commission to have sufficient flexibility and independence of management to respond quickly to changes in international market conditions. It will also be a source of valuable advice for the Government and provide an early warning mechanism on international changes and trends affecting Australia's trade...

The government holds strongly to the view that very significant benefits will come from the guidance of a board of directors drawn principally from the private sector. Indeed, I am heartened by the very favourable reception that the interim board of the Commission...has received. The business qualities of that board indicate the seriousness with which the Government is going about the task of putting the activities of the Trade portfolio on a more commercially oriented basis.¹⁰

3.7 Professor Wettenhall asserted that Austrade's establishment as a body corporate was justified in 1985 in order that the Commission would 'have sufficient flexibility and independence of management to respond quickly to changes in international market conditions'. He concluded:

6 Explanatory Memorandum, Item 7, p. 7.

7 Item 25 of the bill which repeals Part III and IV of the current act.

8 See Item 7B of the bill and Explanatory Memorandum, item 9.

9 Proposed subsection 60(2), Division 2—Staff of the Commission.

10 Second reading speech, House *Hansard*, 11 October 1985, p. 1924.

I find no argument here to show that there are changed conditions that invalidate that reasoning.¹¹

3.8 DFAT and Austrade argued that the abolition of the board 'does not impact the capacity of government to seek the input of industry to Austrade's operations.' They stated further:

A range of non-legislated mechanisms for consultation with industry continue to operate. These include the Free Trade Agreement Export Advisory Panel and the Trade Promotion Advisory Committee. The amendments proposed in the...bill do not impact these consultation mechanisms, or the capacity to modify or establish additional or revised processes as required.¹²

3.9 Furthermore, DFAT and Austrade informed the committee that the chair of Austrade's Board had informed the Deputy Prime Minister of the Board's unanimous acceptance of the assessment's recommendations (see paragraph 2.30).¹³

Committee view

3.10 The committee notes DFAT's assertion that the removal of the board does not influence the capacity of the government to obtain independent advice or assistance from industry.

3.11 It appreciates, however, the value that an independent board comprising experienced people who are held in high regard in the trade and commercial sector bring to an organisation such as Austrade. It agrees with Professor Wettenhall that the explanatory memorandum or the second reading speech could have provided more detailed reasons and explanations for removing Austrade's board.

3.12 The committee believes that a statement from the government explaining the need to re-organise Austrade would provide Senators with a better understanding of the proposal to abolish Austrade's board and further assist them when considering the proposed legislation. The value of such an explanation is evident in light of the recognition given to the importance attached to having an independent board at the time of Austrade's establishment. Keeping in mind that the Uhrig report did not consider the governance structure of Austrade, the committee is of the view that a reliance on this report to justify the re-structuring of Austrade only partially explains the need for the proposed changes.

3.13 Austrade and DFAT's assurance that there already exists a range of non-legislated mechanisms for consultation with industry is vague. The committee would like more definite information on the mechanisms that Austrade will use to make up

11 *Submission P1*, p. 2.

12 *Submission P3*, p. 4.

13 *Submission P3*, p. 1.

for the loss of its board and to ensure that it has the expert advice it needs to assist Australian business in developing export trade.

Recommendation 1

3.14 The committee recommends that the government provide parliament with a statement of reasons for abolishing the board which recognises the initial justification for establishing the board in 1985 and the changed circumstances giving rise to the proposed legislation.

3.15 Professor Wettenhall also argued that the continued use of the name 'Australian Trade Commission' would cause confusion if the board is eliminated and the commission becomes a single-headed statutory body under a CEO. He noted further that 'there seems to be no problem in referring to such single heads elsewhere as 'Commissioners' eg Commissioner for Superannuation, Commissioner of Taxation.' He stated further that 'I don't think we now refer to senior overseas trade representatives as 'trade commissioner', so there should be no ambiguity if this were done here'. The committee suggests that naming the CEO 'Commissioner for Trade' may also be a matter worthy of further consideration by the Parliament.

The CEO's terms of engagement

3.16 The CEO is to be appointed by the Minister by written instrument and holds office on a full-time basis for the period specified in the instrument. The period, however, must not exceed 5 years though the provision does not intend to limit the application of the Acts Interpretation Act 1901 that allows the ability to re-appoint.¹⁴ The Remuneration Tribunal is to determine the CEO's remuneration. If no determination by the Tribunal of that remuneration is in operation, the CEO is to be paid the remuneration that is prescribed.¹⁵

3.17 The Minister may terminate the appointment of the CEO for misbehaviour or physical or mental incapacity. He or she may also terminate the appointment of the CEO if:

- (a) the CEO:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
 - (iii) or compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or

14 Proposed sections 51 and 52, item 26 of the bill.

15 Proposed section 54, item 51.

- (b) the CEO is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- (c) the CEO engages, except with the Minister's approval in paid employment outside the duties of his or her office.

3.18 Although the circumstances for terminating the CEO's appointment remain the same as those stipulated in the current act for appointed members of the board, the terminology has been changed. In the circumstances given immediately above the Minister 'may' not 'shall' terminate the appointment. The explanatory memorandum offers no explanation for the change.

3.19 Proposed Part 6 of the bill, directs that the Minister 'must' terminate the appointment of the CEO if, in the Minister's opinion, the performance of the CEO has been unsatisfactory for a significant period of time. It should be noted that the proposal puts in no doubt that the CEO's appointment under these circumstances is to be terminated. This is a stronger direction than that given in the current act which states that the Minister 'may' terminate the appointment of an appointed member to the board under such circumstances.¹⁶

Functions of the newly created CEO

3.20 The Act requires Austrade to perform the following functions:

- (a) to facilitate and encourage trade between Australia and foreign countries (in this section referred to as Australian export trade) by:
 - (i) representing the trading and commercial interests of Australia in foreign countries;
 - (ii) assisting, directly or indirectly, Australian organisations in trade negotiations;
 - (iii) promoting, or participating in or co-ordinating projects to promote, Australian export trade;
 - (iv) obtaining, and making available to Australian organisations, information relating to current or future opportunities for Australian export trade, including opportunities for involvement in overseas development projects;
 - (v) supporting and facilitating investment in foreign countries, and facilitating investment in Australia, where that investment is likely to enhance opportunities for Australian export trade;

16 The Office of Parliamentary Counsel in its manual on plain English specifies that the current usage is to avoid the use of 'shall' and to use 'must' instead. The reason for the change is that 'shall' is ambiguous and can refer to the future. 'Must' is direct and declaratory of the imperative. Office of Parliamentary Counsel, Plain English Manual, paragraph 83.

- (vi) carrying out, or assisting other persons to carry out, or participating with other persons in carrying out, in whole or in part, overseas development projects, in circumstances where that course of action will benefit Australian organisations;
 - (vii) administering the Export Market Development Grants Act 1997;
 - (viii) developing and administering schemes to provide assistance in the development of markets in foreign countries; and
 - (ix) facilitating access by persons to Departments of State of the Commonwealth or of a State and to instrumentalities established by or under a law of the Commonwealth or of a State where that access is likely to enhance opportunities for Australian export trade;
- (b) to do any other act or thing required by this Act or by any other Act to be done by the Commission; and
 - (c) to act, outside Australia, as agent for Departments of State of the Commonwealth or for instrumentalities established by or under a law of the Commonwealth.¹⁷

3.21 Under the proposed legislation the functions and powers of the current Commission are to be vested in the new Commission. The explanatory memorandum makes clear that there is no intention to amend any functions of Austrade.

3.22 Proposed section 7A of the bill stipulates that the function of the Commission (other than the CEO) is to assist the CEO in the performance of his or her functions. The Explanatory Memorandum notes that this amendment is necessary 'because other provisions of the Bill vest the statutory functions held by the old Commission in the CEO'.¹⁸

Duties of the Commission

3.23 In performing its functions, the current Commission shall:

- (a) comply with any directions given to it under section 10; and
- (b) have regard to:
 - (i) the desirability of improving and extending the range and accessibility of advice, assistance and financial support available (whether through the Commission or otherwise) to persons involved, or likely to be involved, either directly or indirectly, in trade between Australia and foreign countries;

¹⁷ Section 8, *Australian Trade Commission Act 1985*.

¹⁸ Explanatory Memorandum, Item 8.

- (ii) the need to provide its services as efficiently and economically as possible; and
- (iii) Australia's obligations under international agreements.¹⁹

3.24 Proposed section 9 simply confers on the CEO the duties of the old Commission. It should be noted, however, that the language used in the bill is more direct in that the new Commission 'must' not 'shall' perform his or her duties in such a manner that will best assist in the development of trade between Australia and other countries.²⁰

3.25 Proposed section 9A allows the CEO to exercise his or her powers, on behalf of the Commonwealth, in Australia or elsewhere and section 9B allows him or her to charge fees for services.²¹

3.26 The bill also repeals Part IV of the current act which sets down the general powers and duties of the current Commission. As it now stands, the Act allows the Commission 'to do all things necessary or convenient to be done or in connection with, or as incidental to, the performance of its functions under the Act'.²² The Explanatory Memorandum noted the reasons that made this no longer necessary:

As part of the Commonwealth, the CEO will exercise the executive power of the Commonwealth in delivering these functions and does not require prescribed powers.²³

3.27 For clarity, it explained that section 9 of the act and the proposed changes to that section specifically confer additional powers on the CEO that are required for the effective, ongoing operations of the Commission.²⁴

Power of Minister to give directions

3.28 Under subsection 10(1) of the current act, the Minister may give to the Commission, in writing, such directions with respect to the performance of its functions, and the exercise of its powers, under the act, as appear to the Minister to be necessary. It goes on to state *inter alia* that:

Nothing in this subsection shall be construed as empowering the Minister to determine that the Commission should deal in a particular manner with a particular person, or with a particular claim or application for a grant or

19 Section 9(2) of the Act.

20 Item 11, proposed subsection 9(1). See explanation given in footnote 16.

21 Item 16, proposed section 9A and 9B.

22 Section 23 of the Act.

23 Item 25, pp. 9–10.

24 Explanatory Memorandum, item 25.

other benefit, under the Export Market Development Grants Act 1997 or under a scheme approved by the Minister under section 30 of this Act.

A direction of the Minister under this section shall not operate so as to affect prejudicially an application under the Export Market Development Grants Act 1997 in relation to a grant year (with the meaning of that Act) that commenced before the day on which the direction was given.²⁵

3.29 Consistent with these existing provisions, the Minister, under proposed changes, retains the power to issue direction in writing with regard to the performance of the CEO's functions and the exercise of his or her powers.

3.30 It should be noted, however, that the phrase 'Or under a scheme approved by the Minister under section 30 of this Act' is deleted from subsection 10(3). Section 30 of the act is to be removed and as noted in the Explanatory Memorandum:

As part of the Commonwealth, the CEO will exercise the executive power of the Commonwealth and does not require the prescription of powers.²⁶

3.31 Also in keeping with current practice, a direction under the above proposed section is to be included in the annual report.

3.32 The explanatory Memorandum emphasised that the proposed changes to 10(3):

should not be seen to amend 'the limitation imposed by the Act on the Minister's power to issue directions that determine the manner in which a particular person, or a particular claim or application for a grant or other benefit under the Export Market Development Grants scheme, is to be treated.'²⁷

The bill also removes subsection 10(2) which states that:

Nothing in subsection (1) shall be construed:

- as requiring the approval of the Minister to the entry by the Commission into a particular contract or other agreement or arrangement under this Act or to the giving by the Commission of any particular guarantee under this Act; or
- as empowering the Minister to determine that the Commission shall or shall not enter into any particular contract or other agreement or arrangement or shall or shall not give any particular guarantee;

but the Commission shall not enter into a particular contract or other agreement or arrangement, or give a particular guarantee, contrary to a direction by the Minister under this section.

25 Section 10(2 and (3) of the Act.

26 Explanatory Memorandum, item 22, p. 9.

27 Explanatory Memorandum, item 21, p. 9.

3.33 The Explanation Memorandum noted that;

The *Financial Management and Accountability Act* framework will govern the Commission's management of such affairs and recognising that the Minister retains the broad power of direction under section 10, and that directions provided under section 10 must be publicly disclosed in the annual report, this separate provision on limiting the power of direction from the Minister is no longer necessary.²⁸

The Public Service Act and overseas engagement of staff

3.34 New subsection 7(2) states that the Commission is to consist of the CEO and staff of the Commission who are to be engaged under the *Public Service Act 1999*.²⁹ Consistent with the findings of the Uhrig report, Ms Lynelle Briggs, Public Service Commissioner, supported the view that public service functions funded by the taxpayer should be subject to the FMA Act and 'should at the same time have their employment framework brought within the Public Service Act unless there are impressive reasons for an alternative position.'³⁰ She added:

This would add substantially to the coherence of our culture as well as our governance framework. It would mean that public service values are applied more consistently to the performance of public service functions and to the way in which public servants understand themselves and what it is that they do. They would link the Uhrig review to the second great reform process of our decade: the focus on substantial cultural reform.³¹

3.35 Under section 74 of the *Public Service Act 1999*, the CEO may engage persons overseas to perform duties overseas as employees.³² The Explanatory Memorandum noted that subsection 60(2) has been included in the bill to avoid doubt and reflect the unique role of the Commission in managing overseas posts. It stated:

The distinctive nature of Austrade's overseas engaged workforce in size and skill set is noteworthy. Overseas engaged employees comprise over half of the Commission's staff. There should be no ambiguity that such persons engaged under section 74 of the *Public Service Act 1999*, are part of the staff of the Commission.³³

3.36 Also under proposed section 90, the Minister may delegate, in writing, all or any of his or her functions or powers under the *Australian Trade Commission Act 1985* or the *Export Market Development Grants Act 1997* to the CEO. In turn, the

28 Explanatory Memorandum, item 20, p. 9.

29 Proposed section 60 and 61, item 26 of the bill.

30 Lynelle Briggs, 'Public Service Reform', SES Breakfast, 12 May 2005.

31 Lynelle Briggs, 'public Service Reform', SES Breakfast, 12 May 2005. Professor Wettenhall could see no problem with this proposal. *Submission P1*, p. 2.

32 Proposed section 60 and 61, item 26 of the bill.

33 Item 26, Explanatory Memorandum, p. 10.

section provides that the CEO may delegate in writing, all or any of his or her functions and powers to staff of the Commission. The Explanatory Memorandum elaborated further that:

Owing to the relatively small number of staff, geographical dispersal of the Commission's offices and the frequent instances where overseas offices do not have Senior Executive Service Officers present, nor in some instances, do they have a Public Servant presence (a number of posts comprise a single Overseas Engaged Employee assisting exporters), there is a need for the efficient functioning of the organisation that appropriate delegations, as and when required, can be conferred on any staff member. These delegations will operate in the context of other controls on behaviour such as the Commission's Fraud Control Policy.

The provision of delegation will ensure that Commission employees are also able to exercise powers in a manner that will enable the efficient delivery of programs, such as the Export Market Development Grants scheme.³⁴

3.37 The committee is concerned that the provisions of the bill do not appear to provide adequate checks and balances to ensure the appropriate and proper delegation of power.

Reporting obligations

3.38 Item 35 of the bill is intended to repeal Part VIII of the act that establishes the financial powers of the Commission. As noted earlier, the CEO and the Commission will be subject to the FMA Act and the specific provisions set down in this Part of the Act are no longer required. Under an amendment to the Financial Management and Accountability Regulations 1997, Austrade will be added to the list of prescribed agencies subject to the FMA.³⁵

3.39 The committee drew attention in the previous chapter to the Uhrig Report which found that the FMA Act should apply to budget-funded Commonwealth bodies. The assessment carried out by the Minister for Trade concluded that Austrade is primarily a service delivery organisation that is largely budget funded and hence should come under the FMA Act as a prescribed agency.³⁶

3.40 Under the proposed legislation, the CEO must, as soon as practicable after 30 June in each financial year, prepare and give to the Minister a report on the Commission's operations during that financial year. It further stipulates that this annual report must include:

34 Explanatory Memorandum, item 37, p. 12.

35 Schedule 1—Prescribed agencies, Financial Management and Accountability Regulations 1997.

36 See paragraphs 2.19 and 2.31.

- (a) information about the Commission's operations under the *Export Market Development Grants Act 1997*;
- (b) particulars of all directions given by the Minister to the CEO under subsection 10(1), other than any directions that includes a statement to the effect that the direction is not to be disclosed:
 - (i) for reasons of national security; or
 - (ii) because its disclosures would have an adverse effect on the financial interests or property interests of the Commonwealth or of an instrumentality of the Commonwealth.³⁷

3.41 The Minister is to ensure that a copy of the annual report is tabled in each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report.³⁸

3.42 These reporting provisions are consistent with those existing under the current act but, according to the Explanatory Memorandum, are changed to conform to the requirement that the Commission be subject to the guidelines for Financial Management and Accountability Act 1997 agencies on Annual Reports.³⁹

3.43 The Department of Foreign Affairs and Trade informed the committee that Austrade will provide relevant information on its preparations and performance to the Secretary of DFAT in parallel to information provided to the Minister for Trade. It stated:

This reflects the DFAT Secretary's overall responsibility to the Minister for the administration of the foreign affairs and trade portfolio and DFAT's role as the principal source of advice to the Minister on governance responsibilities related to Austrade (assisted by advice from Austrade's executive management).⁴⁰

Conclusion

3.44 As noted earlier, the committee approached a number of people who had criticised the findings of the Uhrig Report and also bodies with an interest in corporate governance. The committee noted Professor Wettenhall's concerns that no commentary accompanied the bill outlining the reasons for removing the board. The committee has recommended that, in light of the perceived need for an independent board of industry experts when Austrade was first established, the government provide a statement outlining the reasons for the abolition of the board.

37 Proposed section 90.

38 Proposed section 92(3), item 37 of the bill.

39 Explanatory Memorandum, item 37, p. 13.

40 *Submission p3*, p. 2.

3.45 In general, however, the lack of response to the committee's invitation to comment on the provisions of the bill indicates that the proposed restructuring of the Commission to fit the executive management template developed by the Uhrig Report is appropriate. Indeed, Alan Oxley, a former Australian Ambassador to the General Agreement on Tariffs and Trade told the *Financial Review* that it was important for Austrade to receive external advice from experts to avoid it being driven by bureaucratic systems. He argued that Austrade 'should have good external advice from people who have been successful exporters but you don't need an elaborate structure like the one they have'.⁴¹ In summary:

They don't need a governance structure pretending to be a proper company.⁴²

3.46 In considering the provisions of the bill and in the absence of any substantial criticism, the committee is satisfied that the proposed legislation is appropriate.

Recommendation 2

3.47 The committee recommends that the bill be passed.



SENATOR DAVID JOHNSTON
CHAIR

41 *Australian Financial Review*, 6 January 2006, p. 5.

42 *Australian Financial Review*, 6 January 2006, p. 5.

Appendix 1

Public submissions

- P1 Professor Roger Wettenhall
- P2 Australian Public Service Commission
- P3 The Hon Warren Truss MP
- P4 Professor Stephen Bartos
- P5 Queensland Government