

The Senate

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Foreign Affairs, Defence and  
Trade Legislation Committee

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Export Finance and Insurance Corporation  
Amendment Bill 2006

September 2006

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## Members of the Committee

Senator David Johnston, LP, WA (Chair)  
Senator Steve Hutchins, ALP, NSW (Deputy Chair)  
Senator Mark Bishop, ALP, WA  
Senator Alan Ferguson, LP, SA  
Senator Marise Payne, LP, NSW

### *Secretariat*

Dr Kathleen Dermody, Secretary  
Ms Pamela Corrigan, Research Officer

Parliament House  
Canberra ACT 2600  
Phone: (02) 6277 3535  
Fax: (02) 6277 5818  
e-mail: [fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)  
Internet: [http://www.aph.gov.au/senate\\_fadt](http://www.aph.gov.au/senate_fadt)



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# **Recommendations**

## **Recommendation 1**

3.12 The committee recommends that the government take steps to ensure that explanatory memoranda provide members of parliament with the information necessary to be able to make informed decisions about the legislation before them. For instance, it suggests that the Legislation Handbook be worded more forcefully to alert those preparing the documentation to the importance and function of an explanatory memorandum. It also suggests that the Department of Prime Minister and Cabinet monitor and report on the standard of memoranda.

## **Recommendation 2**

3.43 The Committee recommends that the bill be passed.





# Chapter 1

## Introduction

### Background

1.1 On 17 August 2006, the Senate referred the Export Finance and Insurance Corporation Amendment Bill 2006 to the committee for examination and report by 9 September 2006.

1.2 The Export Finance and Insurance Corporation (EFIC) is Australia's export credit agency and has carried out its role with various statutory frameworks since 1957. It was established in its current form on 1 November 1991 under the *Export Finance and Insurance Corporation Act 1991* (the Act) as a statutory corporation wholly-owned by the Commonwealth of Australia. It forms part of the Foreign Affairs portfolio.<sup>1</sup>

1.3 The act charges EFIC with undertaking the following four key functions:

- to facilitate and encourage Australian export trade by providing insurance and financial services and products to persons involved directly or indirectly in export trade;
- to encourage banks and other financial institutions in Australia to finance or assist in financing exports;
- to manage the Australian Government's aid supported mixed credit program (a facility which has now been discontinued, although loans are still outstanding under it); and
- to provide information and advice regarding insurance and financial arrangements to support Australian exports.<sup>2</sup>

1.4 EFIC provides specialised financial services in support of Australian exports which include:

- medium to long-term finance facilities (generally for more than two years) to the buyers of Australian exports, or to their financiers, to assist with the purchase of exports. The exports financed this way are usually capital goods and services. The finance is normally provided as a loan, or as a guarantee to a bank lend to an overseas buyer; and
- insurance and guarantee facilities including Performance and other type of bonds; medium to long-term PRI in respect of overseas investments, debt, commodity hedging and plant and equipment operating overseas; export working capital guarantees; and other medium-term insurances

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1 Export Finance and Insurance Corporation Annual Report 2004–2005, p. 13.

2 Export Finance and Insurance Corporation Annual Report 2004–2005, p. 13.

such as export credit insurance for payment terms of more than two years.

1.5 EFIC operates on a commercial basis charging its clients fees and premiums and earns interest on its loans and on the investment of its capital, reserves and working capital. EFIC's aim is to make a profit after covering operating costs, interest expenses and any claims or losses incurred in the business. This profit is used partly to pay a dividend to the Commonwealth and partly to build up EFIC's reserves to enable it to run on a sound financial footing.<sup>3</sup>

### **Purpose of the bill**

1.6 The Bill proposes to re-structure the Board of EFIC. It will amend the Export Finance and Insurance Corporation Act 1991 (the Act) to provide for:

- the removal of the Chief Executive Officer of the Australian Trade Commission from the EFIC board;
- the reduction in the number of other members (not including the Chairperson, the Deputy Chairperson, the Managing Director and the government member) from not fewer than four nor more than six to not fewer than two nor more than five;
- after consulting with the Minister, the EFIC Board, not the Minister as currently required, to have the power to appoint the Managing Director and Deputy Managing Director; and
- appointments to the EFIC Board (other than in respect of the Government Member) to be limited to three years and the introduction of a limit of two terms (or three terms for EFIC Board members who serve as Chairperson).<sup>4</sup>

### **Submissions**

1.7 The committee wrote to the Minister for Foreign Affairs, the Minister for Trade, the Export Finance and Insurance Corporation, and Austrade, informing them of the inquiry and inviting a submission. The committee also advertised the inquiry on its website and in *The Australian* on 30 August 2006. It received a joint submission from EFIC and the Department of Foreign Affairs and Trade.

1.8 The committee was critical of the poor standard of the Explanatory Memorandum (see chapter 3). The joint submission, however, made up for this deficiency. It provided the level of detail necessary to allow the committee to give informed consideration to the legislation and is at the appendix. Because of the lack of any substantial criticism of the proposed legislation and the comprehensive

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3 Export Finance and Insurance Corporation Annual Report 2004–2005, p. 13.

4 Export Finance and Insurance Corporation Amendment Bill 2006, explanatory memorandum, p. 2.

submission from EFIC and the Department, the committee decided not to hold a public hearing.

### **Acknowledgments**

1.9 The committee acknowledges the assistance of the Minister for Foreign Affairs, the Minister for Trade and their departments and EFIC in providing the committee with a submission within a short time frame. This cooperation allowed the committee adequate time to consider the legislation and draft its report for tabling. The committee thanks those who assisted the inquiry.



## Chapter 2

### The Uhrig Report and the proposed changes to EFIC

2.1 The Export Finance and Insurance Corporation is only one of many statutory authorities established by the Commonwealth Parliament.

2.2 In its previous report on proposed changes to Austrade, the committee provided a detailed discussion on Commonwealth statutory authorities and the Uhrig Report.<sup>1</sup> The following section contains a shortened account of this discussion in order to provide background to the proposed legislation.

#### What is a statutory authority?

2.3 A statutory authority in the Commonwealth sphere is a generic term for a body established through legislation for a public purpose.<sup>2</sup> 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.<sup>3</sup> Enabling legislation enunciates the specific set of arrangements under which a statutory authority will operate.<sup>4</sup>

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

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1 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Provisions of the Australian Trade Commission Legislation Amendment Bill 2006*, pp. 3–11.

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

3 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 16. See also Shaun Gath, 'Good Governance and Whole of Government: The Challenge of Connecting Government', *Public Administration Today*, July–October 2005, p. 18; 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.

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

their minister and the financial framework and accountability regime governing such bodies.<sup>5</sup>

2.5 During the election campaign in October 2001, the Prime Minister, the Hon John Howard MP, acknowledged that the government had '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'.<sup>6</sup>

### **The Uhrig Report**

2.6 Consistent with this undertaking, 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

2.7 The terms of reference asked the review to develop a broad template of governance principles and arrangements that the government may 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'.

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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.<sup>10</sup>

2.9 The Uhrig report 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—for authorities undertaking commercial operations***

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.<sup>11</sup>

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.<sup>12</sup> In Mr Uhrig's view, a board did not provide the appropriate governance structure for statutory authorities operating as service providers or regulators.<sup>13</sup>

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

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.<sup>14</sup>

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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 used 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.<sup>15</sup> 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.

## **Government response to the Uhrig Report**

2.16 The government approved of 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.<sup>16</sup>

2.17 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'.<sup>17</sup>

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

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

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



2.18 EFIC was assessed as part of the implementation of the government's response to the Uhrig Report and the government's undertaking to ensure that Australia has 'the most effective accountability and governance structures across the whole of government'.<sup>18</sup>

2.19 The following chapter examines the specific provisions of the bill in light of the recommendations of the Uhrig Report and the government's intention to establish effective governance arrangements for its statutory authorities.

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18 Export Finance and Insurance Amendment Bill 2006, Second Reading, Senate *Hansard*, 16 August 2006, p. 1.



## Chapter 3

### The provisions of the bill

3.1 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 *Review of Corporate Governance of Statutory Authorities Administration Office Holders* conducted by Mr John Uhrig.<sup>1</sup>

3.2 As part of its broad objective to establish effective governance arrangements for statutory authorities, the government assessed EFIC's existing governance structure against the recommendations and principles of the Uhrig Report.<sup>2</sup> It concluded that the board template was suitable for EFIC on the basis that the corporation 'operates primarily as a commercial organisation and (except in relation to national interest transactions) its board has a high degree of power to act'.<sup>3</sup>

3.3 The main changes are concerned with the membership of the EFIC Board which, according to the government, are of 'an operational and enabling nature'. It maintains that the amendments 'do not impact EFIC's functions, nor EFIC's delivery of export facilitation services to Australia business'.<sup>4</sup> EFIC would continue to focus on assisting Australian businesses to enter and develop export markets.

#### The Explanatory Memorandum

3.4 Before examining the proposed amendments, the committee comments on the explanatory memorandum and its value in informing the Parliament on the significance of the proposed amendments.

3.5 An explanatory memorandum is usually provided for every bill introduced in Parliament except for the annual appropriations bills.<sup>5</sup> As a companion document to a bill, the explanatory memorandum is intended to assist members of Parliament, officials and the public to understand the objectives and detailed operation of the provisions of the bill.<sup>6</sup> The Legislation Handbook is unequivocal when stating that

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1 Export Finance and Insurance Amendment Bill 2006, Second Reading, Senate *Hansard*, 16 August 2006, p. 1.

2 Export Finance and Insurance Amendment Bill 2006, Second Reading, Senate *Hansard*, 16 August 2006, p. 1.

3 Export Finance and Insurance Amendment Bill 2006, Second Reading, Senate *Hansard*, 16 August 2006, p. 1.

4 Minister for Justice and Customs, the Hon Senator Christopher Ellison, Second Reading Speech, Senate *Hansard*, 16 August 2006, p. 1.

5 Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, [update No. 1 of May 2000 has been incorporated], paragraph 8.3.

6 Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, [update No. 1 of May 2000 has been incorporated], paragraph 8.1.

support material 'should ensure that notes on clauses clearly and adequately explain their operation and purpose'.<sup>7</sup>

3.6 The Handbook drew attention to criticism of explanatory memoranda in the June 1995 report of the House of Representatives Standing Committee on Procedure. This report expressed disappointment at the general standard of explanatory memoranda. It said:

An explanatory memorandum must be written in plain English and should focus on explaining the effect and intent of the bill, or the amendments, rather than repeating the provisions. Information contained in the explanatory memorandum must be accurate and not misleading, and must reflect the final form of the bill to be introduced or the amendments to be moved.<sup>8</sup>

3.7 It stated further that notes on clauses should not simply repeat the words of the bill or restate them in simpler language. It directs that:

The notes should explain the purpose of the clause and relate it to other provisions in the bill, particularly where related clauses do not appear consecutively in a bill. Examples of the intended effect of the clause, or the problem it is intended to overcome, may assist in its explanation.<sup>9</sup>

3.8 In the committee's view, the explanatory memorandum accompanying the Export Finance and Insurance Corporation Amendment Bill falls short in providing the level of detail necessary to assist legislators in their understanding of the proposed amendments. It provides little insight into the operation of the provisions of the bill and how the proposed amendments are in keeping with Mr Uhrig's recommendations. It did not follow the advice contained in the Legislation Handbook that the explanation 'should focus on explaining the effect and intent of the bill'. There is no attempt, other than general references, to tie the amendments directly to the findings and recommendation of the Uhrig Report. Indeed, there is no summary of any kind providing a basic understanding of the Uhrig Report, nor any commentary on deficiencies or problems in the current legislation that the bill is intended to address.

3.9 Parliament is left in the dark as to the significance of removing the CEO of the Australian Trade Commission from EFIC's board. There is no explanation as to why that position was originally appointed to the Board and in light of the Uhrig Report why it is now deemed appropriate to remove that position.

3.10 The committee accepts that the amendment to remove from the Minister the power to appoint the General Manager and Deputy Manager of EFIC and confer this

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7 Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, [update No. 1 of May 2000 has been incorporated], paragraph 8.19.

8 Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, [update No. 1 of May 2000 has been incorporated], paragraph 8.8.

9 Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, [update No. 1 of May 2000 has been incorporated], paragraph 8.18. Emphasis in original text.

authority on the board is self-explanatory. Even so, the explanatory memorandum again should have endeavoured, at the very least, to explain the significance of this change in light of Mr Uhrig's recommendation.

3.11 The previous chapter contained a brief outline of Mr Uhrig's findings and recommendations and provides the information and context needed to make the direct and relevant connection of the provisions of the bill to the Uhrig Report.

### **Recommendation 1**

**3.12 The committee recommends that the government take steps to ensure that explanatory memoranda provide members of parliament with the information necessary to be able to make informed decisions about the legislation before them. For instance, it suggests that the Legislation Handbook be worded more forcefully to alert those preparing the documentation to the importance and function of an explanatory memorandum. It also suggests that the Department of Prime Minister and Cabinet monitor and report on the standard of memoranda.**

### **Provisions of the bill**

3.13 As mentioned in chapter 1, EFIC, as Australia's export credit agency, facilitates and encourages Australian export trade by providing insurance and financial services and products to persons involved in export trade.

3.14 EFIC is a body corporate created under the *Export Finance and Insurance Corporation Act 1991* (the Act). It has been in operation in one form or another for half a century. In 1991, the government decided to establish EFIC as a statutory corporation structured along government business enterprise lines. It was intended to equip EFIC to operate in a more commercial and accountable way in an increasingly competitive export climate.<sup>10</sup> It was to fill a gap left by the private sector where this sector lacked the capacity or willingness to provide such services.<sup>11</sup>

### **EFIC—a statutory corporation**

3.15 EFIC as a statutory corporation is a separate entity legally independent of the parliament and of the executive. EFIC may:

- enter into contracts; and
- appoint agents and attorneys, and act as agent for other persons; and

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10 The Hon R.V. Free, Minister for Science and Technology and Minister Assisting the Treasurer, House of Representatives *Hansard*, 12 September 1991, p. 1294.

11 See John Moore, Second Reading Speech, House *Hansard*, 26 February 1997, p. 1285, the Hon. Mark Vaile, Minister for Trade, Media Release, no. MVT65/2000, 23 June 2000 and No. MVT18/206, 9 March 2006; The Hon R.V. Free, Second Reading Speech, House *Hansard*, 12 September 1991, p. 1294.

- engage persons to perform services for EFIC; and
- enter into:
  - arrangements known as swaps, foreign exchange agreements, forward rate agreements, options or hedge agreements; or
  - arrangements having a similar purpose or effect; and accept gifts, grants, bequests and devises made to it, and act as trustee of money or other property vested in it on trust; and do anything incidental to any of its powers or the exercise of any of those powers.

3.16 In establishing EFIC as a statutory corporation, the government indicated its intention to establish some degree of independence from ministerial and departmental control. Indeed, the governing board of EFIC provides the mechanism that enables the government, as the shareholder, to delegate its management authority and the responsibility for EFIC's performance to the directors. The joint submission noted that EFIC's status as a commercial organisation with a board having a high degree of power to act aligns closely with the board template outlined in the Uhrig Report. It explained:

As a self-sustaining, primarily commercial organisation it is appropriate for EFIC to retain its status as a Commonwealth authority under the Commonwealth Authorities and Companies Act 1997. The effect of the Bill will be to change EFIC's governance arrangements resulting in EFIC's board management structure reflecting more closely the board governance model set out in the Uhrig Review.<sup>12</sup>

### **The Board and the executive management team—level of ministerial control**

3.17 The Act establishes an Export Finance and Insurance Corporation Board which consists of the following members:

- the Chairperson;
- the Deputy Chairperson;
- the Managing Director;
- the Chief Executive Officer of the Australian Trade Commission;
- the government member;
- as many other members, not fewer than 4 nor more than 6, as the Minister determines in writing to be appropriate.

3.18 It is the function of the board to manage the affairs of EFIC which includes the determination of the policy to be followed in the conduct of the affairs of EFIC.

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12 *Submission 1*, pp. 2–3.

## Appointment of CEO

3.19 According to the Uhrig Report, the board 'is responsible for ensuring the success of the statutory authority through its executive management team and within the broad strategic directions set through its governance framework, including by the Minister'.<sup>13</sup>

3.20 It states clearly that the board should be responsible for supervising the CEO and have the power of appointment and termination. It advised:

Generally, it will be better practice for the chairman and the Minister to consult prior to the final decision on issues involving the employment of the CEO. Where the board does not have the power to appoint and terminate the CEO it cannot be effective, and the alternative template should be used [that is the executive management model].<sup>14</sup>

3.21 Similarly the Australian Government's *Governance Arrangements for Australian Government Bodies*, advises that a governing board should have full power to act in the interests of the relevant authority which generally included the ability to appoint and remove the Chief Executive Officer'.<sup>15</sup>

3.22 In keeping with this advice, the bill changes the method of appointment of the Managing Director and the Deputy Managing Director. Section 71 of the bill proposes that:

- after consulting with the Minister, the Managing Director is to be appointed by the Board—currently the Minister appoints the Managing Director on the recommendation from the Board; and
- after consulting with the Minister, the Board may appoint a Deputy Managing Director—currently the Minister may appoint the Deputy Managing Director on the recommendation from the Board.

### *Committee view*

3.23 The committee understands that the proposed changes to confer on the Board the authority to appoint the Managing Director and Deputy Managing Director is consistent with the principles established in the Uhrig Report. The committee accepts that it is appropriate for the Board of EFIC to have this power.

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13 Uhrig Report, p. 83.

14 Uhrig Report, p. 84.

15 Australian Government, Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, August 2005, p. xv. This publication outlines principles for helping determine the most appropriate structure and governance arrangements for Australian government bodies.

## Composition of Board

3.24 The Uhrig Report examined the responsibilities of board members and the appropriateness of certain appointments to the board. It argued that in order to achieve a high standard of governance, 'it is essential for board members to be focused on ensuring the success of the statutory authority and for governance arrangements to support their roles and promote their ability to perform to their highest potential'.<sup>16</sup>

3.25 The Uhrig Report did not support 'representational appointments' to governing boards. It argued that such appointments 'fail to produce independent and objective views'. In its view, there is the potential for these appointments to be primarily concerned with the interests of those they represent, rather than the success of the entity they are responsible for governing.

3.26 For similar reasons, it advised that care should be taken when appointing public servants to boards. It found:

In circumstances where a departmental staff member is appointed on the basis of representing the government's interests or having a 'quasi' supervision approach, conflicts of interest may arise and poor governance is likely. Through participation in decision-making, either directly or implied, the departmental representative may become an advocate for the organisation rather than contributing critical comment. This also has the potential to create an incentive for the other members of the board to meet to discuss and agree on important issues separately from formal meetings, without involving the departmental representative, thereby removing the formal board meeting as the main decision-making forum of governance. Membership of the board by the related departmental secretary is unwise unless there are specific circumstances which require it.<sup>17</sup>

3.27 The Australian government's *Governance Arrangements for Australian Government Bodies*, also advised against appointing APS personnel to corporate governance boards:

Appointees to governing boards should not be there in a representational capacity. Avoid placing an APS employee on a governing board, in particular the Secretary of a department.<sup>18</sup>

3.28 In 1991, when re-establishing EFIC as a statutory corporation, the government wanted to ensure that linkages between EFIC and Austrade were maintained and provided for cross membership of boards by the managing directors of the respective organisations.

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16 Uhrig Report, p. 95.

17 Uhrig Report, p. 99.

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



3.29 Under the current legislation, the Chief Executive Officer of the Australian Trade Commission is an ex-officio member of EFIC's board. Section 34 of the bill would remove the CEO from this board. The amendment is consistent with the findings of the Uhrig Report.

3.30 The committee notes, however, that Mr Michael L'Estrange, Secretary of DFAT is the government member on the board and Mr Mark Paterson, Secretary of the Department of Industry, Tourism and Resources, is a member of the board. They are not ex officio positions and have been appointed to the board by the Minister. Their appointment seems to be inconsistent with both the recommendations of the Uhrig Report and the government's guidelines on corporate arrangements.

3.31 It should be noted that the joint submission from EFIC and the Department of Foreign Affairs and Trade informed the committee that it is intended to discontinue the practice of appointing the Secretary of the Department of Industry, Tourism and Resources to the EFIC Board.

3.32 This is not the case with the Secretary of the Department of Foreign Affairs and Trade. The joint submission explained:

The Uhrig Review allowed for retention of the Secretary of the related department on boards where “there are special circumstances which require it”. In view of the special circumstances pertaining to EFIC's role in the management of the National Interest Account the Government has decided to retain the Secretary of the Department of Foreign Affairs and Trade as the Government member of the Board. The retention also recognises the contribution of the Government member to country risk assessments which form an important part of Board deliberations, is the most efficient means of ensuring EFIC's compliance with its market gap mandate, and ensures that Board decisions are taken within the framework of a deeper understanding of the Government's foreign and trade policy objectives.<sup>19</sup>

### ***Committee view***

3.33 The committee accepts that the removal of the Chief Executive Officer of Austrade is in keeping with the Uhrig Report's recommendations. It also notes that the Minister no longer intends to appoint the Secretary of the Department of Industry, Tourism and Resources to the board. This move is also consistent with the principles established in the Uhrig Report. The decision by the Minister to retain the Secretary of Foreign Affairs and Trade as a member of the board is supported by the view that special circumstances exist that warrant his presence on the board. Even so, the committee believes that it is important to be aware of the concerns raised by Mr Uhrig about the appointment of departmental secretaries to boards 'unless there are specific circumstances that require it'.

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19 *Submission 1*, p. 4.

## Size of Board

3.34 The Uhrig Report commented on the factors that should be considered when determining the size of a Board. They included factors such as the entity's size, complexity, risk of operations and the needs of the board. It stated:

Based on current thinking on best practice in the private sector a board of between six and nine members (including a managing director if there is one) represents a reasonable size. Boards with members within this range seem to be more easily able to create an environment for the active participation in meetings by all directors.<sup>20</sup>

3.35 The report observed further that:

Boards with less than six members may have difficulty in meeting their statutory responsibilities due to workload pressures and the potential lack of breadth of views. This situation will be exacerbated in periods where vacancies exist. There is also the risk that smaller boards may find it easier to become involved in practices which are not conducive to governance, such as becoming involved in management decisions rather than overseeing them.<sup>21</sup>

3.36 Consistent with the Uhrig Report, section 34(f) reduces the number of members of the Board from not fewer than 4 nor more than 6 to not fewer than 2 nor more than five. Taken as a whole, including the Chairperson, the Deputy Chairperson, the Managing Director, the government member, and other members, the board may consist of between 6 and 9 members. To accommodate the reduction in board membership, the quorum at a meeting of the Board is to consist of 3 members not the current requirement of 5 members.

### *Committee view*

3.37 The committee notes that the reduction in the size of the membership of EFIC's board is consistent with the findings of the Uhrig Report.

## Tenure of board members

3.38 The Uhrig Report considered finite board terms to be important. It suggested that finite terms:

...provide an indication to directors that they should have no expectation of appointments continuing beyond one term. Appointment terms of three years are generally favoured with an expectation that the contribution of a director will increase with knowledge and experience of the entity.<sup>22</sup>

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20 Uhrig Report, p. 96.

21 Uhrig Report, p. 96.

22 Uhrig Report, p. 100.

3.39 Section 35(1) of the bill proposes that an appointed member, other than the government member, must be appointed for a term of 3 years instead of the current arrangement of not exceeding 5 years. The member is eligible for re-appointment but must not hold office as a member of the Board for a total of more than 2 terms. Under the current legislation, Board members may serve a maximum term of five years with no limit to the number of terms for directors.

3.40 The joint submission stated that the term limits 'are intended to improve performance by introducing "greater experience and/or fresh thinking"'.<sup>23</sup> It also noted that allowing a director serving as chairperson an additional three-year term is to provide continuity of direction for the entity.<sup>24</sup>

### ***Committee view***

3.41 The committee is of the view the tenure fixed for board members is appropriate.

### **Conclusion**

3.42 The committee has considered the bill and is of the view that its provisions are consistent with the recommendations of the Uhrig Report. As a commercial organisation, it is appropriate that EFIC aligns more closely with the board template as intended by the bill.

### **Recommendation 2**

**3.43 The Committee recommends that the bill be passed.**



Senator David Johnston  
**Chair**

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23 *Submission 1*, p. 4.

24 *Submission 1*, p. 4.



## **Appendix 1**

**Joint submission on behalf of the Department of  
Foreign Affairs and Trade (DFAT) and the Export  
Finance and Insurance Corporation (EFIC)**



## **Introduction**

1. As part of the Government's response to the *Review of the Corporate Governance of Statutory Authorities and Officeholders* (the Uhrig Review), Deputy Prime Minister Vaile assessed the Export Finance and Insurance Corporation (EFIC) against the principles and recommendations of the Uhrig Review.

2. EFIC is responsible for facilitating and encouraging Australian export trade by providing insurance and financial services and products to Australian exporters and overseas investors. It provides these services in "the market gap" where the private sector lacks capacity or willingness to participate.

3. EFIC is primarily a commercial organisation. It charges its clients fees and premiums and earns interest on its loans and on the investment of its capital, reserves and working capital. EFIC aims to make a profit after covering operating costs, interest expenses and any claims or losses incurred in the business. This profit is used partly to pay a dividend to the Commonwealth and partly to build up EFIC's reserves to enable it to run on a sound financial footing.

4. EFIC forms part of the portfolio of the Department of Foreign Affairs and Trade. The Minister for Trade, the Hon Mark Vaile MP, is responsible for EFIC. EFIC has a board management structure. EFIC's management conducts EFIC's operations under the supervision of the Board.

5. This structure is complicated by what can be described as the "hybrid" nature of EFIC's governance arrangements. EFIC's legislation provides for two distinct platforms from which Australian exports can be supported. These platforms are EFIC's Commercial Account, and the National Interest Account.

6. In the case of the Commercial Account, the risks underwritten are carried by EFIC as a corporation. The Minister is not able to direct EFIC to obtain the Minister's approval for a particular transaction nor to direct EFIC to enter into a particular transaction. Most of EFIC's transactions are written on EFIC's Commercial Account.

7. In the case of the National Interest Account (NIA), the Minister can direct EFIC to enter into, or approve of EFIC entering into, a facility if he or she believes it would be in the "national interest" to do so. NIA transactions tend to involve financial commitments that are too large for EFIC's balance sheet, risks that EFIC considers are too high to accept prudently on its own account, or transactions that would be commercially acceptable if EFIC did not already have significant exposures to a country or entity. Although decisions relating to the national interest are taken by the Minister and EFIC receives a fee for managing the NIA, EFIC's legal position in a national interest transaction is as principal, not agent.

8. Under the templates outlined in the Uhrig Review, EFIC's status as a commercial organisation with a board having a high degree of power to act aligns

it closely with the board template. As a self-sustaining, primarily commercial organisation it is appropriate for EFIC to retain its status as a Commonwealth authority under the *Commonwealth Authorities and Companies Act 1997*. The effect of the Bill will be to change EFIC's governance arrangements resulting in EFIC's board management structure reflecting more closely the board governance model set out in the Uhrig Review. The Bill will have no financial or regulatory impact and EFIC's mandate and functions will not be affected. The EFIC Board has been consulted on the proposed changes and has agreed to them.

### **Summary of amendments**

9. The amendments contained in the Bill provide for:
- the EFIC Board to have the power to appoint the Managing Director and Deputy Managing Director after consultations with the Minister.
  - the removal of the Managing Director of Austrade from the EFIC Board.
  - the size of the EFIC Board to be limited to between six and nine members.
  - the quorum of a meeting of the EFIC Board to be reduced to three.
  - appointments to the EFIC Board (other than in respect of the Government Member) to be limited to three years and the introduction of a limit of two terms (or three terms for EFIC Board members who serve as Chairperson).

### **Rationale for the proposed amendments to the *Export Finance and Insurance Corporation Act 1991***

10. The amendment providing for the EFIC Board to have the power to appoint the Managing Director and Deputy Managing Director after consulting the Minister is consistent with the board template of the Uhrig Review concerning appointment and termination of the chief executive officer of a statutory authority (pages 80–85, especially page 84). Under the current Act, the Managing Director is appointed by the Minister after the Minister has received a recommendation by the Board. According to the Uhrig Review, a board cannot be effective without the power to appoint and terminate a chief executive officer.

11. The amendment providing for limiting the size of the EFIC Board to between six and nine members is consistent with the Uhrig Review's comments relating to board size (page 96). A board of this size is also considered to be consistent with the size, complexity and risks of EFIC's operations. Under the current Act, the minimum number for the EFIC Board is nine and maximum number is eleven. According to the Uhrig Review, private sector best practice suggested an optimal board size of between six and nine members as "Boards of this size seem more easily able to create an environment of active participation by directors". The Uhrig Review states that Boards of fewer than six members may



have difficulty meeting their statutory obligations due to workload pressures and a lack of breadth of views. The amendment reducing the quorum for a meeting of the EFIC Board to three (from five) arises from the reduction in the size of the board.

12. The amendment providing for appointments to the EFIC Board to be limited to three years and the introduction of a limit of two terms (or three terms for EFIC Board members who serve as Chairperson) arise from the Uhrig Review's comments concerning board tenure (pages 100–101). Under the current Act, Board members may serve a maximum term period of five years with no limit to numbers of terms for directors. Term limits are intended to improve Board performance by introducing "greater experience and/or fresh thinking". According to the Uhrig Review, this practice is consistent with the rotation requirements for the Australian Stock Exchange listing rules and Commonwealth Government Business Enterprise arrangements. Allowing a director serving as chairperson an additional three year term is to provide continuity of direction for the entity.

13. The amendment providing for the removal of the Managing Director of Austrade from the Board is consistent with the Uhrig Review's comment concerning the appointment of public servants to boards (page 99). Consistent with this but not requiring legislative amendment to the *Export Finance and Insurance Corporation Act 1991*, is the intention to discontinue the practice of appointing the Secretary of the Department of Industry Tourism and Resources to the EFIC Board.

14. The Uhrig Review allowed for retention of the Secretary of the related department on boards where "there are special circumstances which require it". In view of the special circumstances pertaining to EFIC's role in the management of the National Interest Account the Government has decided to retain the Secretary of the Department of Foreign Affairs and Trade as the Government member of the Board. The retention also recognises the contribution of the Government member to country risk assessments which form an important part of Board deliberations, is the most efficient means of ensuring EFIC's compliance with its market gap mandate, and ensures that Board decisions are taken within the framework of a deeper understanding of the Government's foreign and trade policy objectives.