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Law and Bills Digest Section

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Date introduced: 23 August 2012
House: House of Representatives
Portfolio: Regional Australia, Local Government, Arts and Sport

Commencement: Sections 1 to 3 of the Bill commence on Royal Assent. Schedules 1 and 2 commence at the same time as the National Portrait Gallery of Australia Bill 2012, which if enacted, will commence on 1 July 2013.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The primary purpose of the National Portrait Gallery of Australia (Consequential and Transitional Provisions) Bill 2012 (the Bill) is to provide for the transfer of assets and liabilities relating to the National Portrait Gallery from the Department of Regional Australia, Local Government, Arts and Sport (the Department) to the National Portrait Gallery (the Gallery) and the transfer of staff from the Department to the Gallery. It also provides for associated matters in the transfer of responsibilities to the new statutory authority. Consequential amendments are also made to the Archives Act 1983 (the Archives Act).

Structure of the Bill

Schedule 1 of the Bill provides for the consequential amendments to the Archives Act.

Schedule 2 of the Bill contains the transitional provisions. It is divided into five parts. A summary of each part is outlined in the Explanatory Memorandum to the Bill.¹

Background

This Bill is consequential to, and was introduced with, the National Portrait Gallery of Australia Bill 2012 (the primary Bill). The Bills Digest on the primary Bill 2012 contains detailed background information relevant to both Bills.2

Committee consideration

Senate Selection of Bills Committee

The Committee resolved at its meeting on 12 September 2012 not to refer the primary Bill or this Bill to a committee.3

Senate Standing Committee for the Scrutiny of Bills

The Committee had no comment to make on this Bill.4

Joint Parliamentary Committee on Human Rights

The Parliamentary Joint Committee on Human Rights considered that the Bill does not engage human rights as defined in the Human Rights (Parliamentary Scrutiny) Act 2011.5

Financial implications

The Explanatory Memorandum states that the Bill ‘is not expected to have an impact on Commonwealth expenditure.’6

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Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found at page 2 of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that:

This Bill does not engage any of the applicable rights or freedoms and is compatible with human rights as it does not raise any human rights issues.

Key provisions

Schedule 1—Archives Act 1983

Clause 3 of Schedule 1 of the Bill amends the definition of ‘exempt material’ in subsection 3(1) of the Archives Act to include material in the national collection maintained by the National Portrait Gallery. This means that the Archives Act does not apply to material in the Gallery’s collection.

Other minor consequential amendments proposed to section 3 of the Archives Act include updating the references to the National Gallery of Australia (clause 2 of Schedule 1 of the Bill) and the National Museum of Australia (clause 4 of Schedule 1 of the Bill).

Schedule 2—Transitional Provisions

Schedule 2 of the Bill provides in relation to:

- assets and liabilities and other matters (such as legal proceedings and references in instruments)
- staffing and
- other transitional matters (including: exemption of stamp duty, changing of accounts, constitutional considerations regarding the acquisition of property on just terms, and Director and Board Member appointments).

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7. Ibid., p. 2.
8. Ibid., p. 2.
9. Other institutions whose collections are exempt under the Archives Act are the Australian War Memorial, Australian National Gallery, Museum of Australia and the National Library of Australia.

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Part 2—Transfer of assets and liabilities

**Assets**

**Clause 2** of Part 2 of Schedule 2 of the Bill concerns the transfer of assets from the Commonwealth to the National Portrait Gallery of Australia. **Subclause 2(1)** applies to the assets of the Commonwealth before the transition time\(^{10}\) that are for the purposes of the Gallery program.\(^ {11}\) **Subclause 2(2)** provides that subclause 2(1) applies to structures or improvements on land but not to land or buildings. At transition time the assets of the Commonwealth become the assets of the Gallery without any conveyance, transfer or assignment. The Gallery is the successor in law in relation to these assets (proposed **subclause 2(3)**).

**Assets subject to trust**

**Subclause 2(4)** provides that if an asset is held on trust by the Commonwealth prior to transition time, then after that time the asset will be held on trust by the Gallery and subject to the same terms of the trust.

**Exception**

The Minister may, by writing determine that subclause 2(1) does not apply in relation to a specified asset. This may include a structure or other improvements on land (subclause 2(5)). Such a determination is not a legislative instrument\(^ {12}\) (subclause 2(6)).

**Liabilities**

**Clause 3** of Part 2 of Schedule 2 of the Bill concerns the transfer of liabilities from the Commonwealth to the National Portrait Gallery. **Subclause 3(1)** applies to the liabilities of the Commonwealth that relate to the purposes of the Gallery program before transition time. **Subclause 3(2)** provides that at transition time, the liabilities cease to be those of the Commonwealth and become the liabilities of the Gallery without any conveyance, transfer or assignment. The Gallery is

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\(^{10}\) Transition time is defined in Part 1 of Schedule 2 of this Bill. It refers to the commencement of Schedule 2, which is due to occur on 1 July 2013.

\(^{11}\) ‘National Portrait Gallery program’ is defined in Part 1 of Schedule 2 of the Bill. It means the program that was administered by the Commonwealth immediately before the transition time; and that was generally known as the National Portrait Gallery.

\(^{12}\) Legislative instrument is defined in section 5 of the Legislative Instruments Act 2003. Briefly a legislative instrument is an instrument in writing that is of a legislative character and is made in the exercise of a power delegated by Parliament. ‘Of a legislative character’ means that an instrument determines or alters the law rather than applying the law. It has a direct or indirect effect on a privilege or interest, imposes an obligation or creates, varies or removes a right or obligation.

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then legally responsible for those liabilities. The Minister may determine in writing that subclause 3(1) does not apply to a specified liability (subclause 3(3)). A determination by the Minister under subclause 3(3) is not a legislative instrument (subclause 3(4)).

Specified assets or liabilities

Clause 4 deals with the transfer of assets and liabilities other than those covered those in clauses 2 or 3, or land or buildings. Subclause 4(2) provides that the Minister may, in writing, declare that a specified asset or liability vests in the Gallery at a specified time at or after transition time without any conveyance, transfer or assignment. The Gallery becomes the successor in law in relation to this asset or liability at the specified time.

Part 3—Transfer of other matters

Legal Proceedings

Clause 6 of Part 3 of Schedule 2 of the Bill sets out the arrangements that apply to certain legal proceedings which relate to the National Portrait Gallery. If the Commonwealth was a party to such legal proceedings pending in a court or tribunal before transition time, the Gallery is substituted for the Commonwealth as a party from transition time (subclause 6(2)).

References in certain Instruments to the Commonwealth

Subclause 7(1) of Part 3 of Schedule 2 of the Bill applies if an instrument in force before transition time refers to the Commonwealth in relation to an asset or liability that becomes an asset or liability of the Gallery or otherwise relates to the Gallery program. Subclause 7(2) provides that, from transition time, the instrument has effect as if the reference to the Commonwealth is a reference to the Gallery. The Minister may, by writing, determine that subclause 7(1) does not apply in relation to a specified reference (subclause 7(3)). A determination under subclause 7(3) is not a legislative instrument and therefore not subject to parliamentary scrutiny (subclause 7(4)).

Part 4—Staff

Transferring Employees

Clause 8 of Part 4 of Schedule 2 of the Bill concerns the transitional arrangements for employees of the Department of Regional Australia, Local Government, Arts and Sport transferring to the Gallery and for the employment of new employees. Under the new statutory authority, transferring and new employees will be APS employees in the Gallery. They will continue to be covered by the enterprise agreement of the Department and other employment arrangements existing at the transition time as further outlined below.

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Subclause 8(1) provides that a person is a transferring employee, if before transition time, the person was employed by the Department and was covered by a determination under section 72 of the Public Service Act 1999. At transition time the person becomes an APS employee in the Gallery.

Subclause 8(2) provides that the Department’s enterprise agreement will apply and have effect in relation to transferring employees in the Gallery after transition time as if it had been made by the Director of the Gallery on behalf of the Commonwealth. If however, an enterprise agreement is made by the Director after transition time which covers the Commonwealth and the transferring employee to the Gallery, the provisions relating to the Department’s enterprise agreement cease to apply.

Subclause 8(3) provides that if a determination made under subsection 24(1) of the Public Service Act applied to a transferring employee before transition time then, to the extent that it applies to the employee, the determination has effect after transition time as if it had been made by the Director and was applicable to the person’s employment in the Gallery. These provisions do not prevent variation or revocation of the determination.

New Employees

Subclause 8(4) provides that a person is a new employee if they are an APS employee in the Gallery and not a transferring employee. Subclause 8(5) provides that the designated agreement that covers transferring employees because of subclause 8(2), covers a new employee as well if the Director determines within 14 days after the person becomes a new employee that the designated agreement applies to that person. The designated agreement then applies to new and transferring employees until a new enterprise agreement commences after the transition time.

Clause 9 concerns a regulation-making power to deal with matters of a transitional nature in relation to the transfer of APS employees from the Department to the Gallery.

Clause 10 relates to the designated agreements of the Department and the Gallery which initially are the same. For the purposes of the Fair Work Act 2009 and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 the two agreements are treated as separate agreements for the two separate agencies. The Explanatory Memorandum states that if there are changes in the Department’s enterprise agreement, the terms and conditions of the Gallery’s agreement will not be affected and vice versa.13

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Part 5—Other matters

National Portrait Gallery Special Account

Clause 12 of Part 5 of Schedule 2 of the Bill is concerned with the National Portrait Gallery Special Account. Subclause 12(1) abolishes, at transition time, the Special Account established in the Gallery’s name under subsection 20(1) of the Financial Management and Accountability Act 1997. Subclause 12(2) provides that if there is a credit amount in the Special Account, an equal amount is payable to the Gallery at transition time. Subclause 12(3) provides that the amount payable to the Gallery under subclause 12(2) be paid out of the Consolidated Revenue Fund, which is appropriated accordingly.

‘Just terms’ compensation—a constitutional guarantee

Clause 13 is concerned with ‘just terms’ compensation. Subclause 13(1) provides that if the operation of Schedule 2 results in an acquisition of property, then the Commonwealth is liable to pay ‘just terms’ compensation14 to the person concerned. Subclause 13(2) provides that if agreement as to an amount of compensation is not reached between the Commonwealth and the person, the person may institute proceedings in a court of competent jurisdiction to recover reasonable compensation as the court determines.

This is a standard type of provision15 that is designed to preserve the law from a challenge based on section 51(xxxi) of the Constitution, which provides that Parliament has power to make laws with respect to ‘the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws’.

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14. See paragraph 51(xxxi) of the Australian Constitution.
15. For example, equivalent provisions are: section 300 of the Carbon Credits (Carbon Farming Initiative) Act 2011; subsections 68(2) and (3) of the Tertiary Education Quality and Standards Agency Act 2011; and section 152ELD of the Competition and Consumer Act 2010.

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