

2004-2005-2006

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE HOUSING AUTHORITY AMENDMENT BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Defence, the Hon. Dr. Brendan Nelson MP)

DEFENCE HOUSING AUTHORITY AMENDMENT BILL 2006

OUTLINE

This Bill will amend the *Defence Housing Authority Act 1987* (the Act) enabling the Defence Housing Authority (DHA) to operate more efficiently and effectively as a government business enterprise with greater freedom to operate commercially with the DHA board in a more “arms-length” relationship. The Bill also reflects the recommendations of the inter-departmental committee (IDC) established to review the DHA’s governance and legislative arrangements. In making its recommendations, the IDC considered the *Review of Corporate Governance of Statutory Authorities and Office Holders* by John Uhrig, June 2003. The Bill will expand the DHA’s scope in relation to the services it can provide and also enable it to expand operations to include the provision of services to other Commonwealth agencies. It will also provide more clarity for the DHA in relation to its financial framework.

The purpose of the Bill will be to:

- establish a smaller, more commercially focused board with greater freedom to act;
- establish an advisory committee to assist the DHA Board to better meet the operational requirements of Defence (the Department of Defence and the Australian Defence Force);
- confirm that the primary function of the DHA is to provide housing and housing-related services to the Defence and its members to meet the operational requirements of Defence;
- broaden the DHA’s functions to allow it to provide housing and housing-related services to other Commonwealth agencies as defined in the *Financial Management and Accountability Act 1997*;
- broaden the DHA’s powers to allow it to provide services that are ancillary to housing and housing-related services to Defence and other Commonwealth agencies;
- remove the DHA’s exemption from Commonwealth taxation;
- retain the DHA’s exemption from State and Territory taxation but require it to make tax equivalent payments to the Commonwealth;
- change the DHA’s name to Defence Housing Australia; and
- remove the outdated provisions in the Act.

FINANCIAL IMPACT

The amendments in the Bill have no financial impact.

Defence Housing Authority Amendment Bill 2006

NOTES ON CLAUSES

Clause 1: Short Title

1. This clause is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. The substantive provisions of the Bill set out in the Schedules will commence on Proclamation or 6 months after Royal Assent if not proclaimed before this time.

Clause 3: Schedule

3. Clause 3 is a formal provision specifying that amendments or repeals are made to the provisions set out in the Items in the Schedule.

Schedule 1 – Amendment to the Defence Housing Authority Act 1987

Items 1 and 2 - Title and Section 1

These items denote the change of name from ‘Defence Housing Authority’ to ‘Defence Housing Australia’.

Items 3 to 11 – Section 3 Definitions

Item 3 item amends the definition of ‘appointed member’ to reflect the new board structure.

Item 4 repeals the definition of ‘Authority’ as this terminology will no longer be used within the Act. References to the word ‘Authority’ will be replaced by the acronym ‘DHA’ or the word ‘Board’, as appropriate, throughout the Act. ‘DHA’ means ‘Defence Housing Australia’ as defined in item 7.

Item 5 inserts a definition of ‘Board’, being the Board of Directors established under section 11A.

Item 8 inserts a new definition for the ‘DHA Advisory Committee’ being established under Part IIIA.

Items 6 and 10 amend existing definitions for ‘Chairperson’ and ‘members’ to reflect the establishment of the Board under the new section 11A.

Items 9 and 11 amend the definition of ‘Managing Director’ and subsection 3(2) to replace the word ‘Authority’ with the acronym ‘DHA’.

Item 12 – Part II – Establishment, function and powers of DHA

This item replaces the word ‘Authority’ with the acronym ‘DHA’ in the heading of Part II.

Item 13 – Section 4 – Establishment

This item repeals the section which established the Defence Housing Authority and confirms that the body known as the Defence Housing Authority is to continue in existence with the new name, Defence Housing Australia.

Items 14 to 21 - Section 5 – Function

Item 14 inserts the word ‘main’ in front of the word ‘function’ in both the heading and subsection 5(1). The purpose of this is to reinforce that the DHA’s first and primary responsibility remains the provision of housing to Defence (the Department of Defence and the Australian Defence Force). This amendment also indicates that there can be other subsidiary functions.

Items 15, 19 and 21 replace references to ‘the Authority’ with ‘DHA’.

Items 16 and 20 expand the references to the DHA’s function to include housing-related services as opposed to just housing. The provision of housing-related services is not to be contingent on the recipient being provided housing. For instance, the DHA may provide rental assistance to all eligible members of the Australian Defence Force.

Item 17 is a technical amendment adding the word ‘and’ to the end of paragraph 5(1)(a).

Item 18 repeals the words ‘other persons’ in paragraph 5(1)(c) and replaces it with references to ‘(c) persons contracted to provide goods or services to members of the Defence Force, and the families of such persons; (d) and persons contracted to provide goods or services to officers and employees of the Department, and the families of such persons.’ The amendment provides greater clarity as to whom DHA can provide housing and housing-related services to. It allows for DHA to provide housing to Defence contractors and the contractor’s families. This situation could arise when Defence engages a contractor and, as part of that contractual arrangement, has agreed to supply the contractor’s housing.

Further, Defence may contract a third party to provide it with housing and housing-related services. This third party may wish to engage DHA to provide some, or all, of the houses or housing-related services required. In these circumstances, DHA is able to contract with the third party provided that there is a sufficient nexus between the services DHA is being contracted to provide and the operational requirements of Defence.

Item 22 - Section 6 - Additional Functions

This item repeals the existing section relating to the manner in which the DHA can perform its function, as this is covered under section 28 of the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

This item also inserts a new section enabling DHA to provide services to other Commonwealth agencies and to provide ancillary services to Defence and other Commonwealth agencies.

The first additional function set out in subsection 6(1) is to allow DHA to provide housing and housing-related services to the officers and employees of other Commonwealth agencies, or to persons contracted to provide goods or services to officers and employees of other Commonwealth agencies and their families, in order to meet the operational needs of that agency. A Commonwealth agency is defined using the definition of agency under the *Financial Management and Accountability Act 1997* (the FMA Act).

The second additional function set out in subsection 6(2) allows DHA to provide services that are ancillary to housing and housing-related services to Defence and other Commonwealth agencies in order to meet their operational needs. These ancillary services may include the provision of access to services provided by other service providers such as, but not limited to, recreational, educational and financial service providers. It was the intention not to limit the potential ancillary services by defining them precisely. This will allow DHA to submit proposals for Ministerial consideration in the future without further amendment of the Act. A proposed ancillary service must have a nexus with housing and housing-related services.

The Minister's approval is required for the exercise of both the additional functions. Under new subsection 6(4) the Minister may determine to whom services can be provided, the kind of services that can be provided and any other matter. Each individual contractual arrangement that is within the scope of the determination does not need to be approved by the Minister. The determination is a legislative instrument but is not subject to the disallowance or sunset provisions in the *Legislative Instruments Act 2003* (subsection 6(5)).

To safeguard the interests of Defence and to ensure that DHA maintains its primary Defence focus, the exercise of these functions is to be limited by volume. The volume is to be measured by gross revenue of the additional functions as a percentage of DHA's total gross revenue. The total gross revenue figure is to be determined from DHA's audited financial statements. It is intended that the limit is to be no more than 25% but if the limit is to be less than 25%, it may be varied in the future in the regulations.

It is intended that there will be an administrative review of the 25% limit after the amendments have been in place for three years.

Items 23, 24 and 25 replace references to the word 'Authority' with the acronym 'DHA'

Items 26 and 27 - Section 7 - Powers

Item 26 provides for variation of the threshold over which contracts require Ministerial approval by way of a Ministerial determination. Currently DHA must seek written Ministerial approval before entering into a contract requiring the payment by it of an amount in excess of \$6 million. This limit is being retained but the subsection

is being amended to provide Minister with the flexibility to vary the limit in line with changes to Government policy or, changes to economic and commercial operating environments.

Item 27 inserts two new subsections. Subsection 7(3) allows the Minister to determine the new contract threshold in writing.

Subsection 7(4) states that the Ministers determination is not a legislative instrument. This provision has been included to assist the reader as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Items 28, 29 and 30 - Sections 8, 9 and 10 - Limitations on formation of companies, partnerships and participating in joint ventures.

These items repeal sections 8, 9 and 10 respectively, with the intention that DHA would then be subject solely to the obligations placed on it under section 15 of the CAC Act. This section of the CAC Act requires that Ministers be notified of significant events. This is consistent with the obligations placed on other government business enterprises.

Item 31 – Part III – Constitution and meetings of the Authority

This item repeals the heading ‘Part III – Constitution and meetings of the Authority’. This repeal has the effect of placing section 11 ‘Authority is a body corporate etc.’ under Part II – ‘Establishment, functions and powers of the Authority’.

Item 33 – Section 11 – DHA is a body corporate etc.

This item repeals the note exempting DHA from section 29 of the CAC Act provided for under subsection 8(9) of the Act and replaces it with a note stating that DHA is subject to the CAC Act.

Items 32, 34, 36 replace the word ‘Authority’ with ‘DHA’.

Item 35 replaces the word ‘Authority’ with the word ‘Board’ to reflect the actions that are to be taken by the board, which has been newly established under section 11A.

Item 37 – Part III – The Board

This item inserts a new Part III dealing with the Board.

New section 11A establishes a Board of Directors. New section 11B provides that the functions of the Board are to ensure the proper and efficient performance of DHA’s functions and, subject to those provisions set out in subsection (2), to determine the policy of DHA. The provisions in subsection (2) relate to the giving of directions, tax arrangements and delegation by the Finance Minister.

Items 39 and 40 – Section 12 – Membership of the Board

Item 39 repeals the existing paragraphs 12(1)(b) to 12(1)(e) and inserts new paragraphs describing the new composition of the board. This item will have the effect of reducing the board size from twelve to nine members to ensure it is more commercially focused and facilitate more effective decision making. Australian Defence Force and Departmental representatives will be reduced from five to two. The Secretary of the Department will nominate a current or former Australian Public Service (APS) employee or Agency Head, with a background in Defence to serve on the board. The Chief of the Defence Force will nominate a current or former member of the Defence Force to serve on the board. A representative nominated by the Secretary of the Department of Finance and Administration will be added to the Board. The Defence spouse member will be removed from the Board. The Chairperson, the DHA Managing Director and four commercial members will remain.

Item 40 repeals the definition of spouse as there will no longer be a spouse representative on the DHA board.

The new structure has regard to the recommendations of the Uhrig Review. It reflects the Australian Government's decision that DHA should remain an authority operating commercially under the Act and the CAC Act, rather than changed to executive management status. The structure that has been determined provides a greater emphasis on the DHA board having the power to act and the freedom to determine its directions, strategies and to manage its risks.

It is now intended that representatives of Defence, Defence families and the Department will be members of the Advisory committee to the DHA Board, rather than have a representational responsibility on the board. These committee members will then be able to raise representational concerns with the DHA Board unrestrained by the conflicting objectives associated with being a board member acting in the best interest of the DHA itself.

The member nominated by the Secretary of the Department is required to have a 'background in Defence'. The intention is that this appointment will be a person who has an in-depth knowledge of Defence and its operational requirements. It is not restricted to only those people who have worked in either the Department or the Defence Force. This requirement will be dealt with administratively.

Item 41 makes the reference to function plural to give effect to the additional functions that DHA can provide under section 6.

Items 42 and 50 replace the word 'Authority' with 'DHA'.

Items 38 and 43 replace the word 'Authority' with the word 'Board' to reflect the actions that are to be taken by the board, which has been newly established under section 11A.

Items 44, 45, and 46 - Section 14 – Appointment of Members

Item 44 repeals the existing subsection 14(1) and replaces it with a new subsection. This removes the requirement for appointments to the DHA Board to be made by the Governor-General. In the replacement subsection the appointments are to be made by either the responsible Minister or the Finance Minister. The Finance Minister will appoint the member who is nominated by the Secretary of the Department of Finance and Administration. Appointments are to be by written instrument.

Item 45 changes the paragraph reference relating to commercial members to align it with paragraph reference in section 12 ‘Membership of the Board’ which sets out the new board structure.

Item 46 substitutes the words ‘Governor-General’ with ‘Minister’, which allows the Minister to determine that a commercial member is suitably qualified for appointment instead of the Governor-General.

Items 47, 48 and 49 – Section 19 – Resignation of appointed members

These items provide for the insertion of a new subsection 19(2) and substitutes the words ‘Governor-General’ with ‘Minister’ allowing for resignations of appointed members to be made in writing to the Minister rather than the Governor-General. The resignation of a member of the DHA Board takes effect either when it is received by the Minister or a later day if this is specified in the letter of resignation.

Items 51, 52, and 54 – Section 21 – Terminations

Items 51 and 54 remove the references to ‘Governor-General’ and replaces them with ‘Minister’ have the effect of giving the right to terminate appointments of appointed members to the Minister.

Item 52 repeals the paragraph relating to the termination of appointment of the Defence spouse member as this appointment will no longer exist.

Items 53, 57, 62, 65, 66, 91, 93-96, 98, and 100 replace the reference to the ‘Authority’ with a reference to the ‘Board’.

Items 55 to 61 – Section 23 – Acting Appointments

Items 55 and 56 amends the paragraph references relating to particular board positions to align them with the paragraph references in section 12, ‘Membership of the Board’ which sets out the new board structure. This enables the Minister to appoint persons to act when there are vacancies in all cases, except when vacancy is the position appointed by the Finance Minister.

Item 58 inserts a new subsection 23(2A) allowing the Finance Minister to appoint a person to act when the member nominated by the Secretary of the Department of Finance and Administration is absent or the position is vacant.

Items 59 and 60 gives effect to the new subsection (2A) in that acting appointments made by the Finance Minister can be expressed to have effect only in specified circumstances and that acting appointments cannot continue for longer than 6 months. These conditions are also applicable to appointments made by the Minister.

Item 61 inserts a reference to the new subsection 23(2A) into paragraph 23(5)(a) to include acting appointments made by the Finance Minister in the subsection outlining how long acting appointments may continue.

Item 64 – Section 24 - Meetings

Item 64 reduces the number of members required for a quorum from six to five.

Item 63, 67 and 74 makes the reference to function plural to give effect to the additional functions that DHA can provide under section 6.

Items 68, 73, 75-77, 81-90, 92 and 101-103 replace the reference to ‘Authority’ with a reference to ‘DHA’.

Item 69 - Part IIIA – DHA Advisory Committee

This item inserts a new part establishing an advisory committee. Under new section 27, the Committee consists of the National Convenor of Defence Families Australia and representatives from the Royal Australian Navy, the Australian Army, the Royal Australian Air Force and DHA.

The Board member who was nominated by either the Secretary of the Department or the Chief of the Defence Force is to chair the committee. The decision as to who will chair the committee is to be made by the DHA Board to ensure that the DHA Board can distribute committee workloads appropriately and evenly.

Whilst the National Convenor of Defence Families Australia has been designated as the Defence spouse representative on the Advisory Committee, the Bill provides scope for a person occupying a similar office to be appointed to the committee. This similar office must be specified in the regulations to the Act. It is not the current intention that any one other than the National Convenor of Defence Families Australia should be the Defence spouse representative. This paragraph was inserted to ensure that an alternate Defence spouse representative could be appointed to the committee should Defence Families Australia cease to exist. Reference to the similar office in the regulations to this Act would also cover the situation of Defence Families Australia changing its name.

New section 27 also provides that appointment to the advisory committee should not exceed three years but members can be re-appointed. Under new section 29, the National Convenor of Defence Families Australia is to be remunerated for serving on the Advisory committee and the remuneration determined by the Remuneration Tribunal.

New section 28 provides that the Advisory Committee is to give advice and information to the DHA Board about the performance of DHA’s functions. New

section 30 provides that the Board has the power to provide written directions to the Advisory Committee about how to carry out its functions and meeting procedures. New subsection 30(2) assists readers by noting that a written direction from the Board is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

As recommended in the Uhrig review it is intended that this Advisory Committee will be the primary vehicle for the representatives of Defence and Defence families to voice their concerns to the DHA Board.

Item 70 - Part IV – Operation of DHA

This item repeals the heading ‘Operation of Authority’ and replaces it with ‘Operation of DHA’.

Items 71 and 72 – Part IV Operation of DHA

These items repeal sections detailing the financial targets to be included in the corporate plan and the Ministers right to vary the corporate and financial plans of the DHA. These sections are no longer necessary as section 17 of the CAC Act details the obligations of government business enterprises in relation to the corporate planning process and place an obligation on directors to keep Ministers informed of changes to the plan or matters that significantly affect the achievement of the plan.

Items 78, 79, 80 – Part V – Finance

These items repeal the sections relating to the capital structure of the DHA, the capital of the DHA and the payment of dividends to the Commonwealth. These sections are no longer necessary as these issues are covered under sections 17 and 28 of the CAC Act. Section 28 of the CAC Act allows the Minister to notify the DHA of the general policies of the Government that are to apply to it.

Items 97 and 99 – Part VI – Managing Director, staff and consultants

These items repeal sections relating to the disclosure of interests by the Managing Director of the DHA and the exclusion of the Managing Director from certain deliberations. These sections are no longer required as section 27 of the CAC Act provides for disclosure and exclusion as relevant to the Managing Director.

Item No 106 – Part VII Miscellaneous - Section 59 – Rents

This item removes the reference to section 6 when determining rent as section 6 has been amended and it is no longer appropriate to refer to it in this context. Previously section 6 required that DHA was to perform its function in accordance with the policies of the Commonwealth and sound commercial practices. New section 6 now describes the additional functions that DHA has.

Items 105, 107, 108, 121, and 124 replace the reference to the ‘Authority’ with a reference to the ‘Board’. Item 107 also removes the outdated wording ‘as soon as

practicable after the commencement of this Act' in relation to when DHA should determine the rent setting principles and inform the Minister.

Items 104, 109, 110, 111, 115, 118, 120, 122, 123, 125 and 126 replace the reference to 'Authority' with a reference to 'DHA'.

Item 112 – new section 62A – Commonwealth taxation

This item inserts new section 62A making DHA liable for Commonwealth taxation. New sections 62A and 63A have been inserted to make DHA liable for Commonwealth taxation and for tax-equivalent payments as directed by the Minister.

Item 113 replaces the reference to 'Authority' with a reference to 'DHA' and the heading of section 63 is amended to 'Exemption from State and Territory taxation'.

Items 114, 116, and 117 – Section 63 – Exemption from taxation

These items amend section 63 to remove all references to "Commonwealth" as DHA will no longer be exempt from Commonwealth taxation but it will remain exempt from State and Territory taxation.

Item 119 - Section DHA must make tax-equivalent payments to the Commonwealth.

New section 63A makes DHA liable for tax-equivalent payments. The Minister is to advise DHA in writing of the applicability of tax-equivalent arrangements ensuring that DHA does not receive a competitive advantage by virtue of its exemption from State and Territory taxation. Tax-equivalent payments are to be made within four months of the end of the relevant financial year.

The Minister's notification of the tax-equivalent payments may cover more than one financial year.

Item 127 - Subsection 66A - Delegation by Finance Minister

This item deletes the reference to section 8, "Limitations on formation of companies" in reference to the Delegations by the Finance Minister as this section has been repealed.

Schedule 2 – Amendments to Other Acts

Item 1

This item denotes the change of name from Defence Housing Authority to Defence Housing Australia in paragraph 37(c) of the *Defence Force (Home Loans Assistance) Act 1990*.

Item 2

This item denotes the change of name from Defence Housing Authority to Defence Housing Australia in Schedule 1 of the *Occupational Health and Safety (Commonwealth Employment) Act, 1991*. This amendment is contingent on the passage of the Occupational Health and Safety (Commonwealth Employees) Amendment Bill 2005 (see item 4 in the table in clause 2 of this DHA bill).

Schedule 3 - Application

Item 1

This confirms that the amendment made to subsection 47(1) that the Managing Director shall be appointed by the 'DHA' instead of the 'Authority' does not affect the validity of the appointment of the Managing Director who holds the position immediately prior to this bill being enacted.

Item 2

This item indicates that DHA's taxation liabilities as described in section 62A of the Act are to commence from 1 July in the year after the commencement of the Act.

Schedule 4 – Minor technical amendments

Items 1 and 2 remove obsolete references to subsection numbers in sections 20 and 48 of the Act.