

## Advice for XYZ Limited

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CORRS  
CHAMBERS  
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*Privileged and confidential*

# Application of Public Works Committee Act 1969 (Cth) to XYZ

## Question

You have asked us these questions in relation to the National Bridges project:

- Is XYZ Limited (**XYZ**) exempt from the operation of the *Public Works Committee Act 1969* (Cth) (**Act**) (which requires certain projects to be referred to the Public Works Committee)?
- Are there any other bases upon which XYZ, or the works it proposes to undertake, may be exempted from the operation of the Act?

## Answer

- It is unlikely that XYZ could obtain the benefit of a regulation under s 6A(3) exempting it from the Act.
- Because of the nature of the construction, it is unlikely any other exemptions will apply.

## Risk analysis

This is our assessment of the key legal risks having regard to likelihood and impact.

Key issues	Low	Low to Medium	Medium	Medium to High	High
Risk that XYZ is found not to be engaging in competitive trading activities		✓			
Risk that Ministers might find it is not appropriate to exempt XYZ			✓		
Risk of disallowance motion in the Senate and unfavourable public scrutiny			✓		
Reputational risk for XYZ, its directors and officers in being seen to try to avoid the Act			✓		

## Next steps

XYZ should proceed on the basis that the Act will apply, and that the construction will need to be referred to the Public Works Committee before commencement.

## What this advice covers

This advice focuses on the following issues:

How does the Public Works Committee Act generally apply to XYZ .....	2
Is XYZ eligible to be exempted under s 6A(3) of the Act? .....	3
Are there any bases for exemption related to the nature of the construction works? .....	4
Reliance .....	5

### Annexures:

Facts and assumptions .....	6
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## How does the Public Works Committee Act generally apply to XYZ

**The Act applies to XYZ as an ‘authority of the Commonwealth’ in relation to the construction – which is a ‘public work’.**

### Authority of the Commonwealth

- 1 Subject to exceptions, the Act applies to every ‘authority of the Commonwealth.’<sup>1</sup>
- 2 The term ‘authority of the Commonwealth’ includes an incorporated company over which the Commonwealth is in a position to exercise control. It follows that XYZ is an authority of the Commonwealth under the Act.

### Public Works

- 3 Each of the matters covered by the definition of ‘public work’<sup>2</sup> relies on the term ‘work’ and if something is not a ‘work’ then it will not be a ‘public work’.
- 4 The Australian Government Solicitor has previously advised that the construction would be ‘work’ within the definition provided in the Act. We agree with that conclusion.

### Referral to the Public Works Committee

- 5 A public work the estimated cost of which exceeds \$15 million must not be commenced unless it has been referred to the Committee.<sup>3</sup>
- 6 It follows from the above that the construction work that XYZ proposes must be referred to the Committee before it is commenced.
- 7 The Public Works Committee (**Committee**) has the functions of:
  - (a) considering public works work that are referred to it; and
  - (b) reporting to both Houses of the Parliament about:
    - (i) the expediency of carrying out the work; and

<sup>1</sup> Section 6A(1)

<sup>2</sup> Section 5AA

<sup>3</sup> Section 18(8)

- (ii) any other matters related to the work that the Committee thinks should be reported.<sup>4</sup>

### Is XYZ eligible to be exempted under s 6A(3) of the Act?

**Section 6A(3) could apply to exempt XYZ from the operation of the Act. But it needs to be shown that “it is appropriate for XYZ to be exempted”, and such a proposition might be difficult to sustain.**

#### Exemption under section 6A(3)

- 8 Section 6A(3) could apply to exempt XYZ from the operation of the Act because XYZ is currently ‘engaging in trading or other activities’ in competition with other bodies.
- 9 Section 6A(3) states:
- ‘Where the Governor General is satisfied that an authority of the Commonwealth **is engaging in trading or other activities, or is providing services, in competition with another body or other bodies** or with persons, the Governor General may make regulations declaring that this Act does not apply to that authority.’
- 10 Although XYZ is not currently providing services in competition with other bodies, XYZ is currently ‘engaging in trading or other activities’ in competition with other bodies.
- 11 The reasons for this conclusion are that:
- (a) under trade practices law, a business that is not currently supplying goods or services can be a competitor of an existing business if the actions of the existing business are, to some extent, constrained by the first; and
  - (b) existing road operators are likely to be constrained, to some extent, by XYZ even though XYZ is yet to commence supplying services.

#### Is it appropriate for XYZ to be exempted?

##### *Process before Governor General*

- 12 Before a regulation is put before the Governor General, the Minister responsible for the Act (The Hon Mary Smith) will need to be satisfied of the following:
- (a) s 6A(3) is able to be applied; and
  - (b) having regard to s 6A(3), and the purposes of the Act generally, it is appropriate for XYZ to be exempted from the operation of the Act.

##### *Is it appropriate to exempt XYZ?*

- 13 In relation to **paragraph 12(b)**, it may be considered inappropriate to exempt XYZ because:

<sup>4</sup> Section 17

- (a) The Committee is considered to be an important mechanism for Parliamentary scrutiny over Government expenditure on works.
  - (b) Section 6A(3) appears to have as its purpose the protection of public sector bodies from a level of Parliamentary oversight that might reduce their ability to operate in a competitive market. Because of the level of Commonwealth Government commitment to XYZ, and the likely regulatory changes that will be made to support it, XYZ will be able to effectively compete even if it remains subject to Committee scrutiny.
  - (c) There was resistance and debate in Parliament on 10 October 2018 over a motion that was brought by The Hon Mary Smith to exempt the 'national tunnels' project from the operation of the Act.
- 14 On the other hand, it may be considered appropriate to exempt XYZ because XYZ is subject to the Senate Select Committee on the National Bridges project, and there is already adequate Parliamentary scrutiny of XYZ (including its works projects). The Senate Select Committee is due to table its final report next month.
- 15 It is likely that it will be considered inappropriate to exempt XYZ from the operation of the Act. In particular:
- (a) it is likely that any regulation to exempt XYZ from the Act would be closely scrutinised; and
  - (b) a motion to disallow the regulation might be brought before Parliament under s 42 of the *Legislative Instruments Act 2001* (Cth).

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**Are there any bases for exemption related to the nature of the construction works?**

**The other exemptions in the Act do not seem to fit the circumstances of XYZ or the proposed works.**

**Section 18(8)(b) – urgent work**

- 16 A resolution of the House of Representatives could potentially be sought under s 18(8)(b) on the basis that the nature of the work is urgent.
- 17 Section 18(8)(b) of the Act provides that a public work that will cost more than \$15 million need not be referred to the Committee if the House of Representatives has resolved that:
- 'by reason of the urgent nature of the work, it is expedient to be carried out without having been referred to the Committee'.*
- 18 This exemption is unlikely to apply because:
- (a) there is some doubt about whether the proposed work is urgent; and
  - (b) similarly to the 'national tunnels' resolution that was passed on 10 October 2018, a resolution of this kind is likely to be debated in Parliament.

### Section 18(8)(d) – repetitive work

- 19 An order of the Minister could potentially be sought under s 18(8)(d) and 18(8A) on the basis that the work is repetitive.
- 20 A public work need not be referred to the Committee if the Minister has declared the work to be 'repetitive' under s 18(8)(d) and 18(8A) of the Act.
- 21 This exemption is unlikely to apply because the intention is that before a declaration of this kind is made, some 'work' will have previously been referred to the Committee - which has not occurred in the present case.

### Section 5(k) – rollout is not a 'work'

- 22 A regulation of the Governor General may be sought under s 5(k) declaring that the rollout work is not 'work' for the purposes of the Act.
- 23 This exemption is unlikely to apply because:
  - (a) regulations made by the Governor must be 'not inconsistent' with the Act. Given that in our opinion the national bridges work appears to fall within the definition of 'work' within the Act, there is some doubt about whether a regulation of this kind would be 'not inconsistent' with the Act; and
  - (b) it is likely that a regulation of this kind would be closely scrutinised. As would be the case with a regulation under s 6A(3), a motion to disallow a s 5(k) regulation might be brought before Parliament under s 42 of the *Legislative Instruments Act 2001* (Cth).

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#### Reliance

This advice is for the benefit of the addressee. It is not to be disclosed to any other person without our prior written consent, nor relied upon by any other person for any purpose.

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**Please call to discuss any aspects of this advice**

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#### Attachments

- 1 Letter from Committee to Client dated 1 February 2018
- 2 Copy of authority to act

## Annexure 1

# Facts and assumptions

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### Facts

- 1 XYZ is a corporation over which the Commonwealth is in a position to exercise control.
  - 2 XYZ proposes national bridges construction works, and has not referred those works to the Committee.
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### Assumptions

- 3 XYZ is not currently providing services but proposes to do so and may do so in competition with other operators.
  - 4 XYZ intends to enter into contracts to carry out construction works outside of Victoria.
  - 5 XYZ might also assume responsibility for construction work in Victoria, as a result of alterations to the existing contractual arrangements relating to the construction work that is presently being carried out in Victoria
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