

1990

**THE LEGISLATIVE ASSEMBLY OF THE
AUSTRALIAN CAPITAL TERRITORY**

TERRITORY OWNED CORPORATIONS BILL 1990

EXPLANATORY MEMORANDUM

TERRITORY OWNED CORPORATIONS BILL 1990

In its 1990/91 Budget the ACT Government announced the corporatisation of the ACT Electricity and Water Authority, the TAB and the Mitchell Health Services Centre. This announcement reflected the Government's decision on a model for corporatisation of ACT public sector operations and to the preparation of umbrella legislation to embody the fundamental rules and principles of the corporatisation policy. The Territory Owned Corporations Bill 1990 (the Bill) gives effect to the broad rules and principles of the corporatisation policy agreed to by Government. The principle features of the Bill are as follows:

- the establishment of Territory Owned Corporations as companies, incorporated under the Commonwealth Companies Code;
- ownership of the companies will be by way of shareholding with shares held in trust for the Territory; the Territory Owned Corporations will be wholly owned by the Territory;
- voting shares in the Territory Owned Corporations will be held by the Treasurer and another Minister;
- the Board of Directors of Territory Owned Corporations will be appointed by the voting shareholders; Board members will be appointed having regard for their expertise in assisting the Territory Owned Corporation achieve its objectives;
- public accountability of directions given by Ministers to Territory Owned Corporations, where such directions were

considered to be inconsistent with the commercial objectives of the Corporation;

- the establishment of a Statement of Corporate Intent (SCI) agreed between the Boards of Territory Owned Corporations and the voting shareholders; the SCI will detail the strategic direction of the Territory Owned Corporation together with financial and other performance measures by which their operations can be judged;
- a requirement for Territory Owned Corporations to prepare annual reports; these reports will provide details on the operations of the Corporation, audited financial statements of the Corporation and details regarding the performance of the Corporation against the information contained in the SCI;
- the establishment of taxation arrangements for Territory Owned Corporations whereby all taxes payable by the Territory Owned Corporation will be retained by the Territory; and
- provisions regarding borrowings by Territory Owned Corporations and guarantees that the Territory may provide to the Corporations in respect of borrowings.

Details of the Bill are set out in the clause notes in the Attachment.

ATTACHMENT

TERRITORY OWNED CORPORATIONS BILL 1990

Clause 1 cites the name that the Bill will have when enacted.

Clause 2 provides for commencement of the Bill once enacted. The principal provisions will commence on 1 January 1991.

Clause 3 deals with interpretation.

Clause 4 provides that the Bill, once enacted, will be subject to Commonwealth law insofar as that law restricts the legislative power of the Territory.

Clause 5 provides that this Act bind the Crown.

Clause 6 provides that Territory Owned Corporations (TOCs) will be companies limited by shares and established as TOCs by the addition of its name in a schedule to the Territory Owned Corporations Act (when enacted) by another Territory Act. This clause also provides that a change in the name of a company may be made by regulation.

Clause 7 provides that the principle objective of every TOC is to be a successful business and to achieve this objective, to operate as efficiently as comparable businesses in order to maximise the return to the Territory on its investment in the TOC.

Clause 8 deals with the status of TOCs and their subsidiaries, and provides that they are not automatically exempt from taxes, fees or charges payable under a Territory Act nor can they be held to represent the Territory merely because they are corporations wholly owned by the Territory. This clause further provides that the Territory is not liable for debts, liabilities or obligations of TOCs or their subsidiaries unless provided for elsewhere in

legislation or alternatively where the Territory agrees that it will be liable.

Clause 9 provides that following the establishment of a TOC or a subsidiary, the portfolio Minister shall table in the Assembly a copy of the Memorandum and Articles of Association of the TOC or subsidiary together with a statement detailing the names of the shareholders, and a description of the principle activities to be undertaken by the TOC or subsidiary. This clause also provides that the Assembly will be notified of any changes to the Memorandum and Articles of Association or the abovementioned statement tabled by the portfolio Minister.

Clause 10 provides that the obligations imposed by this Bill are in addition to any other obligations imposed upon companies, their directors or shareholders by other laws or the Memorandum and Articles of Association of the TOC.

Clause 11 deals with the Memorandum and Articles of Association of a TOC and provides that the voting shareholders of the TOC are to ensure that the Memorandum and Articles of Association of the TOC and its subsidiaries at all times contain the provisions to the effect of those set out in schedules 2 and 3 to the Bill.

Clause 12 deals with the appointment of Directors of TOCs and subsidiaries and provides that Directors will be appointed by the voting shareholders, having regard to their expertise in assisting the TOC achieve its objectives.

Clause 13 establishes the authority for persons to form and acquire shares in companies and provides that any shares held in such companies are held in trust for the Territory. This clause also establishes the authority of the Chief Minister to transfer shareholdings, and provides that shares shall not be sold or transferred except with the authority of the Chief Minister.

Clause 14 requires TOCs and subsidiaries to provide to voting shareholders all information that they may from time to time require.

Clause 15 provides that a TOC or a subsidiary is not to form, acquire or dispose of subsidiaries without prior written approval of voting shareholders. Similarly, none of the main undertakings of TOCs or subsidiaries may be sold or disposed of except with prior written approval of the voting shareholders. Where the voting shareholders agree to either of these activities, whether conditional or not, details of the agreements are to be tabled in the Legislative Assembly. This clause also provides that where TOCs or subsidiaries want to acquire or dispose of significant assets of the TOC or subsidiary, prior written consent of the voting shareholders is to be sought.

Clause 16 deals with directions to TOCs from voting shareholders and requires that where voting shareholders direct a TOC to undertake or cease an activity that the TOC considers to be inconsistent with the company's best interests, the voting shareholders shall advise the Directors of the TOC in writing of any such direction. The Directors of the TOC will be required to comply with the direction, but the TOC will be entitled to the reimbursement of any reasonable additional costs incurred. The nature of these costs is to be agreed between the Treasurer and the Directors, and in the event of dispute is to be arbitrated by the Chief Minister. Any such directions given by the voting shareholders together with details of any associated costs are to be tabled by the portfolio Minister in the Assembly.

Clause 17 provides that the Auditor-General of the Territory is to be the auditor of all TOCs and that the TOCs shall pay to the Auditor-General reasonable fees and expenses for audit. In the event of a dispute regarding the level of fees and expenses for audit, the matter shall be determined by the Treasurer.

Clauses 18 and 19 deal with the Statement of Corporate Intent (SCI), a formal document agreed between Directors and voting shareholders of TOCs, setting out strategic and performance details relating to the operations of the TOC.

Clause 18 provides for the procedure and timing of the SCI whereby for a group comprising a TOC and subsidiaries, a draft SCI shall be prepared by the Directors of the group and submitted to the voting shareholders, within one month of the commencement of the financial year, for consideration. A final SCI is to be agreed between the Directors and the voting shareholders within three months of the commencement of a financial year and be tabled in the Legislative Assembly by the portfolio Minister. In the case of the first SCI of a newly established TOC, a period of three months is allowed for the preparation of the first draft SCI. This clause also provides that matters contained in the final SCI, considered to be commercially sensitive, may be deleted from the SCI by the portfolio Minister prior to the tabling in the Legislative Assembly. In such instances the portfolio Minister shall table in the Assembly a further statement setting out in general terms the nature of the material deleted and the reason for the deletion.

Clause 19 provides that an SCI for each group shall be prepared in respect of the financial year to which it relates and each of the two following financial years, and contain the following information:

- . the commercial objectives of the group;
- . the main undertakings of the group;
- . the nature and scope of the activities to be undertaken by the group;
- . detailed corporate and business strategies of the group;
- . the performance targets and other measures upon which the group may be judged in relation to its objectives;
- . any other information that the voting shareholders have requested the Directors to include in the Statement.

Clause 19 also provides that where a group comprising a TOC and any subsidiaries is established in the course of a financial year, the first financial year of the group will commence on the day when the TOC was established.

Clause 20 deals with modifications to the SCI and provides that the SCI may be modified at any time by written agreement between the Directors and the voting shareholders. The procedures and timing for modifications to the SCI are the same as those applied in regard to the drafting and finalisation of the SCI at clause 18. Any agreed modifications to the SCI, tabled within the Assembly, are to be incorporated into the last final SCI as agreed between the Directors and the voting shareholders and tabled in the Assembly.

Clause 21 deals with annual reports of TOCs and provides that an annual report on the operations of a TOC and its subsidiaries is to be submitted by the Directors to the voting shareholders within four months after the end of the financial year. The annual report will provide information on the operations and the performance of the TOC and its subsidiaries, and include audited financial statements. The annual report is to be tabled in the Assembly by the portfolio Minister.

Clause 22 provides that the financial year of a TOC will be a twelve month period commencing on 1 July.

Clause 23 provides that the Treasurer may approve the lending of Territory monies to TOCs.

Clause 24 provides that TOCs or subsidiaries may borrow monies from sources other than the Territory, subject to total annual borrowing limits approved by the Treasurer.

Clause 25 provides that a TOC or subsidiary may offer its assets as security in respect of any borrowings undertaken consistent with clauses 23 and 24.

Clause 26 provides that TOCs or subsidiaries shall borrow monies only in accordance with borrowing provisions set out in this Bill.

Clause 27 provides that the Territory may give guarantees in respect of borrowings or other obligations of TOCs or subsidiaries.

Clause 28 provides that TOCs and subsidiaries will be liable to pay all Territory taxes except in respect of certain exempt classes of taxes relating to the formation of TOCs and subsidiaries, the acquisition and transfer of shares in TOCs and subsidiaries, and the transfer of assets from the Territory to a TOC or a subsidiary.

Clause 29 deals with Commonwealth tax equivalents and provides that TOCs or subsidiaries are to pay to the Territory amounts assessed by the Commissioner for ACT Revenue (the Commissioner) as equivalent to those payable by the company if liable to payment of taxation under Commonwealth legislation. This clause also provides that the Commissioner may determine the terms for payment of the tax equivalents, including instalments and timing of such payments. Any such determinations should be consistent with the application of the Commonwealth taxation legislation in similar circumstances. In the event of a dispute arising from the assessment of the Commissioner, the matter is to be referred to the Treasurer for decision, and the decision of the Treasurer is final. This clause further provides that the Treasurer may determine that certain specific equivalent Commonwealth taxation provisions do not apply in respect of this clause, and in such instances the Treasurer's determination should be a disallowable instrument.

Clause 30 provides that the Territory shall levy a charge on TOCs and subsidiaries in respect of borrowings set out at clauses 23 and 24 of this Bill.

Clause 31 provides that TOCs or subsidiaries shall only pay dividends out of monies lawfully available for the purpose.

Clause 32 provides that no voting shareholder shall have a voting power greater than another voting shareholder.

Clause 33 provides for the making of regulations.

Schedule 1 to the Bill identifies the names of all companies that become TOCs.

Schedule 2 to the Bill deals with the specific provisions to be included in the Memorandum of Association of a TOC or a subsidiary:

- . alteration to the memorandum is to be by way of resolution of the Assembly;
- . the provisions of the Bill, when enacted, will prevail over inconsistent provisions of the memorandum; and
- . the memorandum shall state the objects of the company.

Schedule 3 to the Bill deals with the provisions to be included in the Articles of Association of a TOC or a subsidiary. Part 1 of Schedule 3 sets out provisions relating to:

- . the rights of shareholders who are Ministers, when they cease to be Ministers;
- . the power of the Chief Minister to transfer shares;
- . the authority of the Directors in regard to the operations of the TOC;
- . the compliance by TOCs with the provisions of this Bill.

Part 2 to Schedule 3 deals with the articles of association of a TOC and provides for:

- . the issued capital of a TOC;
- . the allocation of voting shares;
- . the appointment of Directors;
- . other provisions relating to quorums and voting arrangements at general meetings.

Part 3 to Schedule 3 deals with the articles of association of subsidiaries and provides for appointments of Directors and the issue and transfer of shares.