

2004

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

TERRITORY OWNED CORPORATIONS AMENDMENT BILL 2004

EXPLANATORY STATEMENT

Circulated by the authority of the Treasurer

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Territory Owned Corporations Amendment Bill 2004

General Outline

The *Territory Owned Corporations Act* 1990 (TOC Act) applies to the government owned companies listed as Territory owned corporations (TOCs) in Schedule 1 of the TOC Act. It provides the accountability and governance framework to protect the Territory's interests in TOCs. It is important that the TOC Act enables effective government control and oversight of TOCs.

The object of this Bill is to propose amendments to the Act to improve governance and accountability arrangements and correct certain anomalies.

The Bill provides for the following:

- extend the definition of the term “borrowing” to include financing leases;
- amend the definition of TOCs’ objectives so that they are required to operate not only efficiently to maximise the sustainable return to the Territory but also in a socially responsible manner and with the object of ecologically sustainable development;
- remove the inconsistency between the TOC Act and the *Legislation Act 2001* that may unintentionally exempt TOCs from court action and from paying monies (such as tax, duty, fee or charge payable under an Act) that would form part of the public money of the Territory;
- provide clarity about the request for information by the voting shareholders from TOCs or subsidiaries;
- extend the transactions involving “main undertakings” for which the consent of the voting shareholders should be obtained to include partnerships, trusts, unincorporated joint ventures and similar arrangements;
- require TOCs to inform voting shareholders of significant events;
- provide for interpreting the terms “main undertaking” and “significant event”;
- provide for TOCs and subsidiaries to comply with general Government policies as appropriate;
- provide for the establishment of audit committees;
- provide for guarantees to be subject to the approval of the Treasurer;
- confirm that the Treasurer may approve limits for borrowing facilities for more than one financial year; and
- provide for the Department of Treasury (through the Central Financing Unit) to undertake investments on behalf of TOCs.

Financial Implications

The proposed amendments are largely technical in nature, and the financial implications are considered negligible.

Details

Clauses 1, 2 and 3 are formal requirements. They respectively, refer to the name of the Act, the commencement date of the Act and the declaration that it is the *Territory Owned Corporations Act 1990* that is being amended.

Clause 4 inserts a new section, section 2, which specifies that the dictionary at the end of the Act is part of the Act.

Clause 5 removes the definitions of “borrowing”, “group”, “subsidiary” and “voting shareholder” from subsection 3(1).

Clause 6 relocates the remaining definitions from subsection 3(1) to the dictionary.

Clause 7 is a technical amendment inserting a standard clause about notes.

Clause 8 revises “Principal objectives of the corporations” in section 7 of the TOC Act.

Under the existing provisions of the TOC Act, ACTEW Corporation Limited has a set of objectives that cover financial, social and environmental matters and the other TOCs have a set of objectives that cover financial matters only. The proposed amendment requires all TOCs to have the same principal objectives covering financial, social and environmental matters. With regard to the environmental objectives, they are relevant to a TOC only when its activities affect the environment.

Clause 9 removes inadvertent inconsistencies with section 121 of the *Legislation Act 2001*.

Under the existing provisions of the TOC Act, a TOC or a subsidiary of a TOC (subsidiary) is not entitled to any immunity or privilege of the Crown nor is it exempt from a tax, duty, fee or a charge payable. However, the *Legislation Act 2001* may unintentionally contradict these provisions. The proposed amendment preserves the original intention of the TOC Act.

Clause 10 clarifies section 15, which requires a TOC or a subsidiary to provide information required by the voting shareholders.

The current provision requires a TOC or a subsidiary to provide information required by the voting shareholders. The proposed amendment expands and clarifies the section by specifying the type, content and format of the information required by the voting shareholders. The amendment also prescribes a time limit for the provision of the information unless an extension is granted.

Clauses 11 and 12 expand section 16, which covers acquisition and disposal of subsidiaries and undertakings, by inserting new subsections 16(1)(aa) and 16(1)(ca) respectively.

Section 16 specifies the transactions undertaken by TOCs and subsidiaries that require the written consent of the voting shareholders. The proposed amendment makes this section comprehensive by extending the coverage of transactions that require the consent of the voting shareholders. Clause 11 proposes that acquiring a business that could be reasonably expected to become a main undertaking of a TOC or subsidiary should be included as a transaction that requires the written consent of the voting shareholders; and clause 12 imposes the same condition on entering into or making a significant change to a partnership, trust, unincorporated joint venture or similar arrangement. Examples of “similar arrangement” include long-term asset maintenance and management contracts and service provision contracts.

Clause 13 is a technical amendment requiring that subsection 16(1) be renumbered to accommodate subsections 16(1)(aa) and 16(1)(ca), at the time of the next republication of the TOC Act.

Clause 14 revises subsection 16(3).

The proposed amendment requires the Portfolio Minister to inform the Legislative Assembly within 15 sitting days of giving consent to acquiring a business that can reasonably be expected to become a main undertaking or entering into or changing a partnership, a trust, an unincorporated joint venture, or a similar arrangement.

Clause 15 inserts new subsections (5) and (6) under section 16.

The new subsection 16(5) describes the term “main undertaking”. The proposed amendment provides for “main undertakings” to be interpreted in accordance with the accounting standards on materiality practised in Australia when the decision on the status of an undertaking is made. Further, “main undertakings” may also be identified in a TOC’s published document such as the statement of corporate intent or in agreements and memorandums of understandings between the TOCs and subsidiaries and the voting shareholders. The amendment also provides for regulations issued under section 34 of the TOC Act to declare certain undertakings as “main undertakings”.

The new subsection 16(6) describes the term “significant” used in relation to an asset, or a part of an asset, or a part of an undertaking, or a change to the nature or extent of an interest, of a TOC or subsidiary. The proposed amendment provides for the term “significant” to be interpreted in accordance with the accounting standards on materiality practised in Australia when the decision on the extent of “significance” is made. Further, a TOC’s published document such as the statement of corporate intent or agreements and memorandums of understandings between the TOCs and subsidiaries and the voting shareholders, may identify “significant” assets, undertakings and interests, concerning the TOC or subsidiary. The amendment also provides for regulations issued under section 34 of the TOC Act to declare certain assets, undertakings and interests as “significant”.

Clause 16 inserts a new section 16A, on notification of significant events.

It is proposed that TOCs and subsidiaries notify the voting shareholders in writing on events external or internal to an entity that may affect the entity's value, or significant part of its assets, or its operations, or the performance of a significant activity, as soon as practicable after becoming aware of the event. These events are "significant" events. The amendment also provides explanations on interpreting the term "significant" as used in this section. It is proposed that the term "significant" be interpreted in accordance with the accounting standards on materiality practised in Australia when the decision on the extent of "significance" of an event or activity is made. Further, a TOC's published document such as the statement of corporate intent or agreements and memorandums of understandings between the TOCs and subsidiaries and the voting shareholders, may identify "significant" activities and events, in relation to the TOC or subsidiary. The amendment also provides for regulations issued under section 34 of the TOC Act to declare certain activities and events as "significant".

Clause 17 inserts a new section 17A that provides for the voting shareholders to notify TOCs or subsidiaries about the general government policies that have to be complied with.

From time to time government may require the TOCs or subsidiaries to comply with general government policies. However, as these entities operate on a commercial basis it may not be practical to comply with all policies. It is proposed that the voting shareholders in consultation with the directors of a TOC or a subsidiary may notify the relevant TOC or subsidiary about the general government policies that may have to be complied with. The voting shareholders may exempt a TOC or a subsidiary from complying with general government policies, particularly if they think it is not practical or is not consistent with generally accepted commercial practices.

Clause 18 inserts a new section 18A that requires TOCs to establish audit committees.

Consistent with best practice for managing risks, it is proposed that the directors of a TOC establish an audit committee. The audit committee will comprise non-executive directors and undertake a range of functions. Generally the functions will be directed at providing advice, guidance and assistance to directors.

Clause 19 amends section 25 to include a note under subsection 25(1) confirming that the Treasurer may approve borrowing limits for more than one financial year. This note clarifies that once the Treasurer approves a multi-year borrowing facility, it is not necessary to give approval at the beginning of every new financial year for borrowing from the same facility, as long as the borrowing limit of that facility is not exceeded and the borrowing is within the approved period.

Clause 20 inserts new sub section under section 25 specifying that the Treasurer's power to approve borrowing limits must not be delegated.

Clause 21 inserts a new section 28A that provides for a TOC or a subsidiary to give guarantees subject to the approval of the Treasurer.

As TOCs and subsidiaries operate in a commercial environment, it is proposed that consistent with commercial practice they be able to give guarantees. However, as TOCs and subsidiaries are government companies, it is also proposed that the guarantees be subject to the Treasurer's approval.

Clause 22 inserts a new section 33C that provides for a department, usually Treasury (through the Central Financing Unit) to invest the surplus funds of TOCs and subsidiaries on their behalf.

Under the current arrangements, the TOC Act does not provide for any other government agency to invest the surplus funds of TOCs and subsidiaries on their behalf. The proposed amendment enables a department, usually Treasury (through the CFU) to undertake investments of surplus funds of TOCs and subsidiaries, except funds held on trust, which have to be invested in accordance with the *Trustee Act 1925*. However, this does not remove the discretion of TOCs and subsidiaries to invest elsewhere as they presently do. The new section also provides for charging a fee for making or managing the investments and recovering reasonable associated expenses. Other details such as how the interest should be paid and any transfer of funds from a Territory bank account to the relevant bank account of a TOC or a subsidiary does not require an appropriation are also addressed in the proposed new section. The proposed new section is consistent with section 56 of the *Financial Management Act 1996*.

Clause 23 is an amendment that updates clause 1 of schedule 4 of the TOC Act.

This amendment removes the definition of "authority", which refers to the Australian Capital Territory Electricity and Water Authority.

Clause 24 removes clause 2 of schedule 4 to the Act, which specifically relates to the primary objectives applicable to ACTEW Corporation Limited. This clause is no longer applicable as it has been proposed that all TOCs have the same principal objectives.

Clause 25 is a technical amendment that updates clause 4 of schedule 4.

Clause 26 is an amendment that updates clause 1 of schedule 5 of the TOC Act.

This amendment removes the definition of "board", which refers to the Australian Capital Territory Totalizator Administration Board.

Clause 27 is a technical amendment that updates clause 3 of schedule 5.

Clause 28 inserts a dictionary, amends the definition of "borrowing" to include "financing leases", inserts definitions for "department", "financing leases" and "voting shareholders" and rewords the definitions of "group", "subsidiary" and "voting shareholder".

The definition of “department” is the same as that in the dictionary of the *Financial Management Act 1996* (FMA). In a “financing lease”, the lessor transfers risks and benefits associated with the leased asset to the lessee. This method of financing is widely used by all types of businesses. While the lack of coverage of financing leases in the current definition has not prevented TOCs from making use of the facility, the proposed amendment makes the definition of “borrowing” in the Act consistent with the definition of “borrowing” in the FMA. The term “voting shareholders” means voting shareholders acting in concert.

Clause 1.1, Schedule 1, amends the definition of “public money” in the dictionary section of the *Financial Management Act 1996* (FMA).

The proposed amendment excludes the money received by a subsidiary of a TOC and the money received by the Territory from a TOC or a subsidiary of a TOC for investment on their behalf, from “public money”.

Clause 1.2, Schedule 1, proposes that paragraphs in the definition of “public money” in the FMA be renumbered when the FMA is republished.

Clause 1.3, Schedule 1, inserts a definition for “subsidiary” in the dictionary section of the FMA. “Subsidiary” means subsidiary of a TOC and the definition is the same as the definition in the dictionary section of the TOC Act.