

2010

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

**FINANCIAL MANAGEMENT (ETHICAL INVESTMENT) LEGISLATION
AMENDMENT BILL 2010**

EXPLANATORY STATEMENT

**Circulated by
Meredith Hunter MLA**

OVERVIEW

The Bill amends the *Financial Management Act 1996* and the *Territory Superannuation Provision Protection Act 2000* to prohibit certain investments made under those Acts. The Bill also requires the investments made under the *Territory Superannuation Provision Protection Act 2000* to, where prudent, be prioritised in proscribed activities. The Bill adds to the current Section 11 of the *Territory Superannuation Provision Protection Act 2000* and Sections 38 and 58 of the *Financial Management Act 1996* that create the capacity for ACT investments. The Bill places new limitations and obligations on investments made under those sections.

The Bill sets out the prohibited investments and provides a maximum threshold of 5% of revenue, above which investment may not be made. This threshold recognises that entities will have a diverse range of investment streams and that investments in otherwise permissible activities should not be limited because of minor interests or revenue lines. This threshold is consistent with many commercial funds that offer ethical, responsible or sustainable, investment options.

The Bill also provides that funds invested under Section 11 of the *Territory Superannuation Provision Protection Act 2000* must be prioritised, where prudent, in a defined list of activities that are designed to achieve positive social and environmental outcomes.

The Bill builds on, and is complimentary to, the ACT's adoption of the UN Principles of responsible investment.

HUMAN RIGHTS

The Bill does not engage any human rights. Section 6 of the Human Rights Act 2004 sets out that only individuals have human rights. The Bill promotes the application of human rights issues to Territory investment practices and will only affect the activities of the Territory in regard to relevant bodies (as defined) and not individuals.

REASONS FOR THE DELEGATION OF LEGISLATIVE POWER

The Bill delegates the ability to the Minister to set additional investment limitations and add additional investment priorities and provides that any such determination is a disallowable instrument. This limited delegation is considered reasonable and proportionate and allows a level of flexibility to respond to contemporary circumstances.

SUMMARY OF CLAUSES

Clause 1 Name of the Act

This clause sets out the name of the proposed Act as the *Financial Management (Ethical Investment) Legislation Amendment Act 2010*.

Clause 2 Commencement

This clause sets out when commencement of the Act will occur. The Act will commence on 1 July 2011.

Clause 3 Legislation amended

This clause identifies the Act to be amended, namely the *Financial Management Act 1996* and the *Territory Superannuation Provision Protection Act 2000*.

Clause 4 Investment of certain public money New section 38 (10)

This clause inserts into Section 38 of the *Financial Management Act 1996* a requirement that investments made under the that section will now be subject to the new section 38A set out in clause 5.

Clause 5 New section 38A

This clause sets out the restrictions to be placed on investments made under Section 38.

Section 38A - **Restrictions on investment of certain public money** – The limitation on investments only applies to relevant bodies (as defined by the bill) where more than 5% of that body's revenue is attributable to a product or activity defined in subsection (2)(b).

In order for the prohibition to apply the Minister must believe on reasonable grounds that it is not likely that more than 5% of body's revenue for the current financial year will come from a listed product or activity. A body would not be a prohibited investment if they derive revenue from multiple categories provided that no more than 5% of their revenue can be attributed to any single category.

The intention is that the required threshold is only applicable to contemporary circumstances and means that funds may be invested in entities that have previously received more than the permitted revenue from any of the listed activities but no longer do so and as such the Territory may now invest in them.

The clause sets out that the body's revenue must be attributable to one of the listed activities. It is not sufficient that a product may be sold and adapted to one of the listed products. For example a company makes small electric motors and in and of themselves such motors are not armaments components however it may be possible for an armaments manufacturer to use or modify them for use in an armament. This would not be sufficient to satisfy the requirements for the investment to be prohibited.

Similarly a company that derives revenue from another company that is a prohibited investment is not excluded. The requirement is that revenue comes from a particular source, the relevant issue is what the body did to receive the revenue rather than how the recipient of the product or service generated the funds to pay for that product or service. For example the fact that a stationary company sells stationary to a company that manufactures tobacco products would not exclude the stationary company as an investment option for ACT funds. Similarly software applications that can be modified for weapons or gaming purposes but are not manufactured for that purpose are not covered by the screen. The fact that they can also be used or modified for a prohibited application is not sufficient for the investment prohibition.

Relevant bodies are defined by reference to the Corporations Act. Through this definition it is intended that both direct and indirect holdings or interests are covered by the prohibition. For example funds may not be invested in managed funds, pooled investment vehicles or mandated trusts that include holdings or interests in any relevant body (as defined) that is excluded by section 38A (2) (a).

Clause 6 Investment by territory authorities New section 58 (9)

This clause inserts into section 58 of the *Financial Management Act 1996* a requirement that investments made under that section will now be subject to the new section 58A set out in clause 7.

Clause 7 New Section 58A

This clause applies to the investment of funds by Territory Authorities under section 58. The application of the clause is the same as clause 5 set out above.

Clause 8 Dictionary, note 2

This clause inserts ‘Corporations Act’ into the dictionary which in turn refers to the *Legislation Act 2001* which defines ‘Corporations Act’ as the *Corporations Act 2001* (Cwlth).

**Clause 9 Investment of amounts in superannuation banking accounts
New section 11 (7)**

This clause inserts into section 11 of the *Territory Superannuation Provision Protection Act 2000* a requirement that investments made under the that section are subject to the new sections 11A and 11B set out in clause 10.

This clause inserts into section 11 of the *Territory Superannuation Provision Protection Act 2000* a requirement that investments made under the that section are subject to the new sections 11A and 11B set out in clause 10.

This clause sets out the restrictions to be placed on investments made under Section 11.

New section 11A - **Prioritising investment of amounts in superannuation banking accounts** – The provision requires that investments must, where prudent, prioritise defined investments. The prudent person test as it applies to trustee obligations is intended to apply to investment decisions under this section. Where there is no substantive evidence of the potential for a reduced return between competing investment options, that is either option is a prudent investment decision Territory funds must be invested in a defined investment.

The provision is designed to give the decision maker sufficient flexibility to ensure that decisions are prudent in the prevailing market conditions. Investment decisions made under section 11A are subject to the prohibitions in section 11B.

New Section 11B – **Restrictions on investment of amounts in superannuation banking accounts** – This is the equivalent provision to what is inserted into the *Financial Management Act 1996* by clause 5 above. It is intended to have the same application in the context of the *Territory Superannuation Provision Protection Act 2000*.

Clause 11 Dictionary, note 2

This clause inserts ‘Corporations Act’ into the dictionary which in turn refers to the *Legislation Act 2001* which defines ‘Corporations Act’ as the *Corporations Act 2001* (Cwlth).