

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMMONWEALTH AUTHORITIES AND COMPANIES BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM
(Amendments to be moved on behalf of the Government)

(Circulated by Authority of the Minister for Finance,
the Honourable Kim C. Beazley, MP)

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OUTLINE

1 The *Commonwealth Authorities and Companies Bill 1994* is one of a package of three Bills (the other two being the *Financial Management and Accountability Bill 1994* and the *Auditor-General Bill 1994*) that were introduced into the House of Representatives on 29 June 1994, by the Minister for Finance, the Honourable Kim C. Beazley, MP. Together these Bills are to replace the Audit Act 1901.

2 After their first reading, the Minister successfully moved that the Bills be referred to the Joint Committee of Public Accounts (JCPA) for review and for an advisory report. The Committee reported to the House on 22 September 1994 (JCPA Report No.331 refers).

3 The proposed amendments to the *Commonwealth Authorities and Companies Bill 1994*, arise not only directly from the Government's consideration of JCPA Report No.331, but also, indirectly - in the identification of four minor changes, the desirability of which only became evident during the process of review and analysis of the Committee's recommendations.

4 The amendments are intended to cover the definitional character of Commonwealth authorities that deal exclusively as trustees; reduction of the period within which a Commonwealth authority must submit its annual report to the responsible Minister; in the case of non wholly-owned Commonwealth companies, requiring the responsible Minister to table the annual report only after the annual general meeting of shareholders; requiring the Auditor-General to report on interim financial statements; removing the 5-year maximum time-horizon for GBE corporate plans; requiring directors to inform the responsible Minister only in respect of corporate plan changes that are significant and providing for the Minister to give guidance to directors as to what the Minister regards as "significant"; requiring directors to inform the responsible Minister of matters that might significantly affect the achievement of the objectives of the corporate plan; allowing the responsible Minister to exempt directors from the requirement to comply with a general policy of the Commonwealth insofar as certain specified activities of the relevant Commonwealth authority or company, or a subsidiary, is concerned; and adjusting a number of provisions so that they more closely reflect Corporations Law standards

ADDITIONAL INFORMATION

5 The JCPA also made two recommendations to the effect that the Explanatory Memorandum for the Bill be amended.

6 The Committee proposed that, in the context of the definition of 'director' in clause 5, it be made clear that the intention is that the roles and responsibilities of directors of Commonwealth authorities under the Bill be regarded as being comparable to those which a Court would be likely to hold in respect of directors of companies established under the

Corporations Law. Decisions of the Courts have articulated different levels of care and diligence that could be expected from company directors in various circumstances. In particular, they distinguish between full-time (executive) directors and part-time (non-executive) directors. Consequently, the obligations of directors of Commonwealth authorities, as provided in the Bill, should, as far as practicable, be interpreted so as to place those directors on a similar footing to company directors in the performance of their respective duties. Accordingly, an additional dot point after the third dot point under clause 5 of the Explanatory Memorandum should be included to provide:-

"For the purposes of the definition of "director", it is intended that the roles and responsibilities of directors of Commonwealth authorities be interpreted in a manner similar to that enunciated by the Courts in relation to company directors. For example, the Courts have articulated different levels of care and diligence that could be expected of company directors in various circumstances. In particular, the Courts distinguish between full-time (executive) directors and part-time (non-executive) directors."

7 Similar considerations arise in relation to the JCPA's recommendation for clarity in the meaning of the term 'executive officer' in relation to a Commonwealth authority - to reflect the circumstances that may be present in each case, given that the courts do so in considering whether a person is concerned in, or takes part in the management of, a Corporations Law company. Accordingly, the third dot point under clause 5 of the Explanatory Memorandum should be read as including the following additional words after the words "section 232 of the Corporations Law":-

"and should, as far as practicable, be interpreted so as to place public authority executive officers on a similar footing to the executive officers of companies in the performance of their respective roles."

FINANCIAL IMPACT STATEMENT

8 The proposed amendments have no financial impact.

NOTES ON PROPOSED AMENDMENTS

ITEM (1)

Clause 7 - Meaning of "Commonwealth authority"

1. Clause 7 establishes criteria for determining whether a body is a "Commonwealth authority" for the purposes of the Bill. The purpose of the proposed amendment is to remove any doubt as to whether bodies corporate that are incorporated for a public purpose and which only hold money on trust satisfy the criterion that a Commonwealth authority must hold money "on its own account".

ITEMS (2) and (3)

Clause 9 - Directors must prepare annual report

2. The proposed amendment to subclause (1) (Item 2) effectively reduces the period within which the directors of a Commonwealth authority must submit its annual report to the responsible Minister from four and a half months to three and a half months after the end of its financial year. The responsible Minister is in turn required to table the report as soon as practicable. By virtue of subclause (3) and subsection 34B(3) of the Acts Interpretation Act, this will require the responsible Minister to table the annual report in both Houses of Parliament within 15 sitting days after he or she receives it.

3. The reduction of the period within which the directors must submit the annual report to the responsible Minister will require a consequential amendment to the note to subsection (1) (Item 3).

ITEM (4)

Clause 13 - Interim financial statements

4. Clause 13 provides that the Finance Minister may require particular Commonwealth authorities, or a class of Commonwealth authorities, to give the responsible Minister interim financial statements which the latter must table in each House of the Parliament. The proposed amendment will require that the interim financial statements be accompanied by a report prepared by the Auditor-General in accordance with regulations. It is proposed that the regulations will specify the nature of the report which will in turn oblige the Auditor-General to conduct a review or, where requested by the Finance Minister, an audit, of the interim financial statements.

ITEMS (5), (6) and (7)

Clause 17 - Corporate plan for GBE

5. Clause 17 obliges the directors of GBEs that are Commonwealth authorities to prepare a corporate plan at least once a year. It is proposed to omit the requirement in subclause (3) that the period covered by the plan must not be more than 5 years (to allow the directors to

opt for a longer period if they so wish), but retain the requirement that the period covered must be at least 3 years (Item 5).

6. It is proposed to omit subclause (5) and substitute a new subclause (5) which will require directors to keep the responsible Minister informed of significant changes to the corporate plan and also matters that may significantly affect the achievement of the objectives of the plan (Item 6). This is consistent with current practice for a number of GBEs and will facilitate the Government's GBE accountability requirements. A proposed new subclause (8) will enable the responsible Minister to issue guidelines for use by the directors in deciding which matters are covered by the new subclause (5) (Item 7).

ITEMS (8) and (9)

Clause 21 - Directors must disclose pecuniary interests

7. Clause 21 provides for the disclosure by a director of a Commonwealth authority of any direct or indirect pecuniary interest the director may have in any matter that is being considered, or about to be considered, by the Board. It is proposed to extend the requirement beyond those interests that are merely pecuniary by omitting the references in subclauses (1) and (4) "direct or indirect pecuniary interest" and substituting "material personal interest". The equivalent provision in the Corporations Law relating to public companies also refers to a "material personal interest".

ITEM (10)

Clause 22 - Executive officers must act honestly etc

8. It is proposed to omit subclause (2) and substitute a new subclause (2) which will have a similar effect as subsection 232(4) of the Corporations Law. The inclusion of the expression 'a reasonable person' is intended to confirm that the required standard of care and diligence is to be determined objectively.

9. The proposed new subclause obliges a Court to place the reasonable person 'in a like position' with the relevant executive officer. Accordingly, the special background, qualifications and management responsibilities of the particular executive officer may be relevant in evaluating his or her compliance with the standard of care. At the same time, such an evaluation should recognise that decisions must be made on the basis of the circumstances at the time and without the benefit of hindsight.

10. The proposed new subclause also obliges the Court to place the reasonable person in the position of an executive officer 'in the authority's circumstances'. Thus, the proposed subclause will recognise that what constitutes the proper performance of the duties of a director of a particular authority will be influenced by matters such as the state of the authority's financial affairs, the size and nature of the authority, the urgency and magnitude of the problem, the provisions of the authority's enabling legislation, and the composition of the Board.

ITEM (11)**Clause 23 - Improper use of information or position**

11. The purpose of the proposed new subclause (1A) is to make it clear that an executive officer who is also a public servant cannot be in breach of subclause (1) merely because of anything he or she may do in the normal course of his or her duties as a public servant. Such a person will not be in breach of subclause (1) if, for example, he or she discloses information, acquired by virtue of his or position as an executive officer of an authority, during policy discussions with other public servants or the responsible Minister.

ITEM (12)**Clause 24 - Liability of executive officer to pay compensation or damages**

12. The purpose of the proposed new subclause (3) is to enable a Court, in proceedings under subclause (2), to relieve a person, in whole or in part, from liability to account to the authority for a profit, or to compensate the authority for loss or damage, resulting from a contravention of clauses 22 or 23, providing the person has acted honestly and, having regard to all the circumstances, ought fairly to be excused for the contravention.

ITEM (13)**Clause 26 - Restrictions on indemnifying executive officers**

13. The purpose of the proposed new subclause (2A) is to ensure that, subject to the limitations imposed by clause 26, Commonwealth authorities have the power to indemnify a person who is or has been an executive officer against liabilities incurred by the person as an executive officer.

ITEM (14)**Clause 27 - Insurance premiums for indemnity insurance of executive officers**

14. The purpose of the proposed new subclause (3A) is to ensure that, subject to the limitations imposed by clause 27, Commonwealth authorities have the power to insure a person who is or has been an executive officer against liabilities incurred by the person as an executive officer.

ITEM (15)**Clause 28 - Compliance with the general policies of the Government**

15. Clause 28 provides that the responsible Minister may notify the directors of a Commonwealth authority of general Government policies that are to apply to the authority. The directors must ensure that the policies are carried out in relation to the authority and, as far as practicable, its subsidiaries.

16. The proposed new subclause (4) will enable the responsible Minister to exempt the directors from this requirement in relation to specified activities. Its purpose is to recognise that it may not be appropriate for certain general Government policies to be applied to all the activities of a particular authority or its subsidiaries. For example, political, cultural or other differences may make it inappropriate to require an overseas subsidiary to comply with a particular Government policy.

ITEM (16)

Clause 35 - Annual report

17. Clause 35 provides that a Commonwealth company must give a copy of its annual report (or annual general meeting documents) to the responsible Minister at least 14 days before the annual general meeting. The responsible Minister is obliged to table the report in each House of the Parliament.

18. It is proposed to omit subclause (5) and substitute a new subclause (5) which will require annual reports of Commonwealth companies that are not wholly-owned to be tabled as soon as practicable *after* the annual general meeting. This requirement recognises that, where there are shareholders other than the Commonwealth, it is reasonable to allow all the shareholders in general meeting the opportunity to consider the annual report before it is tabled. (In the case of wholly-owned Commonwealth companies, the new subclause retains the requirement for annual reports to be tabled as soon as practicable after the responsible Minister receives them).

ITEM (17)

Clause 37 - Interim financial statements

19. Clause 37 provides that the Finance Minister may require particular wholly-owned Commonwealth companies, or a class of wholly-owned Commonwealth companies, to give the responsible Minister interim financial statements which the latter must table in each House of the Parliament. The proposed amendment will require that the interim financial statements be accompanied by a report prepared by the Auditor-General in accordance with regulations. It is proposed that the regulations will specify the nature of the report which will in turn oblige the Auditor-General to conduct a review or, where requested by the Finance Minister, an audit, of the interim financial statements.

ITEMS (18), (19) and (20)

Clause 41 - Corporate plan for GBE

20. Clause 41 obliges the directors of GBEs that are wholly-owned Commonwealth companies to prepare a corporate plan at least once a year. It is proposed to omit the requirement in subclause (3) that the period covered by the plan must not be more than 5 years to allow the directors to opt for a longer period if they so wish), but retain the requirement that the period covered must be at least 3 years (Item 18).

21. It is proposed to omit subclause (5) and substitute a new subclause (5) that will require directors to keep the responsible Minister informed of significant changes to the corporate plan and also matters that may significantly affect the achievement of the objectives of the plan (Item 19). This is consistent with current practice for a number of GBEs and will facilitate the Government's GBE accountability requirements. A proposed new subclause (8) will enable the responsible Minister to issue guidelines for use by the directors in deciding which matters are covered by the new subclause (5) (Item 20).

