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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

DEVELOPMENT ALLOWANCE AUTHORITY AMENDMENT BILL 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer, the Hon Ralph Willis, MP)



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OUTLINE

This Bill amends the *Development Allowance Authority Act 1992* (the Principal Act).

The primary purpose of the Bill is to amend the Principal Act to remove certain restrictions on the restructuring of ownership of projects eligible for the Development Allowance so that a more consistent approach is available to the various types of prospective applicants for the Development Allowance.

Where all other criteria in the Principal Act are met, these amendments would allow:

- the transfer of the Development Allowance benefit where ownership of a project is transferred to another entity after application for the Development Allowance but before registration; and
- the transfer of the Development Allowance benefit where ownership of a project is transferred from one entity structure to another type of entity structure after application for the Development Allowance.

To maximise the effectiveness of the amendments, they will be retrospective and will apply from 1 January 1993, which is the date applications for the development allowance closed.

The amendments will also ensure that any applications for registration of plant expenditure that were refused, or granted in respect of an amount of expenditure that was less than the amount of expenditure whose registration was sought in the application, may be granted in full if they would have been granted in full if the amendments proposed in this Bill had been in force when the Principal Act received Royal Assent.

Moreover, the amendments will provide that any application for registration of plant expenditure that was withdrawn, will be taken not to have been withdrawn if an application for transfer of the benefits of the application could have been made if the amendments proposed in this Bill had been in force when the Principal Act received Royal Assent.

The amendments will also grant the Development Allowance Authority (the DAA) a power to determine that an application by an entity for registration of plant expenditure has lapsed in certain limited circumstances.

The opportunity is also taken to make some minor administrative adjustments and to correct certain apparent drafting errors.

FINANCIAL IMPLICATIONS

The cost to revenue of the proposed amendments is expected to be approximately \$10 million per annum. Over the nine years from 1993-94 to 2001-02, the total cost to revenue of the amendments is expected to be approximately \$92 million:

- this revenue cost relates only to unregistered projects that have already restructured or have developed an intention to restructure before registration; and
- there is no reliable estimate of the prospective cost of allowing all types of restructuring after registration, but the cost is unlikely to be more than \$3 million per annum.

It is arguable whether the additional cost to revenue should be viewed as merely restoring the revenue cost of the Development Allowance initiative operate with the economic effect that the Government originally intended.

Notes on clauses and items involved in the proposed amendments

Part 1 - Preliminary

This part sets out the preliminary framework for the operation of the Bill.

Clause 1: Short Title

The short title of this Act is specified.

Clause 2: Commencement

This clause provides that this Act is to commence on the date that the Act receives the Royal Assent.

Clause 3: Amendments

This clause amends the Principal Act in accordance with the applicable items in the Schedule of Amendments of the Principal Act (the Schedule) and inserts the other items in the Schedule into the Principal Act.

Part 2 - Schedule of Amendments of the Principal Act

Item 1: Joint venture project schemes

This item amends Section 13A of the Principal Act to allow the DAA to grant an application under Part 6 for the transfer of the whole or a part of the benefits of an application for registration, the benefits of registration, or the benefits of a certificate relating to a project that forms part of a joint venture project scheme, where the parties to a joint venture have elected that the aggregate of 2 or more joint venture projects be treated as a joint venture project scheme.

Item 2: Company group project schemes

This item amends Section 14 of the Principal Act to allow the DAA to grant an application under Part 6 for the transfer of the whole or a part of the benefits of an application for registration, the benefits of registration, or the benefits of a certificate relating to a project that forms part of a company group project scheme, where 2 or more companies who are members of a company group have elected that the aggregate of 2 or more specified projects carried out individually by the companies be treated as a company group project scheme.

Item 3: Individual project schemes

This item amends Section 14A of the Principal Act to allow the DAA to grant an application under Part 6 for the transfer of the whole or a part of the benefits of an application for registration, the benefits of registration, or the benefits of a certificate relating to a project that forms part of an individual project scheme, where an entity has elected that the aggregate of 2 or more specified projects carried out by the entity be treated as an individual project scheme.

Item 4: Form of application

This item amends Section 28 of the Principal Act, such that where an incorporated body has a board of directors, the application for registration of plant expenditure and the accompanying report may be signed by a person authorised by the chairperson of the incorporated body.

Item 5: DAA's decision on application

This item amends Section 30 of the Principal Act to provide that where an application for registration has been varied under Section 45 of the Principal Act, the DAA must consider the application as so varied and decide to either grant or refuse the application.

[New subsection 30(1A)]

Item 6: Criteria for granting application

This item amends Section 31 of the Principal Act to provide that the DAA must be satisfied that it is reasonably likely that the carrying out of the project, joint venture project, joint venture project scheme, company group project scheme or individual project scheme will be completed before granting an application for registration of plant expenditure. Where there is a transfer of the benefits of the application for registration to a new entity under Part 6, there is no requirement that the original applicant complete the carrying out of the project, joint venture project, joint venture project scheme, company group project scheme or individual project scheme.

Item 7: Criteria for granting application

This item amends Section 31 of the Principal Act to provide that where an application has been varied under Section 45 of the Principal Act, the criteria against which the DAA is required to assess applications for registration of plant expenditure are to be applied to the application as so varied.

[New subsection 31(2)]

Item 8: Form of application

This item amends Section 37 of the Principal Act, such that where an incorporated body has a board of directors, the application for pre-qualifying certificate and the accompanying report may be signed by a person authorised by the chairperson of the incorporated body.

Item 9: Heading to Part 5

This item amends the heading to Part 5 of the Principal Act to reflect that Part 5 enables an entity that has applied for registration of plant expenditure to apply to the DAA for a variation of the application for registration.

Item 10: Variation of application for registration

This item amends Section 42 of the Principal Act to provide that an entity that has applied for registration of plant expenditure may apply to the DAA for a variation of the expenditure, project, joint venture project, joint venture project scheme, company group project scheme or individual project scheme relating to the application for registration. However, an entity is not entitled to apply to the DAA for a variation of the application for registration unless the application for variation is made because of a change in circumstances that occurred on or after 1 January 1993. *[New subsections 42(1A) and 42(1B)]*

Item 11: Joint ventures and company group project schemes

This item amends Section 42 of the Principal Act to provide that an entity is not entitled to apply to the DAA for a variation of an application for registration of plant expenditure, a registration or a pre-qualifying certificate for a joint venture project, joint venture project scheme or a company group project scheme, unless each other entity involved in the joint venture project, joint venture project scheme or company group project scheme makes a corresponding application.

Item 12: Applications for variation

This item amends Section 42 of the Principal Act to provide that where an application for registration, registration or pre-qualifying certificate has been varied under Section 45 of the Principal Act, the criteria against which the DAA is required to assess applications for variation of the application for registration, registration or pre-qualifying certificate are to be applied to the application, registration or pre-qualifying certificate as so varied. *[New subsection 42(5)]*

Item 13: Form of application

This item amends Section 43 of the Principal Act, such that where an incorporated body has a board of directors, the application for variation of the application for registration, registration of plant expenditure or pre-qualifying certificate, and the accompanying report may be signed by a person authorised by the chairperson of the incorporated body.

Item 14: Criteria for granting application

This item amends Section 46 of the Principal Act to provide that the DAA in granting an application for variation of expenditure or a project must be satisfied that the proposed variation relates to the same, or substantially the same, project as was specified in the original application for registration, original registration of plant expenditure or original pre-qualifying certificate, as the case may be.

Item 15: Variation of project specification

This item amends Section 48 of the Principal Act to provide that in varying an application for registration, registration or a pre-qualifying certificate the DAA must vary the project's specification, if it has changed. In accord with Section 46 a variation in the project specification must relate to the same, or substantially the same, project as specified in the original application for registration, registration or certificate, as the case may be.

Item 16: Transfer of the whole or a part of the benefits of an application, registration or certificate

16.1. This item amends Part 6 of the Principal Act to provide that an application may be made to the DAA by the transferee for transfer of the whole or a part of the benefits of an application for registration, registration or pre-qualifying certificate where: *[New subsection 49(1)]*

- the transferor has applied for registration of plant expenditure or proposed plant expenditure; or
- plant expenditure is registered in the name of the transferor; or
- the transferor holds a certificate in relation to plant expenditure; and
- the transferee has, on or after 1 January 1993, taken over, or agreed to take over, the completion of the whole or a part of the project concerned (with or without modifications); and
- the transferor is not an exempt entity under the Tax Act(s) e.g a public authority constituted under a State or Commonwealth Act.

16.2. This item provides that the transferee may be a person who is an individual, a company, a person in a particular capacity of a trustee, a partnership or any other person irrespective of the nature of the transferor entity. *[New subsection 49(2)]*

16.3. This item requires a written application and project report for transfer of the whole or a part of the benefits of an application for registration, registration or pre-qualifying certificate to be provided to the DAA in the form, and including information, as required by the DAA. Where an incorporated body has a board of directors, the application for transfer of the application for registration, registration or pre-qualifying certificate, and the accompanying report, may be signed by a person authorised by the chairperson of the incorporated body. *[New section 50]*

16.4. This item allows the DAA to refuse to consider an application for transfer of the whole or a part of the benefits of an application for registration, registration or pre-qualifying certificate where the applicant has not met an information request under Part 7 of the Principal Act. *[New section 51]*

16.5. This item requires the DAA, having considered an application for transfer of the whole or a part of the benefits of an application for registration, registration or pre-qualifying certificate, to either grant or refuse the application. The DAA is required to advise the applicant in writing of the outcome. If an application is refused the DAA is required to set out the reasons for refusal in the written notice. *[New section 52]*

16.6. This item specifies the criteria against which the DAA must assess an application for transfer of the whole or a part of the benefits of an application for registration, registration or pre-qualifying certificate. The criteria are directed towards preventing the transfer of a tax benefit to a different project or for non-commercial reasons and towards only allowing a transfer that occurs for the purpose of completing the project. The criteria are: *[New section 53]*

the transferee's proposal to undertake the remaining plant expenditure for the whole or a part of the project in order to complete the project or part of the project, as the case may be, is for genuine commercial reasons; and

- the project or part of the project is the same, or substantially the same, project as in the transferor's application for registration, registration or pre-qualifying certificate; and

it is reasonably likely that the project or part of the project will be completed; and

the DAA can reasonably assume that the project or part of project will be broadly eligible for the allowance under the relevant tax tests - by passing the prospective deduction test.

16.7. This item provides for two different mechanisms by which a transfer of the benefits of an application for registration is given effect, depending upon whether the transfer is for the whole or a part of the benefits of the application for registration. *[New section 54]*

Where the DAA grants the transferee a transfer of the whole of the benefits of an application for registration:

- the transferor's application for registration is taken to have been withdrawn;
- the transferee's application for transfer is taken to be an application for registration;
- the DAA does not apply the 1 January 1993 deadline for applications for registration; and
- the DAA will, in requiring that the \$50 million threshold test is met by the transferee, treat where reasonable, gross capital expenditure made by the transferor as if it were made by the transferee. This will not be the case where the DAA is not satisfied that the transferee has obtained the benefit of the expenditure, whether by acquisition of the assets or otherwise.

Where the DAA grants the transferee a transfer of a part of the benefits of an application for registration: *[New subsection 54(4)]*

- the transferee's application for transfer is taken to be an application by the transferor for a variation of the application for registration;

the transferee's application for transfer is taken to be an application for registration;

- the DAA does not have to grant the transferee's application for registration;
- the DAA does not apply the 1 January 1993 deadline for applications for registration; and

the parts of the project to be carried out by the transferor and the transferee are considered to be separate projects.

16.8. This item provides for two different mechanisms by which a transfer of the benefits of registration is given effect, depending upon whether the transfer is for the whole or a part of the benefits of registration. *[New section 55]*

Where the DAA grants the transferee a transfer of the whole of the benefits of registration:

- the DAA must cancel the transferor's registration;
- the transferee's application for transfer is taken to be an application for registration;
- the DAA must grant the transferee's application for registration;
- the DAA does not apply the 1 January 1993 deadline for an application for registration;
- the DAA will, in requiring that the \$50 million threshold test is met by the transferee, treat where reasonable, gross capital expenditure made by the transferor as if it were made by the transferee. This will not be the case where the DAA is not satisfied that the transferee has obtained the benefit of the expenditure, whether by acquisition of the assets or otherwise.

Where the DAA grants the transferee a transfer of a part of the benefits of registration:

- the transferee's application for transfer is taken to be an application by the transferor for a variation of the application for registration;
- the DAA must grant the transferor's application for variation of the application for registration;
- the transferee's application for transfer is taken to be an application for registration;
- the DAA must grant the transferee's application for registration;
- the DAA does not apply the 1 January 1993 deadline for applications for registration; and *[New subsection 55(3)]*
- the parts of the project to be carried out by the transferor and the transferee are considered to be separate projects.

16.9. This item provides the mechanism by which the DAA transfers the whole or a part of the benefits of a pre-qualifying certificate. *[New section 56]*

Where the DAA grants the transferee a transfer of the whole of the benefits of a pre-qualifying certificate, the DAA must:

- terminate the transferor's certificate, with effect from the date the DAA grants the application for transfer or an earlier date if reasonably requested by the transferor; and
- grant the transferee a pre-qualifying certificate for the whole of the plant expenditure that the DAA specifies as being required for the project's completion.

Where the DAA grants the transferee a transfer of a part of the benefits of a pre-qualifying certificate, the DAA must:

grant the transferee a pre-qualifying certificate for the specified part of the plant expenditure that the DAA specifies as being required for the completion of the part of the project concerned; and

- the parts of the project to be carried out by the transferor and the transferee are considered to be separate projects.

16.10. This item sets out the form for, and the information that must be specified in, a pre-qualifying certificate for the transferee. In particular the plant expenditure that has pre-qualified (once incurred) and the project, joint venture project, joint venture project scheme, company group project scheme or individual project scheme for which the certificate has been granted are specified. *[New section 57]*

16.11. This item provides for a redefinition of “new” plant and equipment in the circumstances where the DAA believes it reasonable that the plant be treated as new in the hands of the transferee. This may arise, for example, where the transferor has just prior to transfer purchased eligible plant which has not been installed or claimed against the allowance, and is transferred to the transferee as part of the takeover. In this instance, the DAA may deem that plant to be new for the purposes of this Act and the relevant part(s) of the Tax Act. *[New section 58]*

Item 17: Entities to which Part 7 applies

This item amends Section 78 of the Principal Act to provide that the information gathering powers of the DAA apply to those parties dealing with the DAA for the purpose of obtaining a variation to an application for registration, a registration or a pre-qualifying certificate.

Item 18: Entities to which Part 7 applies

This item amends Section 78 of the Principal Act to provide that the information gathering powers of the DAA apply to those parties dealing with the DAA for the purpose of obtaining a transfer of the benefits of an application for registration, a registration or a pre-qualifying certificate.

Item 19: Heading to Part 8

This item amends the heading to Part 8 of the Principal Act to reflect that it sets out the conditions under which the DAA may determine that an application for registration has lapsed, or cancel or terminate a registration or pre-qualifying certificate.

Item 20: Lapsing, cancellation or termination-failure to comply with request

This item amends Section 81 of the Principal Act to provide that the DAA may determine that an application by an entity for registration of plant expenditure has lapsed if the applicant concerned does not comply with a request for information or documentation under Part 7.

[New paragraph 81(1)(aa)]

Item 21: Lapsing, cancellation or termination-failure to comply with request

This item amends Section 81 of the Principal Act to provide that an application by an entity for registration of plant expenditure will lapse when the DAA determines that it has lapsed.

[New subsection 81(2)]

Item 22: Lapsing or Cancellation-false or misleading statements, etc.

This item amends Section 82 of the Principal Act to provide that, in cases where the information gathering powers of the DAA are not utilised, the DAA may determine that an application by an entity for registration of plant expenditure has lapsed if an entity provides the DAA or a Department officer with false or misleading information or knowingly provides a false or misleading document.

Item 23: Lapsing or Cancellation-false or misleading statements etc.

This item amends Section 82 of the Principal Act to provide that the DAA may determine that an application by an entity for registration of plant expenditure has lapsed if an entity provides the DAA or a Department officer with false or misleading information in response to a request for information or documentation under Part 7. *[New paragraph 82(2)(aa)]*

Item 24: Lapsing or Cancellation-false or misleading statements etc.

This item amends Section 82 of the Principal Act to provide that the DAA may determine that an application by an entity for registration of plant expenditure has lapsed if an entity knowingly provides the DAA or a Department officer with a false or misleading document in response to a request for information or documentation under Part 7.

An application by an entity for registration of plant expenditure will lapse when the DAA determines that it has lapsed. *[New subsection 82(3A)]*

Item 25: Spending on the payment of interest

This item amends Section 93J to provide that a borrowing may be a direct infrastructure borrowing where the borrower, at the time of the borrowing, intends to spend the money on the payment of interest relating to that part of the period of the borrowing that occurs during the construction period of the infrastructure facilities or related facilities, and the interest payment is made during the construction period.

Item 26: "acquisition" includes dismantling etc

This item amends Section 93J to provide that a direct infrastructure borrowing may be used for the acquisition, dismantling, transportation or installation of one or more related facilities.

Item 27: Water supply facility

This item amends Section 93L to provide that all eligible water supply facilities must be located in Australia.

Item 28: Sewage or wastewater facility

This item amends Section 93L to provide that all eligible sewage or wastewater facilities must be located in Australia.

Item 29: Quarterly reports by DAA

This item amends Section 115 of the Principal Act to provide that, for the purposes of this section, a quarter is defined as commencing on 1 July, 1 October, 1 January or 1 April.

Item 30: Transitional

This item inserts a new section into the Principal Act to provide for the following circumstances:

- where an application for registration of plant expenditure was refused before the commencement of this Act, but would not have been refused if this Act had been in force when the Principal Act received the Royal Assent, the DAA may treat the refusal as not having occurred, and the application is taken not to have been refused;
- where an application for registration of plant expenditure was withdrawn before the commencement of this Act, but the DAA determines that an application for transfer of the benefits of the application could have been made if the application had not been withdrawn and the amendments proposed in this Bill had been in force when the Principal Act received Royal Assent, the DAA may treat the withdrawal as not having occurred, and the application is taken not to have been withdrawn; and
- where an application for registration was granted before the commencement of this Act in respect of an amount of expenditure that was less than the amount of expenditure whose registration was sought in the application, but would have been granted in respect of a greater amount of expenditure if this Act had been in force when the Principal Act received the Royal Assent, the DAA may treat the greater amount as being the amount of expenditure registered in respect of the application, and must amend the particulars of the registration accordingly.

