

# **Corporations (Consequential Amendments) Bill 2001**

## **Explanatory Memorandum for proposed amendments**

The Bill as introduced seeks to make amendments to replace existing references in numerous Western Australian Acts to the old Corporations Law and other previous companies legislation with appropriate references to the Commonwealth Corporations Act 2001.

The Bill also seeks to make technical amendments to Western Australian Acts that reflect the fact that the new Corporations Act is a Commonwealth Act. This will minimise the risk that provisions of Western Australian Acts will be invalid because of inconsistency with the Commonwealth Corporations Act.

The proposed amendments to the Bill seek to include in the Bill further amendments of exactly the same kind in relation to the remainder of the Western Australian Acts that were not dealt with in the Bill as introduced.

The process of including amendments to Acts in the Bill required consideration of each Western Australian Act and consultation with the relevant Government Department or Agency. There are nearly 900 Western Australian Acts. Given the enormity of the task and the time constraints, Parliamentary Counsel did not have time to complete this task before the Bill was required to be printed for introduction.

As these amendments deal with further Acts in a manner that is consistent with the Bill as introduced, the fact that they were being prepared was not drawn to the attention of the Attorney-General or of the Committee. The amendments were only finalised on 19 June 2001.

As indicated below, the proposed amendments, and the Bill, will preserve the operation of Western Australian Acts and prevent their invalidity on the basis of inconsistency with the Commonwealth Corporations Act.

### *Employers' Indemnity Supplementation Fund Act 1980*

An example is the proposed new clause 72 on page 6 of the amendments which deals with the *Employers' Indemnity Supplementation Fund Act 1980*:

This section at present provides:

#### **36. Payment into Fund of moneys recovered by liquidators**

- (1) If—
  - (a) an insurer is, under a contract of reinsurance, insured against liability in respect of employers' policies issued by the insurer and that liability is incurred by the insurer;
  - (b) any party of the liability of the insurer referred to in paragraph (a) is met by moneys paid by the Insurance Commission under this Act; and

- (c) an amount in respect of that part of the liability of the insurer referred to in paragraph (b) is received by the liquidator of that insurer from the reinsurer concerned,

the liquidator of the insurer referred to in paragraph (a) shall pay the amount so received from the reinsurer, after the deduction of any expenses of or incidental to getting in that amount, to the Commission, in priority to all payments in respect of the debts referred to in section 441 of the *Companies (Western Australia) Code*, to the credit of the Fund.

- (2) If the liquidator of an insurer recovers any amount due to the insurer as a consequence of the payment, the moneys charged to the Fund, of any part of a claim, judgement, order or award arising out of or in relation to an employer's policy issued by the insurer, that liquidator shall pay the amount so recovered, after the deduction of any expenses of or incidental to the recovery of that amount, to the Commission, in priority to all payments in respect of debts referred to in section 441 of the *Companies (Western Australia) Code*, to the credit of the Fund.
- (3) Subject to section 38A, this section has effect notwithstanding any agreement to the contrary, whenever made.

The proposed amendment will insert new subsection (4) as follows:

- (4) The payment of an amount referred to in subsection (1) or (2) is declared to be an excluded matter for the purposes of section 5F of the Corporations Act in relation to that Act to the extent to which the payment of the amount is governed by subsection (1) or (2).

This new subsection maintains the status quo of the priority of the debts and the operation of this Section in the context of the new Commonwealth Corporations Act. That is, section 36 will not be invalid if the proposed new subsection (4) is enacted.

### *Housing Act 1980*

Another example of the further amendments that have now been identified as necessary is the proposed new Part 31, on page 8 of the amendments which will amend section 55 of the *Housing Act 1980*:

The first 4 subsections of section 55 at present provide:

#### **55. Floating security and charge**

- (1) Subject to sections 56 and 57 where a lending institution makes a loan agreement the State, has, by virtue of this Act and notwithstanding the provisions of any other Act or delegated legislation, or of the instrument of constitution of the lending institution, as floating security for the due observance by the lending institution of the terms and conditions of the loan agreement, a floating charge on the whole of the undertaking and other property and assets, present and future, of the lending institution.
- (2) A floating charge created by this section has priority to all other charges, whether they arose or were created before, or arise or are created after the coming into operation of this Act.

- (3) Any amount owing under a loan agreement by a lending institution to the State is a debt owing to the Crown.
- (4) If and when applicable, the provisions of section 438 and Division 6 of Part XII of the *Companies (Western Australia) Code* apply in respect of the debt, but this subsection does not derogate from the generality of the operation of the provisions of subsections (1), (2) and (3).

The proposed amendment will replace s.55 (4) with a new subsection:

- (4) Subsections (1), (2) and (3) have effect despite any provision of the Corporations Law.

The proposed new s.55(4) will maintain the status quo of the priority of the debts and the operation of this section. If this amendment is not made, then the priorities in the Commonwealth Corporations Act will apply.

Other clauses in the amendments have a similar purpose of preserving the operation of the Western Australian Acts.

The Corporations Act permits State Acts to operate where they would otherwise be inconsistent with it and invalid. The Corporations Act does this by recognising that where State Acts expressly indicate that they are to operate despite the Corporations Law or new Corporations Act they will be able to do so. Such express indication has to be made before, or at the same time that, the Corporations Act commences.

If it is not done section 55 of the *Housing Act 1980*, and other like Western Australian provisions, will be displaced by the Commonwealth Corporations Act. This provision means that the Commonwealth Corporations Act will not override the priority given by the State Act.

This aspect was specifically referred to in the Report of the Standing Committee on Legislation on the Corporations (Commonwealth Powers) Bill 2001 and other related Bills. See the discussion of Part 1.1A of the Corporations Act in Chapter 4 of the Committee's Report.

The opportunity has also been taken to make a few minor drafting corrections to the Bill. The amendments to clause 11, 13, 51, 105, 113 and 135 fall into this category.