

ELECTRICITY CORPORATIONS AMENDMENT BILL 2015

EXPLANATORY MEMORANDUM

Overview

The purpose of the Electricity Corporations Amendment Bill 2015 (the Bill) is to introduce greater flexibility in the regime under which Synergy, Western Power and Horizon Power (the corporations) pay dividends to Government by adopting an approach more in line with that contained in the *Commonwealth Corporations Act 2001*.

Currently, under the provisions of the *Electricity Corporations Act 2005*, the board of a corporation is required to calculate the amount of dividend it recommends to the Minister by reference to the profits of that corporation made in the relevant financial year. This approach has its foundation in an earlier (and since superseded) dividends framework established by the corporations law. As a matter of practice, the actual setting of the dividend occurs through the dividend policy that applies under the corporation's statement of corporate intent and is typically set as a percentage of the corporation's net profit after tax for the relevant financial year.

The corporations are prohibited from paying dividends on an interim basis, being restricted to paying an annual dividend only.

The Bill provides increased flexibility in relation to the payment of dividends by the corporations by amending the *Electricity Corporations Act 2005* in two respects:

1. replacing the "profits test" for calculation of dividends in section 126 with a test based on the corporation's net asset and solvency position (modelled on section 254T of the *Commonwealth Corporations Act 2001*); and
2. enabling the corporations to pay dividends on an interim (and what is otherwise sometimes referred to as a "special") basis. This brings the electricity corporations with other Western Australian government trading entities (GTEs) such as the Insurance Commission of Western Australia and the ports.

The change to the test for the calculation of dividends is intended to more closely align requirements for the payment of dividends by the corporations with the approaches contained in the *Commonwealth Corporations Act 2001*. This will enable, among other things, the corporations to return equity to the State by way of a dividend (a return of capital to the owner in the nature of a share buyback by a private sector corporation). The current requirement to calculate the amount of dividend with reference to the profits of the corporation precludes such a return of equity.

Clause 1. Short Title

This clause sets out how the Act may be cited.

Clause 2. Commencement

This clause sets out the date on which the clauses of the Act come into operation.

Clauses 1 and 2 come into operation on the day on which the Act receives Royal Assent. The remaining clauses of the Act come into operation on the day after the day on which the Act receives Royal Assent.

Clause 3. Act amended

This clause provides that the amendments contained in the Act are amendments to the *Electricity Corporations Act 2005*.

Clause 4. Section 108 amended

This clause is a consequential amendment that provides an annual report by a corporation or subsidiary must include particulars of any direction given by the Minister under new section 127A(3).

Clause 5. Section 120 amended

This clause is a consequential amendment that provides a corporation, a subsidiary or a person performing functions under the *Electricity Corporations Act 2005* is not liable for the fact of having done or omitted anything that is required to be done or omitted by a direction given by the Minister under new section 127A(3).

Clause 6. Section 126 amended

This clause removes the requirement for the dividend payable by a corporation to be calculated by reference to the profits of that corporation.

This clause also updates the language used in relation to the procedure for the payment of an annual dividend. This change of language is consistent with equivalent provisions in other Western Australian legislation, for example, the *Land Information Authority Act 2006*.

Clause 7. Section 127A and 127B inserted

Section 127A

Section 127A enables the payment of dividends on an interim basis and sets out the process by which they may be called for, set and paid.

The new provision enables the Minister to notify the board of a corporation that an interim dividend is to be paid to Treasurer, if he or she considers that such a payment is justified. Upon receiving such a notice, the board of the corporation must, as soon as practicable, make a recommendation to the Minister as to the amount of interim dividend that the board considers appropriate. Upon receiving the board's recommendation, the Minister may either accept it, or, after consulting with the board, direct that another amount be paid.

Section 127B

Section 127B sets out the new test for the calculation of the amount of dividend that may be paid by a corporation.

New dividend test

Section 127B(2) provides that the board of a corporation must be satisfied of the following matters before recommending an amount of annual or interim dividend to the Minister:

- (a) the corporation's assets will exceed its liabilities immediately before the dividend is paid;
and

- (b) the excess is sufficient for the payment of the dividend; and
- (c) the corporation will, immediately after the dividend is paid, be solvent.

The new test for the calculation of dividends is intended to provide the corporations with increased flexibility in the amount of dividend that may be paid, and specifically enable them to return equity to the State by way of a dividend.

One example of where a corporation would be able to return a greater amount of dividend under the new test than would be the case under the current test is where the corporation generates cash or earns revenues in excess of any need to re-invest in the business and determines to return the proceeds to the State.

Minister's ability to direct that another amount be paid

The Minister will continue to have the ability to direct a corporation to pay a dividend amount that is different to the amount recommended by the board. The Bill ensures that such a direction may be made in respect to both annual and interim dividends.

Section 127B(3) provides that, prior to issuing such a direction, the Minister must be satisfied as to the same criteria as the board in recommending the amount of dividend (i.e. criteria (a) to (c) above).

Section 127B(4) provides that it is sufficient for the Minister to be satisfied of these matters on the advice of the relevant board.

Model provisions

Section 127B is modelled on section 254T of the *Commonwealth Corporations Act 2001*. At the time of writing section 254T states:

"254T circumstances in which a dividend may be paid.

- (1) A company must not pay a dividend unless:
 - (a) the company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient for the payment of the dividend;
 - (b) the payment of the dividend is fair and reasonable to the company's shareholders as a whole; and
 - (c) the payment of the dividend does not materially prejudice the company's ability to pay its creditors."

There are two broad departures from s254T in the new s127B.

First, criterion (b) from the model provisions has been omitted. This reflects the fact that the corporations are State owned businesses that do not have share capital.

Second, proposed section 127B refers to the solvency position of a corporation, rather than prohibiting a corporation from paying a dividend unless the payment of the dividend does not materially prejudice the corporation's ability to pay its creditors. The solvency criterion is intended to provide a greater degree of clarity than the equivalent provision of s254T.

Clause 8. Section 134 amended

This clause is a consequential amendment that relates to the procedure for laying before Parliament any direction made by the Minister under new section 127A(3).