

[Act 1995 No 32]



New South Wales

State Owned Corporations Amendment Bill 1995

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The object of this Bill is to establish a new class of State owned corporations, to be known as “statutory State owned corporations” or “statutory SOCs”. The existing class of State owned corporations will in future be known as “company State owned corporations” or “company SOCs”.

Some changes are also made to the legislation as it applies to company SOCs.

* Amended in committee—see table at end of volume.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the proposed Act to commence on a day or days to be proclaimed.

Clause 3 is a formal provision that gives effect to the Schedule of amendments to the *State Owned Corporations Act 1989*.

Clause 4 is a formal provision that gives effect to the Schedule of amendments to the *Irrigation Corporations Act 1994*.

Clause 5 is a formal provision that gives effect to the Schedule of amendments to other Acts.

Schedule 1 Amendment of State Owned Corporations Act 1989

The Schedule contains amendments to the *State Owned Corporations Act 1989* (the SOC Act) to provide for the establishment of a new class of State owned corporations (SOCs), to be known as statutory SOCs, and to make general amendments that apply to each class of State owned corporations.

At present, the only class of SOCs that can be established comprise companies established under the *Corporations Law*. These will in future be known as company SOCs. The new class of statutory SOCs will be statutory corporations, not companies, but they will share many characteristics of companies. For example, they will have a memorandum and articles of association, a board of directors and shareholders.

Legislation setting up a statutory SOC will “plug into” the Bill, by inserting the name of the body into Schedule 5. The Bill will provide the overall structure. There will be two ways of establishing statutory SOCs. The first way will involve a separate Act that will create a corporation, confer functions on it, and insert its name into Schedule 5. The second way will involve regulations under the Bill, which will designate a government entity (eg a Department or part of a Department) and insert its name into Schedule 5 (this action will result in the creation of a corporation).

Because a new class of SOCs is being created, many of the amendments are machinery in nature, in that they merely re-arrange or amend the Act to allow for the new class of SOCs, and introduce the terminology “company SOCs” for existing kinds of SOCs. These amendments are described below as machinery amendments.

Schedule 1 (1)–(5) amend the definitions in section 3 of the SOC Act to introduce the concepts described above.

Schedule 1 (6) is a basic provision stating that there are two kinds of SOCs.

Schedule 1 (7)–(11) are machinery amendments.

Schedule 1 (12) inserts a new Part 3 into the SOC Act to deal with the new class of statutory SOCs. Many of the provisions parallel existing provisions as they apply or will apply to company SOCs. These are noted below. The new Part contains the following provisions:

- Proposed section 20A provides for the establishment of statutory SOCs by the insertion of the name of a body into Schedule 5. This parallels section 4 of the SOC Act.
- Proposed sections 20B–20F parallel sections 5–9 of the SOC Act.
- Proposed section 20G enables regulations to apply provisions of the *Corporations Law* to statutory SOCs, but otherwise that Law does not apply to statutory SOCs.
- Proposed section 20H requires statutory SOCs to have a share capital and shares. Each statutory SOC is to have only two shareholders, each being Ministers (one of whom is the Treasurer).
- Proposed section 20I provides for the designation of a Minister as the “portfolio Minister” for a particular statutory SOC, who has various responsibilities under the Act for the administration of the SOC.
- Proposed section 20J provides for the appointment of a board of directors of a statutory SOC. One of the directors is to be selected from staff of the SOC.
- Proposed section 20K requires the appointment of a chief executive officer of a statutory SOC.
- Proposed section 20L gives the primary responsibility for the operations of a statutory SOC to its board of directors, while the day to day management is the responsibility of the chief executive officer under the board.
- Proposed section 20M enables staff to be appointed by a statutory SOC.
- Proposed section 20N empowers the portfolio Minister to require a statutory SOC to perform or refrain from performing functions, subject to re-imburement of the SOC. This section parallels section 11 of the SOC Act.

- Proposed sections 20O and 20P empower the portfolio Minister to require a statutory SOC to comply with public sector policies as notified to it and to comply with directions given to it in the public interest in exceptional circumstances, subject in each case to re-imburement.
- Proposed sections 20Q and 20R require a statutory corporation and any subsidiary to have a memorandum and articles of association. These are to include the provisions contained in new Schedules 6 and 7.
- Proposed section 20S deals with dividends. Subsection (1) provides for a dividend scheme. Subsections (2)–(4) parallel section 14 of the SOC Act. Subsection (5) ensures that statutory SOCs are subject to the dividend provisions of section 59B of the *Public Finance and Audit Act 1983*.
- Proposed sections 20T–20V parallel sections 15–17 of the SOC Act.
- Proposed section 20W makes it clear that a statutory SOC can be involved in the formation of companies, but only with the approval of the shareholders. Subsections (2)–(4) parallel section 18 of the SOC Act.
- Proposed sections 20X and 20Y parallel sections 19 and 20 of the SOC Act.
- Proposed sections 20Z–20ZE provide for statutory corporations to have generally the legal capacity of companies, with the powers of natural persons (the doctrine of ultra vires is disappplied).

Schedule 1 (13) and (14) are machinery amendments.

Schedule 1 (15) inserts a section to ensure that statutory SOCs are subject to public sector requirements regarding auditing and annual reporting.

Schedule 1 (16)–(23) require copies of directions, notifications and the like given to statutory SOCs to be tabled in Parliament.

Schedule 1 (24) gives the portfolio Minister power to require a statutory SOC to supply the Minister with information relating to the affairs of the SOC.

Schedule 1 (25) inserts a new section 33A, which gives effect to a Schedule setting out duties and liabilities of directors and officers of statutory SOCs. Some provisions also apply to company SOCs. The Schedule can be amended by regulation—it is envisaged that amendments can be made to reflect alterations made to corresponding provisions in the *Corporations Law*.

The item also inserts a new section 33B, which provides machinery for dealing with offences against the Act. Offences are found in the new Schedule 10.

Schedule 1 (26) omits section 35, which applied Commonwealth affirmative action law to SOCs to the extent that it did not apply of its own force. A separate amendment is made by the Bill to extend Part 9A of the *Anti-Discrimination Act 1977* to both company SOCs and statutory SOCs.

Schedule 1 (27) and (28) deal with the application of the *Public Finance and Audit Act 1983*. The Act generally does not apply to SOCs. However, Part 4 continues to apply (Public Accounts Committee). Section 59A (dividends) and Part 3 (audit) apply to statutory SOCs.

Schedule 1 (29) and (30) are machinery amendments.

Schedule 1 (31) enables regulations to be made regarding the selection of a director of a SOC from staff.

Schedule 1 (32) is a formal provision giving effect to a Schedule of savings and transitional provisions.

Schedule 1 (33)–(35) are machinery amendments.

Schedule 1 (36) provides for the appointment of a staff director for each company SOC.

Schedule 1 (37) and (38) are machinery amendments.

Schedule 1 (39) amends the Schedule relating to staff rights. This Schedule will apply to statutory SOCs as well as company SOCs. The amendment makes a consequential amendment regarding statutory SOCs.

Schedule 1 (40) inserts the shell of a new Schedule 5, into which the names of new statutory SOCs can be inserted by future legislation.

Schedule 1 (41) and (42) contain the basic provisions that must be contained in the memorandum and articles of association of statutory SOCs and their subsidiaries. The provisions parallel Schedules 2 and 3 to the SOC Act.

Schedule 1 (43) inserts a Schedule of provisions applying to the constitution and procedure of boards of directors of statutory SOCs. There is provision for the appointment of a Chairperson and deputies of directors. The maximum term of office is 5 years, although re-appointment is possible. Other provisions are set out in the Schedule.

Schedule 1 (44) inserts a Schedule of provisions applying to chief executive officers of statutory SOCs. Provision is made for conditions of employment and for requiring performance agreements. The maximum term of office is 5 years, although re-appointment is possible. Other provisions are set out in the Schedule.

Schedule 1 (45) inserts a Schedule setting out duties and liabilities of directors and other officers of (principally) statutory SOCs, as mentioned in relation to proposed section 33A above.

Schedule 1 (46) inserts a Schedule of savings and transitional provisions. Apart from a regulation-making power, the amendments deal with how the requirement for staff directors is to be phased in for the existing two SOCs.

Schedule 2 Amendment of Irrigation Corporations Act 1994

The Schedule contains amendments to the *Irrigation Corporations Act 1994*. The amendments provide that the two bodies that under the existing legislation are to become irrigation corporations will become statutory SOCs instead of company SOCs. They will not be able to be privatised without further legislation.

Schedule 3 Amendment of other Acts

The Schedule contains amendments to other Acts, including the following amendments. The *Anti-Discrimination Act 1977* is amended to apply Part 9A to State owned corporations. The *Environmental Planning and Assessment Act 1979* is amended to provide that a statutory SOC is a public authority for the purposes of that Act. The *Freedom of Information Act 1989* is amended to provide that statutory SOCs are public authorities for the purposes of that Act. The *Public Sector Management Act 1988* is amended to bring the positions of director and chief executive officer of a statutory SOC within the removal provisions of the Act. The *Water Board (Corporatisation) Act 1994* is amended to bring the provisions relating to the appointment of one of the directors of Sydney Water Corporation Limited into line with the new requirement for each SOC to have a staff director.