

[Act 2002 No 16]



New South Wales

AGL Corporate Conversion Bill 2002

Explanatory note

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

Overview of Bill

The objects of this Bill are:

- (a) to constitute The Australian Gas Light Company as a body corporate under the law of New South Wales with a modern corporate structure, and
 - (b) to authorise the Company, once incorporated, to apply to be registered as a public company limited by shares under the *Corporations Act 2001* of the Commonwealth, and
 - (c) to amend the *Gas Industry Restructuring Act 1986* to remove the 5% limit on shareholdings in the Company on its registration as a public company and, pending the removal of that limit, to strengthen the provisions relating to the enforcement of that limit.
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Outline of provisions

Part 1 Preliminary

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

Clause 2 provides that the proposed Act commences on its date of assent.

Clause 3 specifies the objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act.

In particular, it defines **AGL** to mean the company of proprietors known by the name “The Australian Gas Light Company” that was originally established by the *Australian Gas Light Company Act 1837*.

It also defines **Corporations legislation** to mean the Corporations legislation to which Part 1.1A of the *Corporations Act 2001* of the Commonwealth applies. Section 5D of the *Corporations Act 2001* provides that Part 1.1A of that Act applies to the following Commonwealth legislation:

- (a) the *Corporations Act 2001* (including regulations made under that Act),
- (b) Part 3 of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth (and regulations made under that Act for the purposes of that Part).

The proposed section also provides that the proposed Act is intended to have extraterritorial operation in so far as the legislative powers of the State permit.

Clause 5 defines the concept of **preserved resolution**. Preserved resolutions are certain resolutions of the proprietors of AGL that were in force under the constitution of AGL immediately before the day on which AGL is converted into a body corporate by the proposed Act (the **conversion day**).

Clause 6 is a formal provision giving effect to certain amendments to the *Gas Industry Restructuring Act 1986* set out in Schedule 1 that strengthen the provisions in that Act relating to the enforcement of the 5% limit on shareholdings in AGL pending the removal of that limit on the registration of AGL as a public company under the *Corporations Act 2001* of the Commonwealth.

Part 2 Overview of the corporatisation and registration of AGL as a public company

Clause 7 contains a summary of the steps involved under the proposed Act:

- (a) to constitute AGL as a body corporate under State law, and
- (b) to enable AGL when incorporated (*corporatised AGL*) to seek registration under Part 5B.1 of the *Corporations Act 2001* of the Commonwealth as a public company limited by shares.

Part 3 Conversion and registration resolutions

Division 1 Conversion resolutions

Clause 8 defines the concept of *conversion resolution* for the purposes of the proposed Act. A *conversion resolution* is a resolution passed in accordance with the proposed section by the proprietors of AGL at a general meeting of AGL that:

- (a) resolves that AGL be constituted as a body corporate under the proposed Act, and
- (b) approves a constitution for AGL on its conversion into a body corporate.

The passing of a conversion resolution is a necessary precondition for the conversion of AGL into a body corporate under the proposed Act.

Division 2 Registration resolutions

Clause 9 defines the concept of *registration resolution* for the purposes of the proposed Act. A *registration resolution* is a resolution passed in accordance with the proposed section either by the proprietors of AGL at a general meeting of AGL or by the members of corporatised AGL at a general meeting of corporatised AGL (as the case may be). The resolution must resolve that corporatised AGL be registered as a public company limited by shares under the *Corporations Act 2001* of the Commonwealth. The passing of a registration resolution is a necessary precondition before corporatised AGL can apply to be so registered.

Division 3 Judicial review of conversion and registration resolutions

Clause 10 provides that the provisions of the Division apply to the following resolutions (*applicable resolutions*):

- (a) any conversion resolution or purported conversion resolution,
- (b) any registration resolution or purported registration resolution.

Clause 11 provides that an applicable resolution is not invalidated because of any procedural irregularity unless, on an application made under the proposed section, the Supreme Court by order declares the resolution to be invalid (an *invalidity order*). Any such invalidity order may only be made on the application of no fewer than 200 persons who were eligible to vote at the meeting at which the resolution was passed and must be made within the period specified by the proposed section.

Part 4 Conversion of AGL into body corporate

Division 1 Constitution of AGL as a body corporate

Clause 12 constitutes AGL as a body corporate on the conversion day with the corporate name “The Australian Gas Light Company”. The body corporate so constituted is a company limited by shares.

Clause 13 enables the Minister, by order published in the Gazette, to specify a conversion day (being the day on which AGL is to be constituted as a body corporate under the proposed Act). The Minister may make such an order only if the Minister is satisfied that:

- (a) a conversion resolution has been passed by the proprietors of AGL in accordance with the provisions of the proposed Act, and
- (b) the period specified in proposed section 11 for the making of an application for an invalidity order in respect of the resolution has expired, and
- (c) an invalidity order has not been made by the Supreme Court under proposed section 11 in respect of the resolution.

Division 2 Provisions consequent on conversion of AGL into body corporate

Subdivision 1 General

Clause 14 provides that corporatised AGL is taken for all purposes, including the rules of private international law, to be a continuation of the same company, and the same legal entity, as AGL.

Clause 15 provides for the repeal and amendment of certain provisions of legislation relating to AGL and other related legislation that will become redundant on the conversion day. In particular, it gives effect to amendments to be made to the *Gas Industry Restructuring Act 1986* by Schedule 2.

Subdivision 2 Specific transitional matters

Clause 16 provides that Schedule 3 applies to AGL's assets, rights and liabilities on and from the conversion day. Schedule 3 contains provisions that ensure that AGL's assets, rights and liabilities become the assets, rights and liabilities of corporatised AGL on and from that day.

Clause 17 provides that the preserved resolutions of AGL will continue to have effect on and from the conversion day as if they were resolutions of the members of corporatised AGL, subject to such modifications as are necessary or that are prescribed by the regulations.

Clause 18 provides for matters relating to the share capital of, and shareholdings in, corporatised AGL. These matters will largely be determined by reference to the existing share capital of, and shareholdings in, AGL.

Clause 19 provides that officers and employees of AGL immediately before the conversion day will continue to hold office as officers of, or be employed by, corporatised AGL.

Clause 20 provides that corporatised AGL will, on and after the conversion day, be entitled to the benefit and subject to the burden of, and taken to be a party to, any existing contract or arrangement entered into by AGL (or by a person on behalf of AGL).

Clause 21 provides that a reference in any instrument (other than the *Gas Industry Restructuring Act 1986*) to AGL or the Secretary of AGL is to be read as including a reference to corporatised AGL. It also provides for a reference in any instrument (other than an Act or an instrument made under an Act) to any AGL legislation to be read on and after the conversion day as including a reference to the proposed Act.

Clause 22 provides that the financial position and financial reports of corporatised AGL are to be taken to be the same as the financial position and financial reports of AGL immediately before the conversion day.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of Chapter 2M of that Act, which relate to financial reports and audits. Section 5G of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

Clause 23 provides that the auditor of AGL immediately before the conversion day is taken to be the auditor of corporatised AGL on the conversion day.

Clause 24 provides that nothing in the Part renders defective any legal proceedings by or against AGL or its proprietors (whether or not those proceedings are commenced using the name of the Secretary of AGL).

Clause 25 provides that nothing in the Subdivision limits the generality of proposed section 14, which provides that corporatised AGL is a continuation of, and the same legal entity as, AGL.

Division 3 Application of Corporations legislation to corporatised AGL

Clause 26 applies certain provisions of the Corporations legislation (with certain modifications) relating to companies to corporatised AGL as a matter of State law. These provisions will not extend to corporatised AGL as a law of the Commonwealth until corporatised AGL is registered as a company under the *Corporations Act 2001* of the Commonwealth.

The provisions of the proposed section will cease to have effect on the day on which corporatised AGL is registered as a public company under the *Corporations Act 2001* of the Commonwealth (the *registration day*).

Clause 27 authorises corporatised AGL to issue shares, and to pay remuneration to its non-executive directors, in accordance with preserved resolutions despite anything to the contrary in ASX Listing Rules 7.1 and 10.17.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of sections 793B and 793C of that Act (as inserted by the *Financial Services Reform Act 2001* of the Commonwealth), which relate to the enforcement of the operating rules of a licensed market under that Act. Section 5G of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

The provisions of the proposed section will cease to have effect on the registration day.

Clause 28 authorises corporatised AGL to continue to publish and sign public documents and negotiable instruments using AGL's existing Australian Registered Body Number (**ARB**N) instead of the information specified in section 601DE (1) (b) of the *Corporations Act 2001* of the Commonwealth.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of section 601DE of that Act, which relate to the information that a registered Australian body under that Act must set out in its public documents and negotiable instruments. Section 5G (4) of the *Corporations Act 2001* of the Commonwealth provides that a provision of the Corporations legislation does not prohibit the doing of an act or impose a liability (whether civil or criminal) for doing an act if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

The provisions of the proposed section will cease to have effect on the registration day.

Clause 29 enables the regulations to invoke section 5F or 5G of the *Corporations Act 2001* of the Commonwealth in order to avoid inconsistency between provisions of the proposed Act relating to corporatised AGL and the Corporations legislation.

Section 5F of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a matter to be an excluded matter for the purposes of that section in relation to all or part of the Corporations legislation, the provisions that are the subject of the declaration will not apply in relation to that matter in the State concerned.

Section 5G of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

The provisions of the proposed section will cease to have effect on the registration day.

Clause 30 makes it clear that nothing in the Part prevents corporatised AGL from making changes to its constitution or corporate structure on or after the conversion day in accordance with any applicable law.

Part 5 Registration of corporatised AGL as a public company

Division 1 Authorisation to transfer incorporation

Clause 31 authorises corporatised AGL (or AGL on behalf of corporatised AGL) to apply to the Australian Securities and Investments Commission to be registered as a public company limited by shares under Part 5B.1 of the *Corporations Act 2001* once the Minister issues a compliance certificate under proposed section 32.

Division 2 Compliance certificate

Clause 32 enables the Minister to issue a compliance certificate to AGL or corporatised AGL that certifies that the provisions of the proposed Act have been complied with concerning the transfer of the incorporation of corporatised AGL to the *Corporations Act 2001* of the Commonwealth if the Minister is satisfied that:

- (a) a registration resolution has been passed, and
- (b) the period specified in proposed section 11 for the making of an application for an invalidity order in respect of the resolution has expired, and
- (c) an invalidity order has not been made by the Supreme Court under proposed section 11 in respect of the resolution.

Division 3 **Provisions consequent on transfer of incorporation of corporatised AGL**

Clause 33 refers to the provisions of section 601BM of the *Corporations Act 2001* of the Commonwealth. That section provides that the registration of a body as a company under Part 5B.1 of that Act does not:

- (a) create a new legal entity, or
- (b) affect the body's existing property, rights or obligations (except as against the members of the body in their capacity as members), or
- (c) render defective any legal proceedings by or against the body or its members.

The proposed section also provides for references to corporatised AGL in instruments to be read as if they included a reference to registered AGL.

Clause 34 provides that the provisions of Part 4 (other than proposed section 56A to be inserted by Schedule 1 to the proposed Act) of the *Gas Industry Restructuring Act 1986* cease to have effect on the registration day. Part 4 contains special provisions relating to shareholding limitations in AGL and corporatised AGL.

Clause 35 authorises registered AGL to use the name "The Australian Gas Light Company" as its corporate name without the word "Limited" being included in that name.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of Part 2B.6 of that Act, which would otherwise require registered AGL to use the word "Limited" as part of its name. Section 5G (6) of the *Corporations Act 2001* of the Commonwealth provides that the provisions of Part 2B.6 and Part 5B.3 of that Act (which relate to the use of names) do not:

- (a) prohibit a company or other body from using a name if the use of the name is expressly provided for, or authorised by, a provision of a law of a State or Territory, or
- (b) require a company or other body to use a word as part of its name if the company or body is expressly authorised not to use that word by a provision of a law of a State or Territory.

Clause 36 authorises registered AGL to continue to publish and sign public documents and negotiable instruments using AGL's existing Australian Registered Body Number (*ARBN*) instead of the information specified in section 153 (2) of the *Corporations Act 2001* of the Commonwealth. It also confers a similar authority in respect of the annual returns of registered AGL under section 348 of that Act.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of sections 153 (2) and 348 of that Act, which relate to the information that a company under that Act must set out in its public documents and negotiable instruments and in its annual returns. Section 5G (4) of the *Corporations Act 2001* of the Commonwealth provides that a provision of the Corporations legislation does not prohibit the doing of an act or impose a liability (whether civil or criminal) for doing an act if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

Clause 37 provides that the preserved resolutions of AGL (other than any preserved resolution revoked by the members of corporatised AGL before the registration day) will continue to have effect on and from the registration day as if they were resolutions of the members of registered AGL, subject to such modifications as are necessary or that are prescribed by the regulations.

Clause 38 authorises registered AGL:

- (a) to give benefits to a person holding a board or managerial office in relation to registered AGL, and
 - (b) to pay remuneration to a director of registered AGL, and
 - (c) to give financial assistance to a person to acquire shares in registered AGL,
- in accordance with any preserved resolutions that are continued in force by proposed section 37.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the following provisions that Act:

- (a) Part 2D.2 (Restrictions on indemnities, insurance and termination payments),
- (b) Part 2D.3 (Appointment, remuneration and cessation of appointment of directors),
- (c) Part 2J.3 (Financial assistance).

Section 5G (4) of the *Corporations Act 2001* of the Commonwealth provides that a provision of the Corporations legislation does not prohibit the doing of an act or impose a liability (whether civil or criminal) for doing an act if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

Clause 39 authorises registered AGL to issue shares, and to pay remuneration to its non-executive directors, in accordance with preserved resolutions that are continued in force by proposed section 37 despite anything to the contrary in ASX Listing Rules 7.1 and 10.17.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of sections 793B and 793C of that Act (as inserted by the *Financial Services Reform Act 2001* of the Commonwealth), which relate to the enforcement of the operating rules of a licensed market under that Act. Section 5G of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

Clause 40 provides that the auditor of registered AGL on the registration day is the same person or firm as the auditor of corporatised AGL immediately before the registration day.

The proposed section also provides that:

- (a) registered AGL is authorised to hold the first annual general meeting that occurs after the registration day without at that meeting appointing a person or persons, firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the company, and
- (b) the auditor of registered AGL is authorised to hold office until death or removal or resignation from office in accordance with section 329 of the *Corporations Act 2001* of the Commonwealth or until ceasing to be capable of acting as auditor by reason of section 324 (1) or (2) of that Act.

The provisions granting the above authorisations are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of section 327 of that Act. Section 5G (4) of the *Corporations Act 2001* of the Commonwealth provides that a provision of the Corporations legislation does not prohibit the doing of an act or impose a liability (whether civil or criminal) for doing an act if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

Clause 41 authorises registered AGL on and after the registration day to use an amount of share capital equal to the amount standing to the credit of AGL's share premium reserve referred to in clause 6 of Schedule 4 in accordance with the provisions of that clause.

The provisions of the proposed section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of sections 254K and 256D of that Act, which relate to reductions in share capital. Section 5G (4) of the *Corporations Act 2001* of the Commonwealth provides that a provision of the Corporations legislation does not prohibit the doing of an act or impose a liability (whether civil or criminal) for doing an act if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

Clause 42 enables the regulations to invoke section 5F or 5G of the *Corporations Act 2001* of the Commonwealth in order to avoid inconsistency between provisions of the proposed Act relating to registered AGL and the Corporations legislation.

Section 5F of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a matter to be an excluded matter for the purposes of that section in relation to all or part of the Corporations legislation, the provisions that are the subject of the declaration will not apply in relation to that matter in the State concerned.

Section 5G of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

Part 6 Miscellaneous

Clause 43 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 44 ensures that the operation of the proposed Act will not result in a breach of contract or any other civil liability.

Clause 45 provides that State tax is not payable in respect of matters relating to the conversion of AGL into a body corporate or the registration of corporatised AGL as a company under the *Corporations Act 2001* of the Commonwealth.

Clause 46 is a formal provision giving effect to Schedule 5, which contains an amendment to the *Subordinate Legislation Act 1989*.

Clause 47 is a formal provision giving effect to Schedule 6, which contains savings and transitional provisions.

Schedule 1 Amendment of Gas Industry Restructuring Act 1986 concerning shareholdings limits

Schedule 1 [1] makes an amendment in the nature of statute law revision. It inserts a definition of *Corporation* in the general definition section of the Act. The term is defined to mean the Energy Corporation of New South Wales.

Schedule 1 [3] increases the maximum penalty for an offence under section 41 (Maximum shareholding in AGL) from 500 penalty units (currently \$55,000) to 5,000 penalty units (currently \$550,000).

Schedule 1 [4] amends section 45 of the Act to enable the Minister to direct that a person pay to the Corporation any realised capital gain on any shares that the Minister has directed the person to dispose of under the section because of a contravention of section 41. **Schedule 1 [2], [5], [6] and [7]** make consequential amendments to sections 40 and 49.

Schedule 1 [8] inserts a new section 50A in the Act that enables the Minister to require AGL to furnish the Minister with such information contained in its Share Register or concerning shareholdings in AGL as may be required by the Minister.

Schedule 1 [9] inserts sections 56, 56A, 56B and 56C in the Act.

Proposed section 56 enables the Minister to obtain, and act on, advice from any person or body that the Minister considers has relevant expertise to assist the Minister in exercising functions under Part 4 of the Act.

Proposed section 56A requires AGL to lodge a statement with the Minister within 7 days after the enactment of the proposed Act concerning suspicious movements in its Share Register during the period commencing 2 April 2001 and ending on the day immediately before the date of assent to the proposed Act (inclusive) that may constitute contraventions of section 41 (Maximum shareholding in AGL) of the Act. It also requires a similar statement to be lodged with the Minister within 7 days after AGL is registered as a public company under the *Corporations Act 2001* of the Commonwealth in respect of the period commencing on the date of assent to the proposed Act and ending on the registration day (inclusive).

Proposed section 56B provides that any act, omission, body, person or thing that is prohibited, required, authorised or permitted by or under Part 4 of that Act is declared to be an excluded matter for the purposes of section 5F of the *Corporations Act 2001* of the Commonwealth in relation to the whole of the Corporations legislation. Section 5F of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a matter to be an excluded matter for the purposes of that section in relation to all or part of the Corporations legislation, the provisions that are the subject of the declaration will not apply in relation to that matter in the State concerned.

Proposed section 56C provides that the amendments made to the Act by Schedule 1 to the proposed Act extend to matters occurring on or after 2 April 2001.

Schedule 1 [10] amends clause 17 of Schedule 3 to the Act to enable regulations to be made of a savings and transitional nature consequent on the enactment of the amendments made to the Act by the proposed Act.

Schedule 2 Amendment of Gas Industry Restructuring Act 1986 on incorporation of AGL

Schedule 2 [1] inserts a new section 4 in the Act to ensure that the provisions of the Act apply to corporatised AGL.

Schedule 2 [2] omits section 6, which refers to the *Australian Gas Light Company Act 1837*. That Act will be repealed by section 15 (1) of the proposed Act on the conversion day.

Schedule 2 [3] omits Division 1 of Part 3 dealing with the transfer of The Australian Gas Light Company's gas undertakings. That Division is now spent.

Schedule 2 [4] amends section 41 to ensure that the maximum shareholding provisions in that section apply to corporatised AGL to the exclusion of anything in the proposed Act.

Schedule 2 [5]–[7] omit sections 51, 53 and 54 dealing with the corporate governance of AGL. Those provisions will become redundant with the adoption by corporatised AGL on the conversion day of a new corporate constitution.

Schedule 2 [8] omits section 55, which imposes restrictions on dealings in shares of certain gas distributors.

Schedule 2 [9] amends Schedule 1 to omit references to corporate bodies whose gas undertakings have been transferred to other bodies.

Schedule 3 Existing assets, rights and liabilities to belong to corporatised AGL

Schedule 3 provides for the assets, rights and liabilities of AGL immediately before the conversion day to become the assets, rights and liabilities of corporatised AGL on that day.

Schedule 4 Provisions relating to par value shares on or after conversion day

Schedule 4 makes transitional provision in relation to shares of AGL that, immediately before the conversion day, have a par value and to its share premium and capital redemption reserves. These provisions are modelled on the transitional provisions previously contained in Division 10A of Part 11.2 of the *Corporations Law* that were inserted in that Law when the par value rule was abolished in relation to the shares of registered companies.

Schedule 5 Amendment of Subordinate Legislation Act 1989

Schedule 5 amends Schedule 4 to the *Subordinate Legislation Act 1989* to ensure that regulations made under the proposed Act are excluded instruments for the purposes of the *Subordinate Legislation Act 1989*.

Schedule 6 Savings, transitional and other provisions

Schedule 6 contains savings, transitional and other provisions. In particular, it enables the regulations to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act.