

[Act 1997 No 56]



New South Wales

Australian Mutual Provident Society (Demutualisation and Reconstruction) Bill 1997

Explanatory note

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

Overview of Bill

- 1 The objects of this Bill are:
 - (a) to provide a mechanism for the Australian Mutual Provident Society (*AMP*) to be demutualised and reconstructed as a company limited by shares, and
 - (b) to limit entitlements to shares in AMP's holding company.
 - 2 AMP was originally established under legislation enacted in 1844, and was constituted a body corporate by legislation in 1857. Its status as a body corporate is preserved by the *Australian Mutual Provident Society's Act 1910*. It is not a company, but provisions of the *Companies (New South Wales) Code* are applied to it by the *Australian Mutual Provident Society Act 1988*.
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- 3 At present, AMP consists of its members, with membership being, under the 1988 Act, determined in accordance with AMP's By-laws. The By-laws provide that AMP policy holders are the members of AMP. However, the members do not have rights in the nature of shares.
- 4 The mechanism provided by the Bill for demutualising AMP involves:
 - changing the status of AMP to a company limited by shares, which will be wholly owned by a holding company
 - changing the status of eligible existing members of AMP to that of shareholders in AMP's holding company.
- 5 Initially, the company to which AMP is being converted is not a "company" within the *Corporations Law*, though its holding company will be such a "company". Hence the shares issued to policy holders will be shares within the *Corporations Law*.
- 6 For a limited period after the conversion, there will be shareholding limitations in AMP's holding company, so that no one person will generally be able to hold more than 5% of the shares. This limitation will operate from the date of the conversion until 12 months after the shares in the holding company are first listed, but can be extended by regulation.
- 7 The Bill provides that, after the creation of AMP as a "*non-Corporations Law*" company, AMP is authorised to transfer to being a "full" company within the *Corporations Law*, and is required to do so if the member or members of AMP approve the transfer.
- 8 Provision is made for the repeal of special legislation applying to AMP after it becomes a "full" company within the *Corporations Law*.
- 9 The change of AMP's status into a company limited by shares necessarily involves the extinguishment of the rights of members. The rights extinguished include those of the members who do not support the resolution required to effect the change of status and thus may be seen to involve an element of expropriation of vested rights (even though it is contemplated that these will be replaced by new rights arising from the issue of shares upon the change of status). An expropriation will occur by virtue of proposed section 11 upon the

change of status taking effect. Expropriation occurs by virtue of legislation and a statutory procedure, rather than simply by virtue of the action of members in changing AMP's constitution. Accordingly, the principles set out in *Gambotto and another v W.C.P Limited and another* [1994–1995] 182 CLR 432 have no application to this mechanism. Further, the Bill does not remove or purport to remove the right of members to take proceedings under the “oppression” provisions of general company legislation.

Outline of provisions

Part 1 Preliminary

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 to be appointed by proclamation of the Governor.

Clause 3 contains various definitions used in the proposed Act.

Part 2 Demutualisation and reconstruction of AMP

Division 1 Conversion resolutions

Clause 4 defines a “conversion resolution” for the purposes of the proposed Act. Such a resolution is the starting point of the process leading to demutualisation and reconstruction. It is a resolution that AMP be converted to a company limited by shares, and has a number of features, including the following:

- the resolution has to be passed at a general meeting of AMP
- written notice of the resolution has to be posted to AMP members, giving details of the resolution and voting rights
- an explanatory statement about the resolution has to be posted to AMP members
- an independent financial expert's report relating to the resolution to convert has to be posted to AMP members
- a voting paper has to be posted to AMP members
- the resolution has to be passed by a majority of at least three-quarters of the votes cast.

The clause also makes it clear that such a resolution, although called a conversion resolution, is still a special resolution for legal and other purposes.

Clause 5 cures certain irregularities that might occur in the conversion resolution process referred to in clause 4.

Division 2 Conversion process

Clause 6 states that AMP may convert to a company limited by shares in accordance with the Part.

Clause 7 provides for AMP to apply to the Attorney General to convert to a company limited by shares. The clause lists the detailed matters that must be included in the application.

Clause 8 provides that, if the Attorney General is satisfied that the application complies with the requirements of clause 7 and that creditors will not be materially prejudiced, the Attorney General is to publish a notice that the Attorney General intends to issue a certificate of conversion for AMP. After a month after the notice has been given, and if a court has not ordered to the contrary, the Attorney General must issue a certificate of conversion.

Clause 9 provides that the issue of the certificate of conversion has the effect of converting AMP to a company limited by shares.

Clause 10 provides that the company to which AMP is converted has the general attributes that companies have (that is, a corporate nature, with the liability of members being limited to any amount unpaid on their shares). However, the company to which AMP is converted by the proposed Act is not a “company” within the *Corporations Law*. This will facilitate the ultimate registration of AMP as such a company. See paragraph (a) of the definition of “non-company” in section 9 of the *Corporations Law*, which is relevant for the registration of non-companies as companies under the *Corporations Law*.

Clause 11 states the effect of the conversion of AMP. In brief, AMP is demutualised and reconstructed, and existing members of AMP cease to be members unless they become shareholders.

Clause 12 requires AMP to change its name within one month after the conversion, so that it includes “Limited” or “Ltd” at the end of its name.

Clause 13 provides that if all of AMP’s shares are held by AMP’s holding company or holding companies, shares in the ultimate holding company must be issued to former members of AMP.

Clause 14 authorises the Attorney General to be advised in connection with the Attorney General's functions under the proposed Act by the Australian Securities Commission under an agency agreement or arrangement. Section 67 of the *Corporations (New South Wales) Act 1990* contemplates that the Minister, or a person authorised in writing by the Minister, may enter into an agreement or arrangement for the performance of functions or the exercise of powers by the Commission as an agent of the State; a corresponding provision is found in section 11 (8) of the *Australian Securities Commission Act 1989* of the Commonwealth. The agreement or arrangement contemplated in clause 14 would be with the Commission as agent of the Attorney General's Department of New South Wales, which is an emanation of the State, and would reflect the understanding that Ministers receive advice from their Departments (in this case, advice of the Commission as agent of the Department).

Clause 15 empowers AMP directors to cut off membership rights as at 5 pm on 11 December 1996. However, provision is made for special and anomalous cases.

Clause 16 authorises the Supreme Court, on application made to it, to cure various irregularities, subject to certain safeguards.

Part 3 Limitation on share entitlement

Clauses 17 and 18 contain various definitions and interpretative provisions for the purposes of the Part. One definition is that of *restriction period*, which is defined as the period from the date of issue of the certificate of conversion to the end of one year after shares in the holding company are first listed. The period can be extended by regulation for a maximum of one year.

Clause 19 prevents a person from holding more than 5% of shares in the holding company during the restriction period.

Clause 20 contains various exceptions to the rule in clause 19.

Clause 21 allows shares to be allotted during the restriction period to a nominee where the rule in clause 19 would be breached, on condition that the nominee disposes of them for the benefit of the person who would have been entitled to them.

Clause 22 automatically suspends voting, dividend and winding up rights on shares that breach the rule in clause 19.

Clause 23 empowers the directors of the holding company to require a shareholder to dispose of excess shares that breach the rule in clause 19.

Clause 24 provides that a breach of the Part is not an offence, but the Supreme Court can grant injunctions.

Part 4 Registration of AMP as a company

Clause 25 empowers AMP to be registered as a company under the *Corporations Law*, if its members approve of the transfer of incorporation. As mentioned above, the company to which AMP is converted under Part 2 of the proposed Act is not an entity under the *Corporations Law*, though it has the attributes of one.

Clause 26 provides for the repeal of the two major Acts regulating AMP, once it has been converted to a “full” company under the *Corporations Law*.

Part 5 Rights and remedies

Clause 27 provides that persons have, as nearly as possible, the same rights and remedies in connection with the proposed Act as persons have in connection with the *Corporations Law*.

Clause 28 provides that the Supreme Court has, as nearly as possible, the same jurisdiction, powers and functions in connection with the proposed Act as the Federal Court of Australia and the Administrative Appeals Tribunal of the Commonwealth have in connection with the *Corporations Law*.

Clause 29 applies the provisions of certain Commonwealth Acts for the purposes of the Part. Those provisions already apply in connection with the *Corporations Law*.

Clause 30 makes it clear that the rights and remedies provided by the Part do not override time limits and other restrictions imposed by other provisions of the proposed Act.

Clause 31 authorises rules of court to be made for the Supreme Court for the purposes of the Part.

Clause 32 makes it clear that the Part does not supplant other rights and remedies.

Part 6 Miscellaneous

Clause 33 makes it clear that the proposed Act is to be construed as operating to the full extent of the legislative power of the State and that, in the event of a provision being held to be invalid, the remaining provisions of the proposed Act are to continue to operate, thus negating an argument that partial invalidity renders the whole Act invalid. These provisions reinforce section 31 of the *Interpretation Act 1987*.

Clause 34 is a formal provision giving effect to the Schedule of amendments to the *Australian Mutual Provident Society Act 1988*.

Clause 35 authorises regulations to be made for the purposes of the proposed Act.

Schedule 1 Amendment of Australian Mutual Provident Society Act 1988

The amendments ensure that the provisions and effect of the proposed Act take precedence over the provisions of the 1988 Act.