

TOTE TASMANIA (SALE) ACT 2009

NOTES ON CLAUSES

PART 1 PRELIMINARY

- Clause 1 Short Title.
- Clause 2 The *TOTE Tasmania (Sale) Act 2009* commences on the day it receives Royal Assent.
- Clause 3 This clause interprets key terms used in the Bill.
- Clause 4 This clause defines the business of TOTE Tasmania. It also allows the Treasurer to exclude a part of the business of TOTE, or a TOTE subsidiary from this Act or a provision of this Act. This provides the Treasurer with flexibility to sell part of the business.

PART 2 AUTHORITY OF TREASURER TO SELL TOTE TASMANIA

- Clause 5 This clause provides authority for the Treasurer to sell the shares in TOTE Tasmania and its subsidiaries, or the business of TOTE Tasmania and its subsidiaries. This clause also provides that the Treasurer must have regard to achieving a fair and reasonable price in exercising this power of sale.
- Clause 6 This clause provides the Treasurer with powers to facilitate the sale process.
- Clause 7 This clause provides that the Treasurer may direct TOTE Tasmania to take certain actions that would facilitate the sale. This is consistent with existing powers under the Constitutions for State-owned Companies and the *Government Business Enterprises (Sale) Act 2003* and removes doubt about this power of direction.
- TOTE or its Board must comply with the direction provided by the Treasurer.
- Clause 8 This clause allows the Treasurer to amend the Constitution of TOTE Tasmania and its subsidiaries. This provision allows for the constitution to be amended without tabling the amendments in Parliament as required under the *TOTE Tasmania Act*, which will allow for the sale to be expedited.

- Clause 9 This clause provides the Treasurer with the power to exempt from State tax a document prepared for the sale of TOTE Tasmania or the transfer of any unsold parts of the business to the Crown. This is consistent with the *Government Business Enterprises (Sale) Act 2003*.

PART 3 SALE OF SHARES IN TOTE TASMANIA OR TOTE SUBSIDIARY

This Part contains similar provisions to those in the Government Business Enterprises (Sale) Act 2003 relating to long service leave and superannuation.

- Clause 10 This clause specifies that Part 3 of the Bill relates to the sale of the shares in TOTE Tasmania and its subsidiaries.

- Clause 11 This clause provides a formula for uplifting the long service leave entitlements of TOTE Tasmania employees covered by the *Long Service Leave (State Employees) Act 1994* when the sale of shares is completed. Its intent is to ensure that employees' current long service leave entitlements are not diminished as a result of sale.

The clause specifies that employees are not covered by the *Long Service Leave (State Employees) Act 1994* after the sale of shares is completed.

- Clause 12 This clause provides that, if the Treasurer agrees to sell the shares in TOTE Tasmania or its subsidiaries, the Minister administering the *Retirement Benefits Act 1993* is to declare the sale agreement a prescribed arrangement for the purposes of the *Retirement Benefits Regulation 1994*. Declaration of the sale as a prescribed arrangement provides for a more favourable superannuation outcome for employees who are members of the RBF Contributory Scheme than would otherwise be the case. It allows them to receive a redundancy benefit if their membership ceases as a result of a prescribed arrangement.

PART 4 SALE OF BUSINESS OF TOTE TASMANIA OR TOTE SUBSIDIARY

This Part contains similar provisions to those in the Government Business Enterprises (Sale) Act 2003 relating to the sale of a business.

- Clause 13 This clause specifies that Part 4 of the Bill relates to the sale of the business of TOTE Tasmania and its subsidiaries.

Clause 14 Clause 14(1) defines transferring business.

Clause 14(2) provides that, when the business is sold, unless otherwise agreed, the purchaser assumes full legal responsibility in respect of the business sold, including any legal documents and proceedings.

Clause 14(3) provides that TOTE Tasmania is, after the sale day, discharged from any liabilities and obligations that are transferred to the purchaser on the sale day.

Clause 15 Clause 15(1) defines transferred employee.

Clause 15(2) provides that the Treasurer may transfer the employment of a person employed by TOTE Tasmania or a subsidiary to the purchaser. The Treasurer may also terminate the employment of a person employed by TOTE Tasmania, on conditions the Treasurer considers appropriate, provided that any termination is in accordance with any contract, award or agreement.

Clause 15(3) provides that before transferring or terminating the employment of a person, the Treasurer is to consult with the person in any manner the Treasurer considers appropriate including, but not limited to, consultation with representatives of the person or employee organizations to which the person belongs.

Clause 15(4) provides that any termination must be subject to and in accordance with any relevant contract, awards or agreement.

Clause 15(5) provides that each person whose employment is transferred or terminated is to be given written notice of the transfer or termination.

Clause 15(6) provides that if the employment of a person is transferred to the purchaser, that person becomes the employee of the purchaser and ceases to be an employee of TOTE Tasmania.

Clause 15(7) makes provision for any transferred employee to be employed by the purchaser for the same remuneration as was received immediately before the transfer. It also provides that except where an award, agreement or law otherwise provides, a transferred employee retains all existing and accrued rights and is entitled to claim those rights against the purchaser.

Clause 15(8) provides that an award or agreement applying to a transferred employee before transfer will continue to apply upon and after transfer except where another award, agreement or law provides otherwise.

Clause 15(9) provides that the period of service of an employee with TOTE Tasmania or its subsidiaries is taken to be service with the purchaser.

Clause 15(10) clarifies that the terms of employment of a transferred employee may be altered by an award, agreement or law after the employee becomes a transferred employee.

Clause 15(11) provides that where the employment of an employee of TOTE Tasmania is terminated, that employment is terminated immediately before the business of TOTE Tasmania is sold or on the day specified in the order. The employee is not entitled to any compensation or other payment in respect of termination except as provided by the Retirement Benefits Act 1993 or the Public Sector Superannuation Reform Act 1999, any other law, award, agreement or conditions determined by the Treasurer.

Clause 15(12) provides that the order transferring the employee under section 2 is not a statutory rule

Clause 16 This clause provides a formula for uplifting the long service leave entitlements of TOTE Tasmania employees covered by the *Long Service Leave (State Employees) Act 1994* if their employment is transferred to the purchaser. Its intent is to ensure that employees' current long service leave entitlements are not diminished as a result of sale.

The clause specifies that employees are not covered by the *Long Service Leave (State Employees) Act 1994* after the sale of shares is completed.

Clause 17 This clause provides that in the event the Treasurer makes an order under Section 15(2)(a) the agreement for sale is to be declared by the Minister administering the *Retirement Benefits Act 1993* a prescribed arrangement for the purposes of the *Retirement Benefits Regulation 1994*. Declaration of the sale as a prescribed arrangement provides for a more favourable superannuation outcome for employees who are members of the RBF Contributory Scheme than would otherwise be the case. It allows them to receive a redundancy benefit if their membership ceases as a result of a prescribed arrangement.

Clause 18 Clause 18(1) defines for the purposes of Division 3 the terms "transfer day" and "transferring business".

Clause 18(2) provides that the Treasurer, if only part of the business of TOTE Tasmania or a subsidiary is sold, may transfer the whole or any part of the remaining business to the Crown and to specify conditions relating to that transfer. The transfer is to occur by order published in the gazette.

Clause 18(3) provides that this transfer may occur before the sale is completed.

Clause 18(4) provides that the business of TOTE or a TOTE subsidiary, other than a liability, vests in the Crown. It also provides for a liability specified in the transferring order to become the responsibility of the Crown.

Clause 18(5) provides that on and after the transfer day the Crown assumes full legal responsibility in respect of the transferred business.

Clause 18(6) provides that if any dispute arises in respect of a transferring employee, the Treasurer may resolve the matter and will provide TOTE Tasmania or its subsidiary with written advice.

Clause 18(7) provides that the Treasurer's determination under clause 18(6) is final and binding.

Clause 18(8) provides that an order under subsection (2) is not a statutory rule.

Clause 19 Clause 19(1) defines the transfer day as specified in the Treasurer's order in 18(2).

Clause 19(2) provides that the Treasurer may terminate the employment of a person if the business of TOTE Tasmania or a subsidiary is transferred to the Crown under clause 18.

Clause 19(3) provides that any termination must be in accordance with any relevant contract, award or agreement.

Clause 19(4) provides that each person whose employment is terminated is to be given written notice of the termination.

Clause 19(5) provides that terminated employees are not entitled to compensation or other payments except as provided by the *Retirement Benefits Act 1993* or the *Public Sector Superannuation reform Act 1999*, or any other law, an award, an agreement or any conditions determined by the Treasurer.

Clause 20 This clause provides for the de-registration of TOTE Tasmania and its subsidiaries if the respective businesses are sold. This is because these companies will still exist, without assets or liabilities, and will need to be wound up under the Corporations Act.

PART 5 MISCELLANEOUS

Clause 21 Clause 21(1) defines a potential purchaser.

Clause 21(2) provides for relevant parties involved in the sale to disclose information, including confidential information to each other and to potential purchasers, their directors, employees, agents and advisors in order to facilitate the sale.

Clause 21(3) provides that a person who receives information under clause 21(2) must not disclose that information to parties other than those specified in this clause. It also provides for a penalty if the person discloses this information to unauthorised parties.

Clause 22 This clause provides that the obligations of TOTE Tasmania and its subsidiaries are not guaranteed by the Crown.

Clause 23 This clause provides for the proceeds of the sale to be paid into the Consolidated Fund.

Clause 24 This clause provides that the Auditor-General is to review a sale under clause 5 after the sale has completed and is to report to each House of Parliament within 120 days of the sale or the deregistration of TOTE Tasmania. This clause also provides that the Auditor-General must be given access to all information that the Auditor-General considers relevant to the report.

Clause 25 This clause provides protection for acts done or omitted under the Act if the act or omission is done in good faith. It protects contracts and agreements from being terminated and claims that confidentiality has been breached as a result of the sale.

- Clause 26 This clause provides for matters to be excluded from the Corporations Act 2001. For example, this includes a sale under clause 5 and the amendment of TOTE's constitution under clause 8. This is a fairly standard provision for the sale of State owned Companies.
- Clause 27 This clause provides for the Treasurer, by an order published in the Gazette, to exclude sale contracts from the *Trade Practices Act 1974* and the *Competition Policy Reform (Tasmania) Act 1996*.
- Clause 28 This clause provides that TOTE Tasmania or its subsidiaries or any person concerned in the management of TOTE Tasmania or a TOTE subsidiary be convicted separately of an offence unless they had no knowledge of the offence or they used all due diligence to prevent the act or omission.
- Clause 29 This clause empowers the Governor to make regulations for the purposes of this Act.
- Clause 30 This clause provides that the administration of the Act is assigned to the Treasurer.
- Clause 31 This clause provides for the Auditor-General to conduct an audit for the financial year prior to the sale. It also requires the Treasurer to table TOTE's annual report in parliament. It provides for a penalty if TOTE does not provide the necessary information to the Auditor General.
- Clause 32 and schedule 1
This clause provides for the repeal of the Portfolio legislation once all the shares in TOTE are sold, or TOTE has been deregistered and the Governor has made such a proclamation on the recommendation of the Treasurer.
- This clause also provides for section 23 of the TOTE Tasmania Act 2000 to be repealed on Royal Assent. Section 23 does not permit the company to sell its assets or main undertaking unless the sale or disposal is approved by both Houses of Parliament.