

Notes on Clauses

Water and Sewerage Corporation Act 2012

- Clause 1 Short title and citation.
- Clause 2 Specifies that the provisions of the proposed Act are to commence on proclamation.
- Clause 3 This clause outlines the purpose of the proposed Act which is to establish a single state-wide water and sewerage business under council ownership; and to make provision for the transfer of assets, liabilities and employees to the new Corporation.
- Clause 4 This clause defines terms that are used in the proposed Act to aid in ensuring their correct interpretation.
- Clause 5 This clause provides that the councils are collectively to incorporate the Corporation and be its members (i.e. its shareholders).
- The Corporation is to be incorporated as a proprietary company limited by shares under the Australian Government's *Corporations Act 2001*.
- Clause 6 This clause sets out the principal objectives of the Corporation which are:
- to efficiently provide water and sewerage functions in Tasmania;
 - to encourage water conservation, the demand management of water and the re-use of water on an economic and commercial basis;
 - to be a successful business and, to this end:
 - to operate its activities in accordance with good commercial practice; and
 - to deliver sustainable returns to its members.
- Clause 7 This clause sets out the status of the Corporation. In particular, the Corporation and any subsidiaries of the Corporation established under the proposed Act are not representatives of the Crown, the State or the councils and are not exempt from State taxes, duties or other imposts.
- The Crown is not liable for any debt, liability or obligation of the Corporation or a subsidiary of the Corporation.
- A council is not liable for any debts, liabilities or obligations of the Corporation or its subsidiary unless the council gives a guarantee or indemnity or is liable to contribute funding under the constitution of the Corporation.

- Clause 8 This clause adopts relevant parts of the Corporations Law and excludes those parts of the Corporations Law that are inconsistent with the structural approach.
- Sub-clauses (1) and (2) have the effect of excluding the operation of specified sections or Chapters of the Australian Government's *Corporations Act 2001*, either because the proposed Act provides alternative provisions in respect of that subject matter or because the specified sections of the Corporations Act are not relevant to the model.
- Provisions of the Corporations Act that are excluded include:
- the appointment and removal of the auditor;
 - the procedure of corporate takeovers (this Chapter is not relevant to the model);
 - fundraising by the issue of securities (instead the proposed Act prohibits the issuing of securities);
 - the provision of financial services, the financial markets, insider trading and prohibited conduct in relation to financial products (this Chapter is not relevant to the model);
 - the recognition of offers of securities in jurisdictions other than Australia (this Chapter is not relevant to the model); and
 - the appointment and removal of directors – other than the disqualification of directors (instead, the appointment and removal of directors will be in the constitution).
- Sub-clause (3) provides that where there is an inconsistency between the Corporations Act and the provisions of the proposed Act or the regulations of the proposed Act, the proposed Act will prevail.
- Sub-clauses (4) to (8) allow various matters excluded under (1) or (2) to be adopted by regulation as a matter of Tasmanian law and for consequential administrative arrangements relating to those matters. The provisions adopt the procedure contemplated by the *Corporations (Ancillary Provisions) Act 2001*.
- Clause 9 This clause provides that the Corporation must have share capital.
- Clause 10 This clause deals with the ownership of the Corporation and provides that public ownership of water and sewerage assets by all councils cannot be sold down or otherwise diluted.
- Clause 11 This clause requires the Corporation and any subsidiary of the Corporation to have a constitution.

- Clause 12 This clause provides that on incorporation, the members are to give the Board of the Corporation a shareholders' letter of expectation.
- A shareholders' letter of expectation is to be consistent with the proposed Act, the regulations and the constitution of the Corporation. The requirement to have a shareholders' letter of expectation is consistent with the State-owned Company model.
- Clause 13 This clause requires the Corporation and any subsidiary of the Corporation to have a corporate plan. The corporate plan must cover the period, be in the form and cover matters specified by the owner councils in the shareholders' letter of expectation.
- Clause 14 This clause provides that a Board is to govern the Corporation and the Board is to be appointed in accordance with the Constitution.
- Clause 15 This clause provides that the Board can appoint and remove a chief executive officer.
- Clause 16 This clause sets out that the Board of the Corporation is responsible for all operational decisions, that the Board may delegate powers, and that the CEO of the Corporation is responsible for the day-to-day management of that Corporation.
- Clause 17 This clause empowers the Corporation to hire staff according to its needs. The Corporation may, subject to any other Act or law, fix salary, wages and conditions. A subsidiary of a Corporation has the same powers except as otherwise provided for in negotiations.
- Clause 18 This clause prevents the Corporation or a subsidiary of the Corporation from borrowing from any person other than the Tasmanian Public Finance Corporation, unless the Treasurer approves otherwise. This is consistent with arrangements that apply to State-owned Companies which seek to optimize the terms of public sector borrowing.
- Clause 19 This clause prohibits the acquisition and disposal of assets or investments by the Corporation or a subsidiary of a Corporation outside the ordinary course of business or in contravention of the regulations.
- Clause 20 This clause prevents the disposal of the main undertakings of the Corporation or its subsidiaries.
- Clause 21 This clause provides that the Board is to determine a dividend policy to form the basis for determining the aggregate dividend distribution to owner councils.
- Clause 22 This clause provides for the calculation of the aggregate payment by the Corporation, or any subsidiary, of any guarantee fees in respect of borrowings in accordance with the relevant provisions of the *Government Business Enterprises Act 1995* and for the allocation of those guarantee fees back to councils.

- Clause 23 This clause provides for the calculation and payment of income tax-equivalents. The Corporation will be nominated by the State Government under the National Tax Equivalent Regime arrangements. Under these arrangements, the tax that would be payable if the Commonwealth Income Tax Assessment Act applied is assessed by the Australian Taxation Office.
- On the basis of those assessments, the Corporation, or a subsidiary, will make payments of tax equivalents direct to the owner councils.
- Clause 24 This clause sets out the requirements imposed on the Corporation and its subsidiaries in respect of the: maintenance of financial records; preparation of annual financial statements and provision of financial statements to the Auditor-General.
- This clause appoints the Auditor-General as auditor of the Corporation and provides him or her with all necessary information required to fulfil the auditing requirements in accordance with Chapter 2M of the Corporations Act.
- Clause 25 This clause provides that the annual report of the Corporation is to be made available to the owner councils and then made available to the public.
- Clause 26 This clause provides that the Corporation or its subsidiary may obtain a guarantee or an indemnity from a council in relation to the repayment of any money lent (or to be lent) to the Corporation or its subsidiary, or the performance of an obligation undertaken (or to be undertaken) by the Corporation, or its subsidiary.
- Clause 27 This clause is a glossary of terms within the proposed Act that have a defined meaning to aid in ensuring correct interpretation of clauses in this Part.
- Clause 28 This clause provides that the Minister may transfer any relevant assets, rights, liabilities or employees or part thereof, held or employed by a council, regional corporation, common services corporation, the Corporation, or subsidiary or the Crown, to the Corporation or to a council. The inclusion of the Crown in this definition provides the flexibility to transfer relatively minor Crown water and sewerage assets held by the Crown to the new entity in the future.
- Sub-clauses (1) and (2) give the Minister the power to order the transfer of all or part of a transferor's assets, rights, liabilities and employees by publishing a notice in the Gazette.
- Sub-clauses (3) and (4) specify the effective date of the order and require the transferor to ensure that the transfer occurs as soon as practicable.
- Sub-clause (5) provides that the Minister may issue multiple orders which may include different transfer dates. This will ensure flexibility to deal with specific issues that may emerge upon transfer.
- Sub-clause (6) provides that the Treasurer may amend or revoke a transfer order at any time.

- Clause 29 This clause provides a dispute resolution procedure that is to be followed if a dispute arises in respect of a transfer order made under clause 28. The Minister has the power to determine any dispute that is final and binding on the parties, noting that the Minister is an independent party to the transfer.
- Clause 30 This clause provides that when assets, rights or liabilities are transferred: the assets vest in the transferee automatically; the rights and liabilities of the transferor become those of the transferee; and the transferee replaces the transferor as a party to any legal or other proceedings, whether on foot, potential or future as well as becoming the relevant party in respect of any judgment, document, act, omission or reference to the transferor.
- Other legal consequences of the operation of any transfer, such as any potential claim for breach of control, are also excluded.
- Sub-clause (1) comprehensively provides that a transfer order substitutes the transferee for the transferor in respect of all legal title, party to contracts, party to legal proceedings, and many other applicable laws with no further steps needed to effect that substitution.
- Sub-clause (2) prevents any party from claiming remedies or compensation based on what might otherwise be taken to be a breach of a contractual or other right that results from the effect of a transfer order.
- Sub-clause (3) provides that there is no need for a lease to be separately assigned to a transferee other than by transfer order.
- Sub-clause (4) allows the transfer order to specify any other terms and conditions for the order's effect.
- Clause 31 This clause provides that a transfer order can transfer a specific interest in land without transferring all the interest in the land. Where no separate interests exist prior to the transfer, the order effectively creates the transferred interest on such terms as specified in the order.
- Clause 32 This clause prescribes the process supporting clause 31.
- Clause 33 This clause prevents the transferor from claiming compensation for any loss resulting from a transfer. This is subject only to provisions in the transfer order if it specifies that compensation is to be paid.
- Clause 34 This clause provides that the Minister may specify a price payable by the transferee to the transferor for the transfer and to specify the value at which any assets, rights or liabilities are transferred.
- Clause 35 This clause sets out the procedure to be followed and notifications to be provided when employees are transferred under a transfer order.
- Sub-clause (4) provides that a chief executive officer of a transferor does not have an automatic right to be appointed as chief executive officer of the transferee. That appointment must be made by the board of the transferee.
- Clause 36 This clause preserves the general conditions of employment of a transferred employee and protects the interests of employees subject to transfer.

- Clause 37 This clause sets out how the Corporation is to provide superannuation to transferred employees and provides that the Corporation may make arrangements to participate in specified public sector schemes in relation to employees that were in those schemes prior to the transfer, but not create their own scheme.
- Clause 38 This clause provides that a transferred employee that is working for the Corporation is not entitled to payment or other benefit merely because his or her employment with the transferor has ceased. It also provides that an employee cannot “double-dip” by claiming benefits of the same kind for the same period of work under the proposed Act and any other which might be relevant.
- Clause 39 This clause provides that the Minister may delegate any powers or functions under the proposed Act to another person, other than the power of delegation.
- Clause 40 This clause empowers the Governor to make regulations for the purposes of the proposed Act.
- Clause 41 This clause provides for the administration of the proposed Act.
- Clause 42 This clause provides for the staged repeal of the *Water and Sewerage Corporations Act 2008*.
- Clause 43 This clause provides for transitional provisions.
- Clause 44 This clause provides for consequential amendment to the legislation listed in schedule 2.
- Schedule 1 Schedule 1, as referenced in clause 11, makes it clear that the Corporation’s constitution is subordinate to the proposed Act and ensures that the Corporation cannot form subsidiaries or enter into other structural dealings that would be inconsistent with the proposed Act.
- Clause 1 prevents modifications to the constitution of the Corporation that would be inconsistent with the proposed Act and requires that the process for adoption, modification or repeal of a constitution under clause 11 is complied with.
- Clause 2 provides that in the case of an inconsistency between the provisions of the proposed Act and the constitution of the Corporation, the proposed Act prevails. The Corporation and its officers and members are expressly prohibited from exercising any of its powers in contravention of or inconsistently with the proposed Act.

Clause 3 provides that the Corporation cannot form separate business arrangements without member approval. If a subsidiary is created the Corporation must as far as practicable ensure that the subsidiary complies with the requirements of the proposed Act.

Clause 4 provides that the ‘replaceable’ rules under the *Corporations Act 2001* which would otherwise substitute for the constitution of a Corporation are specifically excluded, being unnecessary given that the Corporation is to have its own constitution.

Schedule 2

Provides a list of legislation for consequential amendment.