ANL Sale Bill 1995

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ANL Sale Bill 1995

Date Introduced: 20 September 1995
House: Representatives
Portfolio: Finance

Commencement: The Preliminary provisions, Regulation-making power and an automatic repeal provision (if the "agreement day" is not declared by 1 January 1996), commence on the day the Act receives the Royal Assent.

Part 5 (transfer of assets from the Australian National Line ("ANL"), Part 6 (taxation provisions) and Part 7 (arrangements to safeguard the national interest) commence on the day declared by the Minister to be the "agreement day".

The remaining provisions commence on the day declared by the Minister to be the "sale day".

("Agreement day" and "sale day" are defined in Clause 5)

Purpose

The Bill facilitates the sale of the Commonwealth's shares in ANL Limited.

Background

The Commonwealth Government first became a shipowner in somewhat exceptional circumstances. During World War I (1914-1918), the Commonwealth seized and retained a number of enemy vessels. Twenty eight vessels became Australian prizes of war. The Commonwealth Government established the Commonwealth Government Line in 1916 and it progressively received the war prizes from the Navy. At one time, the Commonwealth Government owned 54 vessels, including a range of which had been constructed in Australia. The Commonwealth Government Line was re-christened the Australian Commonwealth Line of Steamers in 1923. By 1928, all vessels had been sold.
Following World War 2 (1939-1945), the Commonwealth Government was obliged to charter some of its former vessels from British shipowners.iii

In October 1956, the Australian Coastal Shipping Commission was appointed to take over and manage the vessels formerly under the control of the Australian Shipping Board. The fleet began operating under the registered business name of The Australian National Line.iv The relevant legislation was the Australian Coastal Shipping Commission Act 1956. The title to the Act was amended in 1974 to the Australian Shipping Commission Act 1974. The title was again changed to the ANL Act 1956 by the ANL (Conversion into Public Company) Act 1988 which came into effect from 14 December 1988.

The Australian Shipping Commission ceased to exist on 30 June 1989 and ANL Limited came into being. As from 1 July 1989, ANL operated as a public company wholly owned by the Government.v

In the Context of a Debate on Appropriation Bills Nos 3 & 4 for 1991-92, it was stated that the Government was to sell a substantial part of ANL and that a study was under way to ascertain how the proposal might proceed to sale.vi

In August 1994, the Government installed a new board for ANL with the task of restructuring ANL.vii On 22 September 1994, the Senate asked for a report from the Auditor-General on an analysis of the due diligence report commissioned by the Government to assist in an assessment of the financial and strategic outlook for disposal of the Commonwealth's interest in ANL. The Senate also request a report on other issues relevant to ANL. The Auditor-General responded with Audit Report No. 11 1994-95: Project Audit ANL: Valuation Issues, on 2 December 1994.


In any sale process as complex as ANL's there needs to be full confidence, understanding, trust and a common focus among those involved to secure a successful outcome. ANAO considers that the type of cooperation needed to achieve an effective sales process between the Departments and ANL was not readily apparent. Partly as a result of this, there has been ongoing uncertainty as to the future of ANL and therefore about any implications for taxpayers' interests. The audit was not able to determine cause and effect in a very complicated and changing environment. ANL has continued to make operating losses since the proposed sale of ANL was first announced in 1991, amounting to $53.7m to 30 June 1994.viii

The prospective purchaser for ANL is the P&O Group. The corporate vehicle used to facilitate the sale will be a corporate entity known as RetainCo. The basic offer by P&O is just under $20 million which will reduce by the time of sale but P&O will take over $140m in debt as part of the sale. It is estimated that the Commonwealth will be exposed to a potential liability of $183m. The Bill appropriates up to $15m to cover sale costs, unexpected contingencies and any related liabilities.ix Another view of the proposal as a whole suggests that it will actually cost the Commonwealth a significant amount to "sell" this national asset.x
Main Provisions

Clause 4 provides that the meaning of a "subsidiary" is determined in the same way as is specified in the Corporations Law. In section 46 of the Corporations Law a "subsidiary" (referred to as the first body) achieves that status when another body:

. controls the composition of the first body's board;
. is in a position to control more than 50% of the maximum number of votes that might be cast at a general meeting of the first body; or
. holds more than one-half of the issued share capital of the first body.

Clause 5 contains the power for the Minister for Finance to declare, in writing, the date of the "agreement day" and the date of the "sale day". That declaration is to be published in the Gazette within 21 days after the relevant day. If no date is declared by 1 January 1996 for the "agreement day", the Act is automatically repealed (see Clause 79).

Clause 6 implements Schedule 1 to the Bill. Schedule 1 contains proposed amendments to the ANL Act 1956. These proposed amendments mainly include technical modifications which are necessary once ANL Limited is sold to the private sector. For example, specific statutory protection of the company and business names under the Principal Act is no longer appropriate. The company will be on the same footing as any other body corporate and it will have available to the usual provisions available to any registered company. Another proposed amendment removes Public Service mobility rights for any personnel who obtained that protection when ANL converted to a company wholly-owned by the Commonwealth, in 1988. Regard should also be had to Clause 38. This latter proposed amendment means that there may be a small number of former officers of the public service who have remained with ANL since 1988 who will now lose special consideration for reappointment to the Public Service should they subsequently decide to relinquish employment with ANL Limited after cessation of Commonwealth ownership. Clause 6 also implements necessary amendments set-out in Part I of Schedule 2 which specifies other Commonwealth statutes such as the Administrative Decisions (Judicial Review) Act 1977 and the Occupational Health and Safety (Commonwealth Employment) Act 1991.

Clause 7 implements proposed amendments contained in Part 2 of Schedule 2 to the Bill. These proposed amendments concern necessary modifications to various Regulations which are, in the main, concerned with Commonwealth employment. Regard must also be had to Clauses 9-14 which, in effect, allow portability of benefits, such as long service credits, for Commonwealth employees now serving with ANL Ltd who continue to remain with ANL after its sale.

Clauses 15-28 are transitional provisions which protect superannuation and "workers' compensation" benefits and entitlements accrued by Commonwealth employees who remain with ANL after its sale. Essentially, the clauses preserve the
pre-sale position for relevant employees. These saving provisions also include protection of deferred benefits accrued by any former Defence Force personnel (see Clauses 24-25).

Likewise, Clauses 29-30 preserve any maternity leave provisions.

Clauses 30-34 continue any obligations upon former Commonwealth employees in relation to any offences or legal proceedings that arose prior to the "sale day" of ANL.

Clause 36 removes any scope for financial losses incurred by ANL prior to sale to be carried-over as a tax deduction available after the date of sale.

Clause 41 removes ANL's current obligation to pay a levy for any borrowings from other than the Commonwealth for ANL's operations. This levy (pursuant to the Commonwealth Borrowing Levy Act 1987) is redundant once ANL ceases to be a Commonwealth-owned body. (One issue that may need elaboration by the Government is whether the guarantee for RetainCo (see Clause 59) brings into operation a need for RetainCo to pay a levy if the Commonwealth guarantees any of its borrowings).

Clauses 42-58 are key provisions in the Bill. These provisions operate from "agreement day". The purpose of these provisions is to identify RetainCo which is to be the corporate vehicle used by the Commonwealth to facilitate the sale of ANL. RetainCo is not a public authority of the Commonwealth (Clause 45). RetainCo is the conduit for the marshalling of ANL's assets for sale of those assets to the prospective purchaser, P&O.

The sale of ANL will, of course, involve a sale agreement between the parties. The Minister has the power to determine what assets of ANL or its subsidiaries shall be listed in the sale agreement, as well as any relevant rights and obligations (Clause 46).

Clause 56 provides that any transfer of assets which would result in the "acquisition" of the property of any person, then the Commonwealth must pay that person reasonable compensation.

RetainCo will be responsible for all of ANL's "residual" assets and liabilities not transferred, as part of the sale agreement, to the prospective purchaser P&O.

Clauses 59-61 provide a statutory guarantee for RetainCo, as well as enabling the Treasurer, or delegate, to continue the Commonwealth guarantee in favour of RetainCo to enable it to carry-out its obligations in relation to the sale of ANL assets.

Clause 62-66 provide exemption from certain taxes and fees (such as stamp duties) at the Commonwealth, State and Territory level in relation to the transfer of the assets of ANL. Income tax, where relevant, and fees under the Corporations Law still apply. A recipient of an ANL asset receives it at its depreciated value and with
the same capital gain tax position as the asset was held by ANL. Any liabilities transferred will be claimable as a deduction by the recipient. The clauses also provide modifications to accounting periods to enable simplification of what otherwise may have been unduly complicated by the sale and transfer of such significant assets.

Clause 67 is a key provision in that it appropriates up to $15m for the Minister to apply to costs associated with the sale of ANL.

Clause 68-78 are key provisions in that they provide the Commonwealth with a special share (a "golden share") which provides the Commonwealth with special rights in relation to the continued operation of ANL. This special share is created to safeguard Australia's national interest. The share does not give the Commonwealth a voting right nor the right to share in any dividend. Essentially what the share does is provide the Commonwealth with membership of ANL in its post-sale corporate form, and the Act empowers the Commonwealth to prevent any alteration of the company's memorandum and articles in a way which is inconsistent with Australia's national interest. In short, what the mechanism appears to do is to ensure that ANL in its post-sale corporate form will continue to operate a shipping service which is consistent with Australia's national interest. It is suggested that the post sale memorandum and articles of ANL will contain a statement of its objects (e.g. the nature of its business) and if those objects are stated, the Corporations Law at section 162, requires compliance with those objects. Clause 70 stipulates that a special resolution to change ANL's memorandum and articles (i.e. its constitution) requires the consent of the Commonwealth.

Clause 79 is an automatic repeal provision which operates to repeal the Act if an agreement day has not been declared for the sale of ANL before 1 January 1996.

Schedules 1 and 2 to the Bill contain minor consequential amendments to various Acts and Regulations.

ENDNOTES


9. See Lewis, S. '183m liability for ANL to be retained', *Australian Financial Review*, 21 September 1995. See also the Financial Impact Statement at p.2 in the *Explanatory Memorandum to the ANL Sale Bill 1995*.