

1990

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

COMMONWEALTH SERUM LABORATORIES
(CONVERSION INTO PUBLIC COMPANY) BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable
Brian Howe MP,
Minister for Community Services and Health)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED



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**COMMONWEALTH SERUM LABORATORIES
(CONVERSION INTO PUBLIC COMPANY) BILL 1990**

OUTLINE

The Bill provides for the establishment of the Commonwealth Serum Laboratories (CSL) as a company providing for CSL to be registered as a company incorporated under the Companies Act 1981 on a day to be proclaimed.

The Bill provides for the conversion to occur in four steps. The first step will come into effect on the Bill receiving Royal Assent. This involves the transfer to CSL of the remaining Commonwealth owned assets, including land and some buildings, which were not transferred to CSL when it became a statutory authority in 1961, although these assets have been used by CSL since it was established in 1916. The second step is the creation of a capital structure for CSL and the issue of shares. Provision is made for the share capital to be divided into classes of shares to which special rights may be attached. This allows for the Commonwealth to have rights in relation to the operation of serum fractionation and also the sale of land. This will occur on a day to be proclaimed. CSL will then be a statutory authority with a share capital.

The third step is the transition of CSL to a company. When suitable memorandum and articles of association are finalised, clause 13 will be proclaimed and CSL will be taken to be registered under the Companies Act 1981. Concurrently the statutory control over CSL will be removed by the repeal of most of the provisions of the existing CSL Act. The operations of CSL will then be governed by its memorandum and articles of association.

The final step is automatic and ensures that CSL maintains its legal personality at all times. This step involves the repeal of Division 1 of Part II of the existing CSL Act which establishes CSL as a statutory authority and will take effect immediately after CSL is registered as a company. Continuity of corporate identity will dispense with the need to transfer CSL assets and liabilities from the existing statutory authority to the new body corporate and means that all contracts, agreements and arrangements entered into by or on behalf of the existing statutory authority which are in force immediately before the transition will apply to the new company.

The Bill provides that, on transition, each staff member of the statutory authority will become an employee of the company on the same terms and conditions as applied to his or her employment by the statutory authority. Entitlements such as long service and recreation leave, and eligibility for sick leave, applying at transition day will be preserved. Those staff who have rights under Part IV of the Public Service Act 1922 will retain those rights.

FINANCIAL IMPACT STATEMENT

The Bill does not involve additional expenditure by the Commonwealth or additional revenue to the Commonwealth.

The Bill provides for exemption from Commonwealth, State and Territory taxes on the transition to a company and transfer of assets, recognising that there has been no change in the Commonwealth's beneficial ownership.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short Title

1. Provides for the Act to be cited as the "Commonwealth Serum Laboratories (Conversion into Public Company) Act 1990".

Clause 2 - Commencement

2. Subclause (1) provides for the Act, other than those parts of the Act referred to in subclauses 2(2), 2(3), 2(5), 2(7) and 2(8), to come into operation on the day it receives the Royal Assent.

3. The effect of subclause 2(2) is that section 32 of the Principal Act, which deals with the capital structure of CSL, is to be repealed immediately after the issue of paid up shares in CSL.

4. Subclause 2(3) provides for the proposed sections dealing with the creation of CSL's capital structure and other steps prior to conversion of CSL into a public company to come into effect on a date to be proclaimed. Subclause 2(4) provides for subclause 2(3) to take effect no later than four months after Royal Assent.

5. Subclause 2(5) provides for those clauses relating to the removal of a statutory control including that over the functions, powers and finances of CSL, and the transition of CSL into a public company, to take effect on a date to be proclaimed. Subclause 2(6) provides for subclause 2(5) to take effect no later than six months after the Royal Assent.

6. The effect of subclause 2(7) is that Part II of the Principal Act, which establishes CSL as a statutory authority is repealed immediately after CSL is registered under the Companies Act 1981, thereby ensuring CSL maintains its legal identity throughout the transition.

7. Subclause 2(8) provides for the renumbering of the Principal Act as a final step.

PART 2 - AMENDMENTS OF THE COMMONWEALTH SERUM LABORATORIES ACT 1961

Clause 3 - Principal Act

8. Defines "Principal Act" as the Commonwealth Serum Laboratories Act 1961.

Clause 4 - Title

9. Amends the long title of the Principal Act to reflect that the Principal Act as amended by this Bill will constitute CSL as a public company.

Clause 5 - Insertion of new sections

10. Proposed section 3 - Interpretation Defines various terms used in the Bill.

11. Proposed section 3A - Operating under a name For the purpose of protection of company and business names, this section specifies circumstances which establish whether a body is operating under a particular name in a State or Territory (see also proposed sections 45 and 46).

12. Proposed section 3B - Subsidiaries Provides that the question of whether a body corporate is a subsidiary is to be resolved in the same manner as under the Companies Act 1981.

13. Proposed section 3C - Operation of Act Provides for the Act to operate within and outside Australia.

14. Proposed section 3D - Extension to External Territories Provides for the Act to extend to all Australian external Territories.

Clause 6 - Repeal of sections 4, 5 and 6

15. Clause 6 repeals sections 4, 5 and 6 of the Principal Act which deal with interpretation, the form of determinations by the Minister and the application of Commonwealth Acts to CSL.

Clause 7 - Establishment of Commission

16. Clause 7 omits subsection 7(3) of the Principal Act which provides for judicial notice of CSL's seal. Proposed section 62 provides for continued judicial notice of the seal applied before transition.

Clause 8 - Transfer to CSL of additional assets etc

17. Clause 8 provides for a proposed new section 31A which provides for the transfer of specified Commonwealth assets and liabilities determined by the Minister to CSL. Specific provision is made in proposed subclause 31A(3) to facilitate registration of any land transfers.

Clause 9 - Capital of the Commission

18. Subclause 9(1)(a) makes a technical amendment to paragraph 32(1)(a) of the Principal Act to take account of the insertion of the proposed section 31A and subclause 9(1)(b) inserts a new paragraph in subsection 32(1) providing that the net value of assets transferred to CSL under section 31A is to form part of the capital structure of CSL. Subclause 9(2) provides for the repeal of section 32 which deals with the capital structure of CSL and as outlined in relation to subclause 2(2), this subclause comes into effect immediately after the issuing of paid up shares in CSL.

Clause 10 - Repeal of Divisions 2 to 6 (inclusive) of Part II

19. Clause 10 repeals Divisions 2 to 6 of Part II which deal with the functions, powers and duties of CSL, its Managing Director, staff, finances and reports.

Clause 11 - Repeal of Part II

20. Clause 11 repeals Part II of the Principal Act. As this clause will come into effect after clause 10, the effect will be to repeal the remaining sections of Part II which deal with the establishment of CSL as a statutory authority.

Clause 12 - Insertion of new Part:

PART IIA - CREATION OF CAPITAL STRUCTURE AND OTHER STEPS PRIOR TO CONVERSION OF CSL INTO A PUBLIC COMPANY

21. Part IIA provides for transforming CSL into an entity which can be converted into a public company. This ensures there is continuity of the corporate entity whilst CSL conforms, as far as possible, with the registration requirements of the Companies Act 1981.

22. Proposed section 44A - Share capital of CSL Provides for CSL to have a share capital equal to the amount provided for in subsection 44B(1), which is the amount of capital that CSL has at the commencement of Part IIA. The shares are to have a \$1 nominal value. Proposed subsection 44A(4) provides for different classes of shares. This relates to proposed subsection 44B(4) which provides for rights to be attached to particular classes of shares.

23. Proposed section 44B - Issue of shares in CSL
Requires CSL to apply the capital it has at the commencement of Part IIA in paying up in full shares in CSL. The shares are to be issued to the Commonwealth or a nominee of the Commonwealth as

directed by the Minister. Proposed subsection 44B(4) provides for the issuing of special rights shares. This allows for the Commonwealth to have rights in relation to serum fractionation and also the sale of land. Proposed subsection 44B(5) provides that the issue of shares by CSL in accordance with proposed subsection 44B(3) discharges any obligation on CSL to repay the capital contributed by the Commonwealth. Proposed subsection 44B(6) provides that the issue of shares is an issue for valuable consideration other than cash. Proposed subsection 44B(7) ensures that a person who holds shares as a nominee for the Commonwealth does not thereby become a member of the company.

24. Proposed section 44C - CSL to apply to be registered as a company etc Requires CSL to apply to the National Companies and Securities Commission for registration as a company limited by shares and to provide supporting documentation, including the proposed memorandum and articles of association.

25. Proposed section 44D - New name of CSL Provides for CSL's name to be changed to "Commonwealth Serum Laboratories Limited" on the day before transition as if the change of name was effected under the Companies Act 1981. This is to facilitate CSL's registration as a company.

Clause 13 - Insertion of new Part:

PART IIB - CONVERSION OF CSL INTO A PUBLIC COMPANY

26. Proposed section 44E - Effect of Part-summary This sets out CSL's status under the Companies Act 1981 on transition.

27. Proposed section 44F - CSL taken to be registered under Companies Act Provides for CSL to be converted into a public company limited by shares with the name Commonwealth Serum Laboratories Limited by deeming the National Companies and Securities Commission to have been required to grant CSL's application for registration as a company under the Companies Act 1981, and for such registration to have been effected on transition, ie the commencement of the proposed Part IIB.

28. Proposed section 44G - Memorandum and Articles of CSL Provides for the prepared memorandum and articles of association of CSL, lodged with the National Companies and Securities Commission prior to transition (see paragraph 24 above), to be the memorandum and articles of CSL and to apply from transition as if they had been registered under the Companies Act 1981.

29. Proposed section 44H - Membership of CSL Provides for members and acting members of CSL to cease to be members and acting members at the transition and for persons holding shares in CSL on transition to be members of CSL after the transition and to be subject to CSL's memorandum and articles of association.

30. Proposed section 44J - Application of certain provisions of Companies Act Provides that, where the Commonwealth holds all the shares in CSL, certain provisions of the Companies Act 1981 shall not apply. The major effect of this section is that, while the Commonwealth is the sole shareholder of CSL, the requirement that there must be at least 5 shareholders does not apply.

31. Proposed section 44K - Accounting records Provides for accounts and records kept by CSL under section 63F of Audit Act 1901 to be deemed to be the accounting records of CSL for the purposes of the Companies Act 1981.

32. Proposed section 44L - Accounts Provides that reports and financial statements prepared by CSL under section 63H of the Audit Act 1901 and section 44 of the Principal Act are deemed to be profit and loss accounts of CSL for the purposes of the Companies Act 1981.

33. Proposed section 44M - Operation of section 25B of Acts Interpretation Act Provides that nothing in this Act or in the Companies Act 1981, affects, or is affected by, section 25B of the Acts Interpretation Act 1901 concerning the continued existence of a body the name or constitution of which, is altered by an Act of Parliament.

Clause 14 - Repeal of Part III and Insertion of new Parts

34. Clause 14 repeals Part III of the Principal Act which deals with delegations and regulation and inserts new Parts III, IV, V and VI.

PART III - USE OF CERTAIN NAMES

35. Proposed sections 45 and 46 - Protected body may operate under protected company/business name These sections together with the definitions of "protected body", "group company", "protected company name" and "protected business name" in proposed section 3, provide that CSL's or a CSL wholly owned subsidiary's company or business name may be used in a State or Territory, even if that name is not registered in that State or Territory.

36. Proposed section 47 - Other persons not to use protected names and Proposed section 48 - Exceptions for pre-existing rights - These sections create an offence for other persons to use CSL's or its subsidiaries' protected names, except where the CSL consents in writing, or where there are pre-existing rights to such use.

37. Proposed section 49 - Use of other names by protected bodies Allows the use of names other than protected names by CSL and its subsidiaries.

38. Proposed section 50 - Effect on State and Territory laws
Allows CSL and its subsidiaries to register names under State and Territory laws.

PART IV - STAFF MATTERS

39. Proposed section 51 - Employment of staff members continues after transition Provides for the Managing Director, officers and employees of CSL immediately before transition to be employed by the new company on the same terms and conditions on which they were employed immediately before transition.

40. Proposed section 52 - Act not to affect certain matters relating to staff members Provides that contracts of employment and periods of employment of staff members of CSL are not broken by the operation of the Bill, and accrued rights are not affected.

41. Proposed section 53 - Effect of sections 51 and 52 This is a procedural section clarifying that section 51 and 52 are inserted only for the avoidance of doubt and do not limit the provisions of the Companies Act 1981 relating to change of company name or continuation of rights and liabilities on registration.

42. Proposed section 54 - Variation of terms and conditions of employment Confirms that terms and conditions of each staff member's employment after transition may be varied in the same way as could be done immediately before the transaction.

43. Proposed section 55 - Application of Part IV of Public Service Act Provides for staff members of CSL who have mobility rights under Part IV of the Public Service Act 1922 to continue to have those rights after the transition.

PART V - TAXATION MATTERS

44. Proposed section 56 - Interpretation Provides for the definition of certain terms used in Part V.

45. Proposed section 57 - Exemptions relating to exempt matters Provides for exemption from Commonwealth, State and Territory taxes of certain matters relating to the conversion of CSL into a public company ('exempt matters') which are defined in proposed section 56.

46. Proposed section 58 - Minister may certify in relation to exemptions Provides for certification by the Minister that a certain matter is an exempt matter or specified transactions were made or instruments executed in relation to an exempt matter (defined in proposed section 56 and by virtue of proposed section 57 not subject to taxation).

47. Proposed section 59 - CSL taken to have had share capital for purposes of Income Tax Assessment Act Provides for CSL for the purpose of the Income Tax Assessment Act 1936 to have had, at all times before issuing of shares under proposed subsection 44B(3), a share capital in which all the issued shares were beneficially owned by the Commonwealth.

48. Proposed section 60 - Treatment of acquisitions of transferring assets for purposes of Income Tax Assessment Act Provides that the application of the taxation law to CSL in respect of transferring assets will, broadly speaking, be the same as if CSL had acquired the assets at the time of their original acquisition by the Commonwealth. In addition, CSL is to be taken to have paid or given as consideration in respect of the acquisition of those assets the consideration actually paid or given by the Commonwealth in relation to their original acquisition. Further, the liability to pay or give that consideration is taken to have been incurred by CSL at the time when the liability was actually incurred by the Commonwealth. Finally, CSL is deemed to have incurred certain incidental costs in relation to the acquisition of a transferring asset, and also expenditure of a capital nature incurred for the purpose of enhancing the value of a transferring asset, at the time when these costs or expenses were actually incurred by the Commonwealth.

The section will have particular impact in relation to the operation of Part IIIA - capital gains and capital losses - of the Income Tax Assessment Act. For example, that Part only applies to assets acquired after 19 September 1985. In the absence of proposed section 60, all transferring assets would be acquired by CSL after that date and, therefore, would be subject to the application of the Part. However, the transferring assets are deemed to have been acquired by CSL at the date of their original acquisition by the Commonwealth. Part IIIA would only apply, therefore, on the subsequent disposal by CSL of a transferring asset originally acquired by the Commonwealth after 19 September 1985. For transferring assets that are subject to the application of Part IIIA on their subsequent disposal by CSL, proposed section 60 effectively deems CSL to have incurred any capital expenses actually incurred by the Commonwealth in relation to the acquisition of those assets or incurred in improving their value. In determining the indexed cost base of a transferring asset for the purposes of the application of Part IIIA, those expenses (including consideration for the acquisition of the asset) are taken to have been incurred by CSL at the time when they were actually incurred by the Commonwealth.

PART VI - MISCELLANEOUS

49. Proposed section 61 - CSL not public authority etc Provides that, after the transition, CSL shall not be a Commonwealth authority or otherwise come under the shield of the Crown for the purposes of a law of the Commonwealth, or a State or Territory unless express provision is made to the contrary by a law of the Commonwealth, State or Territory.

50. Proposed section 62 - Judicial notice of CSL's seal Provides that judicial notice shall continue to be taken of the seal of CSL applied in relation to any document prior to the transition.

51. Proposed section 63 - Compensation for acquisition of property Provides for compensation to be paid if the operation of the Act results in acquisition of property otherwise than on just terms.

52. Proposed section 64 - Additional powers and functions under State Laws Provides, subject to any regulations, for CSL to have any additional powers and functions as conferred by State and Territory laws.

53. Proposed section 65 - Annual return Provides the power which determines that CSL must lodge an annual return in accordance with section 263 of the Companies Act 1981. Further the section provides that on receipt of such an annual return the Minister is to table the return and any accompanying documents in the House within 15 sitting days.

54. Proposed section 66 - Delegations Provides the power for the Minister to delegate all or any of his powers and functions under the Act to an officer of the Department.

55. Proposed section 67 - Regulations Provides the power for the Governor-General to make regulations under the Act. The power provided for in proposed section 3 to prescribe additional protected names will only be available for 6 months after transition and will not be exercised without prior consultation with the Ministerial Council for Companies and Securities.

Clause 15 - Saving of Regulations

56. Provides for the continued operation of regulations made under the Principal Act before the commencement of section 66.

Clause 16 - Renumbering of the Principal Act

57. Provides for the renumbering of the Principal Act as amended by the Bill.

PART 3 - CONSEQUENTIAL AMENDMENTS OF OTHER ACTS

Clause 17 - Consequential amendments

58. This clause provides for consequential amendments of following Acts:

- . Administrative Decisions (Judicial Review) Act 1977;
- . Commonwealth Borrowing Levy Act 1987;
- . Commonwealth Guarantees (Charges) Act 1987;
- . Freedom of Information Act 1982; and
- . Sales Tax Assessment Act (No. 1) 1930.

