

# Infrastructure Investment (Asset Restructuring and Disposal) Bill 2009

## Explanatory Notes

### General Outline

### Policy Objectives

The purpose of the Bill is to facilitate the restructure and disposal of the interests in a variety of businesses, assets and liabilities currently held through several Government Owned Corporations (GOCs) and other Government owned entities, by a structured program over the forthcoming 3 to 5 year period.

In this context, a staged program of asset sales over coming years will play an important role in funding the State's infrastructure program, reducing State debt and encouraging private sector provision of infrastructure.

The sale of a number of State assets is designed to realise value, reduce risk and/or obviate the need to further fund the significant ongoing capital requirements of these businesses, where the private sector can fund those requirements and, in particular, build Queensland's export capacity.

The proposed infrastructure assets restructure and sale program generally involves the following:

- the sale of Forestry Plantations Queensland's (FPQ) business/assets;
- the sale of Queensland Motorways Limited's (QML) business/assets, including the planned Port of Brisbane Motorway upgrade project;
- the sale of the Port of Brisbane Corporation's (POBC) business/assets, but not including the Port of Bundaberg;
- the sale of Queensland Rail's (QR) above and below rail coal businesses/assets, along with Ports Corporation of Queensland's (PCQ) Abbot Point Coal Terminal; and
- the sale of QR's other commercial rail services such as Bulk freight, Intermodal, Retail and Regional freight services, where feasible.

It is intended that QR's passenger services business and associated suburban rail network will remain in State ownership.

In order to facilitate the immediate commencement of the appropriate governance and other arrangements required to support the proposed restructure and sale program, special sale legislation will need to be enacted.

The proposed Bill, *Infrastructure Investment (Asset Restructuring and Disposal) Bill 2009*, is similar to that used in other asset sale processes undertaken by the State in recent years with the Minister (Treasurer) able to exercise significant powers, including the ability to issue Project Directions and Transfer Notices.

Previously, specific restructuring and sale processes for significant Government owned assets have been facilitated by sales legislation which has been sponsored by the Government, for example -

- the restructure and sale of ENERGEX and Ergon's electricity retail businesses and ENERGEX's gas distribution business in 2006, and Stanwell's and Tarong's wind farms and Enertrade's merchant gas and gas transportation business through the *Energy Assets (Restructuring and Disposal Act) 2006*; and
- the restructure and sale (long term lease) of the Cairns and Mackay airports and the sale of the Port of Brisbane Corporation Limited's interest in the Brisbane Airport through the *Airport Assets (Restructuring and Disposal Act) 2008*.

Under both these pieces of legislation, the Minister was granted significant powers to direct nominated sale entities to undertake a wide variety of actions for the benefit of the State. Also, the Minister by transfer notice could transfer assets and liabilities between entities. In addition, the Minister was given wide ranging powers to deal with various existing and new licences, permissions and authorities, including granting, amending and transferring them under other legislation, including overriding other legislation.

In order to facilitate the announced program of restructuring and sale of a variety of large scale projects under the responsibility of the Minister, the legislation sets up the generic framework for the announced program of restructuring and sales. The legislation contains a very broad suite of flexible powers for the Minister to ensure that the program can proceed,

including powers to effectively address the variety of contingencies that will arise with the restructuring of each particular asset for sale.

It is highly likely that, following significant due diligence in relation to each asset, additional legislative provisions will in the future need to be introduced into this legislation. These future legislative provisions could deal with such issues as providing for various existing and new licences, permissions and authorities, any necessary modifications to the existing regulatory frameworks for the assets, and other facilitative provisions. For example, in relation to the recent Cairns and Mackay airport sales it was necessary to establish appropriate control powers for a new owner to undertake roles and functions that had traditionally been undertaken by government officers, and this was achieved by the inclusion of delegation mechanisms in the legislation.

The legislative scheme is necessary to provide a degree of flexibility to the State in “packaging” a number of discrete businesses to be sold in a manner which will maximise the return to the State. This approach will overcome the need to take multiple steps under different legislation (eg under the *Government Owned Corporations Act 1993*).

Even though the legislation is drafted so as to have extraterritorial application, it cannot force particular outcomes where a relevant law is not a Queensland law or the relevant law of a contract or licence, permission or authority is outside Queensland.

It is appreciated that the approach will conflict with a number of fundamental legislative principles. The approach is necessary and justified because the sales are a result of the government’s announced policy, the funds to be generated are for particular and necessary purposes and urgent timeframes are involved. Although there is the potential that third party rights may be overridden during the implementation of the legislation (ie overriding consent requirements which could prevent the necessary restructuring proceeding) there is no practicable alternative which would enable the necessary outcomes to be achieved.

In addition, it is considered necessary to exempt, from the operation of the *Right to Information Act 2009*, documents which are created for the purpose of, or in the course of carrying out the announced restructuring and sales program. Documents which fall within this class relate to commercial business activities of government owned entities involved in the project. Much of this information is highly commercially sensitive,

particularly where the State is considering and implementing the restructuring of businesses and is undertaking competitive sale processes.

## **Reasons for the Bill**

Legislation is required to facilitate the restructure and disposal of a variety of government owned businesses. Similar types of sale legislation have been successfully used in the past.

It is necessary to have general transfer notice powers, because:

- (a) it permits a timely and flexible solution to enable the State to take steps to restructure the relevant businesses, assets and liabilities for divestment with the timetable set by the State; and
- (b) in order to vest assets in project entities, a third party consent may be required. Thus there is a risk that third parties may seize the opportunity to exploit the situation to renegotiate the provisions of their agreement or withhold their consent to the detriment of the State and the people of Queensland.

Project directions are critical for the State during the sales process. They have at least two important functions. First, project directions permit businesses to lawfully provide to the State (and ultimately to bidders in a virtual data room) material that is subject to a confidentiality obligation owed to a third party. Second, project directions are part of the range of measures to permit the boards of the businesses to implement commercial decisions by the State in circumstances where the board's independent discretion is limited.

## **Achievement of the Objectives**

As discussed in the Policy Objectives section, there are a variety of significant projects for disposal which have been announced by the Government. As with previous processes, it is necessary to undertake a due diligence into each business, followed by restructuring in preparation for sale. A sale process (either open or closed) is conducted with the aim of striking an appropriate balance of maximising the return to Government while appropriately minimising risks.

In order for this legislation to facilitate the necessary due diligence, restructuring and sale in respect of each project, a suite of flexible powers are considered necessary.

The powers in the generic sale legislation need to be sufficient to facilitate—

- necessary investigations (including the usual protections from breaches of confidentiality and privacy etc);
- required restructuring;
- the potential need to override certain requirements of third party contracts (including consents and other requirements) for the purposes of internal restructuring
- the conduct by the sale team of an open or closed sale process (including the usual protections for those “government” officers involved); and
- the ultimate completion of the transactions and repatriation of the funds back to the State.

The Bill achieves its main policy objectives by:

- (a) facilitating the creation of stand-alone businesses in preparation for the sale of the nominated assets;
- (b) facilitating a competitive disposal process being conducted for the divestment of the State’s interest in the nominated businesses; and
- (c) conferral on the Treasurer of the power to give directions and to make transfer notices to transfer the assets of relevant entities (including the exercise of powers under various pieces of legislation) to restructure and divest the government businesses.

### **Alternatives to the Bill**

The policy objectives can only be implemented through primary legislation.

### **Estimated Cost for Government Implementation**

The cost of administering the Bill in respect of the divestment of the nominated businesses will be defrayed by the proceeds of the disposal of these assets.

## **Consistency with Fundamental Legislative Principles**

The Government has announced the proposed infrastructure assets restructure and sale program. The Bill is essential to enable the Queensland Government to restructure and dispose of the nominated businesses.

The Government sale team needs to immediately commence:

- (i) the process of identifying and examining the assets and liabilities of the businesses for the purpose of restructuring the businesses; and
- (ii) the necessary preparations for the disposal processes for the State's ownership in the nominated businesses.

The timeframe for the disposal of the appropriately structured entities will be in accordance with a program to be developed and is expected to last some 3 to 5 years. Accordingly, the restructuring provisions under the Bill, particularly in relation to the Minister's powers, will cease to operate on 1 July 2014.

The Bill is essential to facilitate the restructure of the declared entities within this strict timeframe and to ensure that the best available commercial outcome is achieved for the State.

The Bill raises the following issues relevant to fundamental legislative principles:

- (a) Rights and liberties of individuals, facilitation of evidence by certificate - *Legislative Standards Act section 4(2)(a) and 4(3)*. The Bill may not be consistent with the principles of natural justice in that clause 26 provides that the Treasurer may issue a certificate as conclusive evidence in relation to matters done under the Bill. For example, the Treasurer may issue a certificate identifying that certain information was authorised to be disclosed by a GOC or its subsidiaries to a prospective purchaser for the purpose of this project. Such a certificate would prevent a person bringing any contrary evidence to challenge the validity of the certificate. Given the State's proposed timeframe and the need for certainty for this project, any legal proceedings would unacceptably "derail" the disposal process.
- (b) Rights and liberties of individuals, decisions not reviewable - *Legislative Standards Act section 4(2)(a) and 4(3)*. Clause 17 provides that a decision under this Act is final and conclusive; cannot be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way, under the *Judicial Review Act 1991* or otherwise (whether by Supreme Court, another court, a tribunal or

another entity); and is not subject to any writ or order of the Supreme Court, another court, a tribunal or another entity on any ground. Given the State's proposed timeframe and the need for certainty and speed in which things are to be done for these projects, any legal proceedings would "derail" the divestment processes. The exclusion of review in relation to things done under this Bill is on the basis that these are significant commercial projects and the purchasers of the assets require certainty in the current economic conditions. Also, the State would suffer a significant financial detriment if it was delayed in restructuring the State owned government assets and their subsequent disposal. It is necessary to limit the ability of third parties to unreasonably delay the implementation of these projects.

(c) Rights and liberties of individuals, disclosure of confidential information and the deeming of a third party's consent – *Legislative Standards Act section 4(2)(a) and 4(3)* & conferring immunity from liability - *Legislative Standards Act section 4(2)(a) and 4(3)(h)*. There are two circumstances in which third parties' commercial rights may be affected by the Bill in respect of the restructuring and disposal provisions:

- the disclosure of confidential information without third parties' consent; and
- the transfer of businesses, assets and liabilities between a GOC or other government owned entity and its subsidiary or other government entity by gazetted transfer notice issued by the Treasurer for the purposes of restructuring. The transfer notice will potentially override requirements of third party contracts in a variety of circumstances, for example where consent to a change of control is required.

For the purposes of this project, it is intended that the entities which are Government Owned Corporations will have been required by direction to co-operate with the State and its advisors in identifying and examining the assets and liabilities of the particular GOC. The GOCs and other government entities and their subsidiaries will be concerned that they and their employees may be sued by a third party for a breach of contract or obligation of confidence in relation to the disclosure of confidential information to the State and its advisors. This is particularly the case for a GOC subsidiary or other parent entity which can not be given a Shareholding Ministerial direction and thus acts voluntarily to disclose confidential information to the State's advisors which may be to the detriment of the directors of the relevant company.

The sale team will establish “vendor data rooms” to contain information in the possession and control of the parent entity and its subsidiaries. Pursuant to clause 20, the State is entering into a confidentiality agreement with prospective purchasers for the purpose of giving access to information in the possession or control of an entity or its subsidiaries.

Clauses 21 and 22 authorise an entity or its subsidiary to disclose information to persons involved in the project, prospective purchasers and other State owned entities and their subsidiaries for the purposes of the project. Clause 22 overrides any condition contained in an agreement between a third party and an entity or its subsidiaries that certain information (including the terms of the relevant agreement) cannot be disclosed to any person without that third party’s consent.

To achieve the State’s proposed timeframe, it is not possible to obtain the necessary consents from the relevant third parties to disclose the requisite information to the prospective purchasers. At the same time, this information needs to be provided to prospective purchasers for the purpose of them being able to make an informed decision. If this information is not provided, the State is at risk of liability for, and criticism that it is engaging in misleading practices by not providing correct and fulsome information. The purpose of clauses 21 and 22 is to facilitate the due diligence and disposal processes. This clause will also overcome the need for the relevant shareholding Ministers to continue to issue directions to the GOCs relating to disclosure of information to the sale team for the purposes of the project

Similar provisions to clause 9 (Transfer Notice), clause 20 (Confidentiality Agreement with Prospective Purchasers), clause 21 (Disclosure and Use of Information for the Project), clause 22 (Effect on Legal Relationships) and clause 26 (Evidentiary Aids) were contained in the *Energy Assets (Restructuring and Disposal) Act 2006* and the *Airport Assets (Restructuring and Disposal) Act 2008*.

The Bill’s objective is to facilitate and ensure the completion of the disposal process by mid 2014. If the Bill does not override some third parties’ rights, it would not be possible for the restructure of the businesses to occur in a manner which would maximise the return to the State, and enable these projects to be completed within the State’s proposed timeframe. These are significant commercial projects and the purchasers of the assets require certainty. Also, the State would suffer significant financial detriment if the State was delayed in restructuring the businesses of the State owned entities and the subsequent disposal of those businesses.

## **Consultation**

The Government announced its intention to engage in this program in the Parliament on 2 June 2009. The Government has moved to establish consultative committees with trade unions to represent the interests of employees in this process.

Given that clause 13 of the Bill provides that the acts of the Minister under this Act is an excluded matter for the *Corporations Act*, it will be necessary to consult with the Ministerial Council as soon as possible, seeking their comments about the proposed section.

## **Notes on Provisions**

### **Part 1                      Preliminary**

Clause 1 specifies the name of the Act.

Clause 2 states the main purpose of the Act.

Clause 3 states the intention that the legislation is to operate both within and outside Queensland and to the fullest extent legally possible.

### **Part 2                      Interpretation**

Clause 4 refers to the dictionary in the schedule where particular words used in the Act are defined.

Clause 5 defines the term “declared project”. This definition assists to circumscribe the limits of the powers granted under the Act. Clause 5(2) provides that the Minister may, by gazette notice, declare something to be part of a project for the purposes of the Act.

Clause 6 defines the term “declared entity”. This definition assists to limit the powers granted under the Act. Clause 6(2) provides that the Minister

may, by gazette notice, declare a government owned entity to come under the scheme of the Act but only for the purposes of a declared project.

Clause 7 sets out that when the term “function” is used in the Act, it includes a power.

### **Part 3                      Particular Ministerial powers and activities relating to declared projects**

Clause 8 provides that the Minister may take any necessary or incidental action for the purposes of facilitating the disposal of a declared entity or of a business, asset or liability of a declared entity, and to ensure the continued operation of entities. The operation of this clause is limited to the purpose of the declared project.

Clause 9 provides that the Minister may do a number of things for the purposes of the project by way of a transfer notice which must be gazetted to have effect. The transfer notice is available to transfer assets and liabilities from one entity to another entity and make other provision for restructuring as necessary. The Minister’s powers under clause 9 are limited to the purposes of the declared project and to declared entities and are similar to the transfer notice provisions under the *Energy Assets (Restructuring and Disposal) Act 2006* and the *Airport Assets (Restructuring and Disposal) Act 2008*.

Clause 10 provides for limitations on the Minister’s power to second employees of a declared entity under clause 9. For example, the secondment of an employee under a transfer notice must not reduce the employee’s status or unreasonably change the employee’s duties, without the employee’s consent.

Clause 11 provides that the Minister may give a direction to a declared entity or its board requiring it to do something necessary and convenient for effectively carrying out a declared project. A declared entity and its board is required to comply with a direction given pursuant to this section. This clause is similar to the project direction provisions under the *Energy Assets (Restructuring and Disposal) Act 2006* and the *Airport Assets (Restructuring and Disposal) Act 2008*.

## **Part 4                      Application of other laws and instruments**

Clause 12 provides for the validity of acts done under the Act despite contrary provisions under any other Act or instrument.

Clause 13 is a displacement provision for the purposes of section 5F of the *Corporations Act 2001(Cth)* to protect the Minister from liability in circumstances where the Minister is impacting the business of the declared entity by exercising powers under this Act.

Clause 14 provides that no duty under the *Duties Act 2001* is payable in relation to anything done under a transfer notice issued by the Minister under the Act. This facilitates the restructuring of businesses which are government owned for the purposes of the project to occur without attracting duty.

Clause 15 excludes the operation of section 121 of the *Property Law Act 1974* (Provisions as to covenants not to assign etc. without licence or consent) over the lease of land granted by a government owned lessor. Thus, if disposal of a business occurs by means of a long term lease, the government owned lessor will not be subject to a statutory obligation to act reasonably in considering a request by the lessee to assign the lease. This allows the government lessor to protect the State's interests under a long term lease.

Clause 16 provides that where a transfer notice or project direction results in the disposal of a public record, the public record is taken to be disposed of under legal authority, justification or excuse for the purposes of section 13 of the *Public Records Act 2002*.

Clause 17 provides that a decision made under the Act is final and conclusive and is not subject to challenge or review under the *Judicial Review Act 1991*, or otherwise.

## **Part 5**                      **Miscellaneous**

Clause 18 provides that the Minister may not perform a function under the Act on or after 1 July 2014. In particular, the Minister will be unable to issue new project directions or transfer notices.

Clause 19 provides that the registrar of titles or other registering authority may without formal application register the transfer of an asset or liability under a transfer notice issued by the Minister under the Act. However, the registrar of titles or other registering authority must register the transfer if a written application is made by a transferee entity. This clause also requires the registration of a transaction related to a transfer under a transfer notice even if the transferee entity has not been registered as a proprietor of the asset or liability provided that the transaction is effected by an instrument otherwise in registrable form. In addition, this clause provides that the registrar of titles is not obliged to enquire as to whether an asset or liability has been transferred under a transfer notice provided that the asset or liability is registered in the name of a transferor entity before registering a dealing.

Clause 20 provides that a prospective purchaser may enter into a confidentiality agreement with the State for the purpose of obtaining access to information in the possession or control of a declared entity.

Clause 21 (1) provides that a person may disclose information in the possession or control of a declared entity for the purpose of a declared project. Clause 21(1) limits disclosure to those persons who are involved with the project or have entered into a confidentiality agreement mentioned in clause 20, and to declared entities (including any employee or agent).

Clause 21 (2) compels a declared entity or its board to comply with a request by the Minister for the disclosure of information for the purpose of a project. A person, who in acting honestly discloses or uses information under clause 21, is not liable in relation to any civil, criminal or other administrative action in relation to that use or disclosure.

Clause 22 protects the State and other relevant entities from liability for things done under the Act. Clauses 22(2) and (3) provide that where notice or consent is required to do something under the Act that notice or consent is taken to be given unconditionally.

Clauses 20, 21 and 22 are read together to facilitate the restructure and disposal of the selected declared entity assets. For example, if a

commercial agreement contains a confidentiality clause permitting the disclosure of confidential information to another person if required by law, clause 21(2) will be regarded as a sufficient lawful authority to do so. If a commercial agreement includes a condition that certain information (including terms of the relevant agreement) cannot be disclosed to any person without that third party's consent, clause 22 will operate to override that condition by deeming that consent has been given unconditionally. Clause 20 will ensure that a prospective purchaser who is the recipient of such information is subject to confidentiality obligations that may be attached to the information.

Clause 23 provides that a thing is taken to be done under this Act in compliance with a transfer notice or a project direction even if steps are required to be taken under another Act. For example if the Minister grants a sub-lease of land under the *Land Act 1994* by way of a transfer notice, the grant is deemed to be done under this Act and due to the operation of clause 22(2) of the Act, any approval required under the *Land Act 1994*, section 322 is taken to have been given unconditionally.

Clause 24 preserves all rights, benefits, entitlements or remuneration of employees seconded from a declared entity to another declared entity as part of any action taken to facilitate the disposal of the assets and liabilities of a declared entity to the extent permitted by applicable Commonwealth legislation.

Clause 25 preserves all rights, benefits, entitlements or remuneration of employees transferred from a declared entity to another declared entity as part of any action taken to facilitate the disposal of the assets and liabilities of a declared entity to the extent permitted by applicable Commonwealth legislation.

Clause 26 provides that the Minister's certificate is conclusive evidence that a stated thing was, or is being done for the purpose of a declared project or that a person is, or was at a stated time involved in a declared project, or that a company was established for a declared project, or a stated direction by a Minister related to a declared project.

Clause 27 provides that the Minister may delegate the Minister's functions under the Act to the chief executive of the department responsible for administering the Act, except for the power to issue a transfer notice under clause 9, or to declare a thing to be part of a project under clause 5, or a declared entity under clause 6.

Clause 28 provides for the Governor in Council to make regulations under the Act.

## **Part 6**                      **Amendment of Right to Information Act 2009**

Clause 29 provides that the *Right to Information Act 2009* is amended.

Clause 30 provides that a new exemption is introduced into Part 2 of Schedule 2 of the *Right to Information Act 2009* in relation to a declared entity in connection with a declared project under the Act. Accordingly, documents which are specifically brought into existence for the purposes of the State's restructuring and sale program of the nominated commercial businesses and assets cannot be required to be released by the entity under the *Right to Information Act 2009*.

## **Schedule**                      **Dictionary**

The Schedule contains the dictionary of defined words as referred to in clause 4.