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European Bank for Reconstruction and Development Amendment Bill 2005

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Law and Bills Digest Section

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European Bank for Reconstruction and Development Amendment Bill 2005

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House: House of Representatives

Portfolio: Treasury

Commencement: Schedule 1, items 1 to 4 will commence on Royal Assent. Commencement of Schedule 1, item 5 is set out under the Main Provisions below

Purpose

To make changes to the *European Bank for Reconstruction and Development Act 1990* to prepare for the acceptance of Mongolia as country in which the Bank may operate.

Background

The European Bank for Reconstruction and Development ('Bank') was established in 1991. It was formed at the suggestion of President Mitterand of France to assist the economic reconstruction of central and eastern European countries following the break-up of the Soviet Union and the collapse of the communist regimes of eastern Europe. According to the Bank's own web-page, the Bank:

> … uses the tools of investment to help build market economies and democracies in 27 countries from central Europe to central Asia.
>
> The EBRD is the largest single investor in the region and mobilises significant foreign direct investment beyond its own financing. It is owned by 60 countries and two intergovernmental institutions. But despite its public sector shareholders, it invests mainly in private enterprises, usually together with commercial partners.
>
> It provides project financing for banks, industries and businesses, both new ventures and investments in existing companies. It also works with publicly owned companies, to support privatisation, restructuring state-owned firms and improvement of municipal services. The Bank uses its close relationship with governments in the region to promote policies that will bolster the business environment.[1]

The Bank's mandate stipulates that it must only work in countries that are committed to democratic principles. The mandate further stipulates that investments must:

- Help move a country closer to a full market economy

- Take risk that supports private investors and does not crowd them out, and
- Apply sound banking principles.[2]

Interestingly, through its very comprehensive corporate governance principles, the Bank is required to make investments which have 'respect for the environment'. More specifically, under its policies and lending practices, the Bank is 'directed by its founding agreement to adhere to sound banking principles and to promote in the full range of its activities environmentally sound and sustainable development'.[3]

Further, according to its web-page, the Bank intends to promote through its investments:

- Structural and sectoral reforms
- Competition, privatisation and entrepreneurship
- Stronger financial institutions and legal systems
- Infrastructure development needed to support the private sector, and
- Adoption of strong corporate governance, including environmental sensitivity.[4]

Finally, the Bank understands itself as a 'catalyst of change' by:

- Promoting co-financing and foreign direct investment
- Mobilising domestic capital, and
- Providing technical assistance.[5]

Australia participated in the meetings to set up the Bank and ratified the Agreement Establishing the European Bank for Reconstruction and Development (the Agreement) on 28 December 1990. The text of the Agreement appears as Schedule 1 to the *European Bank for Reconstruction and Development Act 1990* (the Act).

Membership of the Bank is open to all European countries, and to non-European countries that are members of the International Monetary Fund (Article 3). Australia is one of 60 members of the Bank. Each member appoints a Governor to the Bank's Board. The Treasurer, Peter Costello, is Australia's appointee to the Board of Governors. In addition, the Bank has a Board of Directors who are elected to represent the interests of various groups of member countries, such as those from central and eastern Europe, other European countries, and non-European countries. Australia is currently represented by former Minister, Peter Reith. The Board of Directors are responsible for the general operation of the Bank and are based in London. Australia's initial subscription to the Bank was 100 million European Currency Units (ECUs).

Membership of the Bank has grown from 39 to 60 countries without the need to amend the legislation. This is because the text of the Agreement uses broad terminology such as 'Central and Eastern European countries' (or variations on this), and does not mention the individual countries by name. However, Mongolia, although it had close economic ties with the former Soviet Union, cannot fit into this broad definition. This Bill amends the text of the Agreement to include in the definition that any reference to 'Central and Eastern European countries' (or variations on this) will also mean a reference to Mongolia.

Countries from central and eastern Europe that apply for assistance from the Bank must demonstrate that their economy is proceeding steadily in its transition towards market orientation and the promotion of private and entrepreneurial activity. In 2004, the Bank announced that it was to restrict its lending to Uzbekistan because of a lack of progress in human rights and economic reforms. This decision, which was made after a year-long assessment, was based on the facts, as reported, that no opposition political parties had been registered, torture was still widespread in prisons, and barriers to trade continued to leave the economy closed.[6]

Main Provisions

The Bill has two central aspects—first, the ratification of the Bank's decision to accept Mongolia as a country of operation and second, the introduction of a regulation making power so that future changes to Schedule 1 of the Act can be made by regulation.

Acceptance of Mongolia – ratification process

The Bill will make changes to the Act to accommodate the Bank's decision to accept Mongolia as a so-called 'country of operations'.[7] This decision was made by the Bank unanimously on 30 January 2004.

Before a country can become a country of operations of the Bank, all countries which are members of the Bank ('member countries') will have to ratify the Bank's decision. In a press conference, the President of the Bank, Jean Lemierre, explained that:

> The fourth point I should like to mention with regard to the key commitments and guidance concerns Mongolia. The Governors have all welcomed Mongolia. You know where we stand. Mongolia wants to become a recipient country of the Bank, meaning that we can use the Bank's money to operate in that country. I totally agree with this. We have already taken the first two steps. The Board has approved it, the Governors have approved it. Now, because this involves an amendment in the Agreement Establishing the Bank, the member countries of the Bank have to go through the process of ratifying this amendment. We have already received a few ratifications and there has been a very clear commitment by Governors to complete the process quickly. Hopefully, Mongolia will soon become a country of operation.[8]

With this Bill, Australia will effect ratification by making changes to the Agreement. The relevant change will be effected by **item 5**, proposed changes to **Article 1, Schedule 1** of the Act which will, after the successful passage of this Bill, stipulate that a reference to:

- Central and Eastern European Countries
- countries from Central and Eastern Europe
- recipient country (or countries), or
- recipient member country (or countries)

will also include a reference to Mongolia.

Despite not being a country of operation yet, Mongolia is already obtaining funds from the Bank through the Mongolia Cooperation Fund. A detailed brochure setting out the details of the fund and projects, in relation to which money was expended, is available on the Bank's webpage.[9]

Commencement: The provision changing the text of Schedule 1 will commence on either the day on which this Act receives Royal Assent, or the day on which Mongolia is admitted as a country of operations of the Bank (that is, when the required number of member countries have ratified or agreed to the changes to the text of the Agreement), whichever is the later. However, the provisions will not commence if the amendments to the Agreement do not occur within two years of the Act receiving Royal Assent. According to the Explanatory Memorandum, this is to avoid an open-ended proclamation provision and to ensure that the Parliament remains responsible for determining when the provision comes into force.[10]

Regulation making powers

In addition to the changes ratifying Mongolia's acceptance as a country of operation, the Bill will also introduce regulation making powers. **Item 4** will introduce proposed **new section 6** which will enable the Executive to implement future changes to the Agreement by making regulations.

In essence, this provision is a Henry VIII clause because it will enable the Executive to change primary legislation by means of subordinate legislation.[11] Arguably, such provisions are problematic because they enable the Executive, to an extent, to undermine the supremacy of Parliament. Despite the fact that regulations are tabled in both Houses of Parliament and Parliament may disallow the regulations, the concern, as expressed by the Scrutiny of Bills Committee, is that regulations 'have full force and effect from the time they were made and, depending on the pattern of Parliamentary sittings, might not be scrutinised by the Parliament for a period of some months'.[12] The Administrative Review Council commented in 1992 that:

> …Henry VIII provisions are defended on the basis that it would be impractical to return to Parliament with changes to the [empowering] Act that are relatively minor in nature. However, it is clearly inappropriate for a body subordinate to Parliament to amend or alter an Act made by Parliament. This is particularly so when changes affect

> the essential elements of a scheme, alter the ambit of legislation, place restrictions on rights, or alter obligations.[13]

Whilst the High Court has accepted such provisions as a valid delegation of power, it has been argued in the Bills Digest to the Workplace Relations Amendment (Work Choices) Bill 2005 that, in light of the sweeping use of these provisions in the new workplace relations system, the constitutionality of these provisions may again be an issue for the High Court. Readers may want to refer to that Bills Digest for more information on the issue.[14]

The use of regulation making power in this Bill is more contained. Under this proposed legislation, the Governor-General is solely to ratify changes to the English text of the Agreement which have been agreed by the Board of Governors of the Bank of which Australia is a member. The Governor-General can only make regulations that add, omit or substitute text in Schedule 1 of the Act for the purpose of ensuring that the Schedule correctly sets out the English text of the Agreement, as amended from time to time by the Bank. As such, any regulations made could not alter the purpose of the Act which is to give effect to the Agreement. The Governor-General is not given any wider regulation making power.

While the Executive retains its constitutional powers on treaty making under section 61 of the Constitution, recent political practice in Australia has been to table all treaties (generally after they have been signed by Australia) in both House of Parliament for at least 15 sitting days prior to binding treaty action being taken. Such action would include entering into a new treaty, negotiating an amendment to an existing treaty or withdrawing from a treaty. Treaties are tabled to allow for consideration by parliamentarians, state and territory governments, sectoral interests and non-government organisations. The Joint Standing Committee on Treaties considers tabled treaties. The Committee can also consider any other question relating to a treaty or international agreement that is referred to it by either House of Parliament or a Minister.

Despite this scrutiny of treaties, there are precedents for changes to Australia's international obligations to be implemented by regulations. For example, the schedules to the *Social Security (International Agreements) Act 1999* set out the texts of existing international social security agreements. The *Social Security (International Agreements) Act 1999* contains provisions for the making of regulations to:

- amend the text of these schedules,
- add new scheduled international agreements, and
- repeal a schedule.[15]

As to why the Government chose to adopt this approach, the Minister responded to the Scrutiny of Bills Committee that:

> The use of regulation making powers in the Social Security (International Agreements) Bill will mean that changes to the law to give effect to new international social security agreements with foreign countries, and changes to existing international social security agreements, can be made more quickly because such changes will not be dependent on the Government's legislative programme or Parliamentary Sittings. This result can be achieved without any diminution in Parliamentary scrutiny because the regulations will be disallowable and subject to the scrutiny of the Senate Committee on Regulations and Ordinances.[16]

In addition, there are some multilateral treaties that include an annual conference of the parties which can result in regular, but minor amendments, being agreed by the members. Seeking the approval of Parliament for each of these adjustments might be seen as an inefficient use of Parliament's time.

Endnotes

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1. European Bank for Reconstruction and Development, *Basic Facts*, available at http://www.ebrd.com/about/index.htm, accessed 9 December 2005.
2. ibid.
3. European Bank for Reconstruction and Development, Environmental Procedures, available at http://www.ebrd.com/about/policies/enviro/procedur/index.htm, accessed 9 December 2005.
4. *Basic Facts*, op. cit.
5. ibid.
6 *Keesing's Record of World Events*, vol. 50 (1994), p. 45953.
7. A list of the current countries of operations can be found at http://www.ebrd.com/about/basics/count.htm, accessed 9 December 2005.
8. J. Lemierre, 'President's press conference at the Annual Meeting in London', 19 April 2004, available at http://www.ebrd.com/new/speeches/transcr/040419.htm, accessed 9 December 2005.
9. European Bank for Reconstruction and Development, Mongolia Cooperation Fund, available at http://www.ebrd.com/pubs/funding/5978.pdf, accessed 9 December 2005.
10. Explanatory Memorandum, European Bank for Reconstruction and Development Amendment Bill 2005, p. 4.
11. In this context the Schedule is part of the Act. D Gifford and K Gifford, *How to understand an Act of Parliament*, 8th ed, The Law Book Company, 1994, pp. 76-80.
12. Senate Standing Committee for the Scrutiny of Bills, *Work of the Committee during the 39th Parliament November 1998 to October 2001*, Chapter 5, p.80, at http://wopared.parl.net/Senate/committee/scrutiny/39_parlreport/report.pdf (accessed 27 January 2006)

13. Administrative Review Council, 'Rule Making by Commonwealth Agencies', *Report No. 35*, AGPS, Canberra, 1992, p. 18.

14. Mary Anne Neilsen et al., Workplace Relations Amendment (Work Choices) Bill 2005, Bills Digest, No. 66, Department of Parliamentary Services, 2005–06, pp. 115–17.

15. This issue is discussed by the Senate Standing Committee for the Scrutiny of Bills, *Work of the Committee during the 39th Parliament November 1998 to October 2001*, Chapter 5, p. 78–79, at http://wopared.parl.net/Senate/committee/scrutiny/39_parlreport/report.pdf (accessed 27 January 2006).

16. Senate Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p. 396.

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