

Passed by both Houses



New South Wales

# Electricity Generator Assets (Authorised Transactions) Bill 2012

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*I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2012*



New South Wales

## **Electricity Generator Assets (Authorised Transactions) Bill 2012**

Act No , 2012

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An Act to authorise and provide for the transfer of the electricity generator assets of the State.

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*I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.*

*Assistant Speaker of the Legislative Assembly.*

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Clause 1 Electricity Generator Assets (Authorised Transactions) Bill 2012

Part 1 Preliminary

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**The Legislature of New South Wales enacts:**

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *Electricity Generator Assets (Authorised Transactions) Act 2012*.

### **2 Commencement**

- (1) This Act commences on the date of assent, except as provided by subsection (2).
- (2) Schedule 5 (Ownership restrictions in floated transaction companies) commences on a day to be appointed by proclamation.

### **3 Interpretation—key definitions**

In this Act:

***authorised transaction*** means a transfer of electricity generator assets authorised by Part 2.

***electricity generator*** means a statutory State owned corporation constituted by the *Energy Services Corporations Act 1995* as an electricity generator under that Act.

***electricity generator assets*** means assets, rights and liabilities of an electricity generator.

**Note.** Schedule 1 contains other interpretative provisions.

## **Part 2 Authorised transfers of electricity generator assets**

### **4 Transfer of electricity generator assets to private sector**

This Act authorises the transfer of electricity generator assets to the private sector.

### **5 Transfer of electricity generator assets between public sector agencies**

This Act authorises the transfer of electricity generator assets between public sector agencies.

### **6 Proceeds of transaction**

- (1) The proceeds of the transfer of electricity generator assets pursuant to an authorised transaction (*the transaction proceeds*) belong to and are payable directly to the State.
- (2) The transaction proceeds paid to the State are to be paid into the Restart NSW Fund (*the Fund*) established under the *Restart NSW Fund Act 2011*.
- (3) The following deductions are authorised to be made from the transaction proceeds:
  - (a) deduction of such amounts as the Treasurer approves to repay debt and satisfy other liabilities of a public sector agency in respect of electricity generator assets transferred for the purposes of an authorised transaction,
  - (b) deduction of such amounts as the Treasurer approves to reimburse public sector agencies for payments made by them in respect of any tax, duty, fee or charge imposed by any Act or law of the State or any other jurisdiction in connection with a transaction arrangement,
  - (c) deduction of such amounts as the Treasurer approves to satisfy any liability of a public sector agency arising under or in connection with a transaction arrangement,
  - (d) deduction of such amounts as the Treasurer approves to meet expenses reasonably incurred by public sector agencies for the purposes of an authorised transaction.
- (4) The transaction proceeds do not include any amount certified by the Treasurer to have been paid to a public sector agency as a tax, duty, fee or charge imposed by any Act or law of the State in connection with a transaction arrangement.

Clause 6 Electricity Generator Assets (Authorised Transactions) Bill 2012

Part 2 Authorised transfers of electricity generator assets

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- (5) The deductions authorised to be made from the transaction proceeds may be made before payment of the transaction proceeds into the Fund or may be made by payment from the Fund.
- (6) The requirements of this section do not affect the validity of a transaction arrangement.

## Part 3 Facilitating authorised transactions

### 7 Treasurer's functions for the purposes of an authorised transaction

The Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction. The functions conferred on the Treasurer by any other provision of this Act do not limit the Treasurer's functions under this section.

### 8 Transaction SOC's

- (1) A statutory State owned corporation may be established under this Act as a transaction SOC for the purposes of an authorised transaction.
- (2) The Governor may by order published in the Gazette:
  - (a) create a corporation under a corporate name specified in the order, and
  - (b) specify the functions of the corporation, and
  - (c) direct that the corporation is established as a statutory State owned corporation and as a transaction SOC.
- (3) On the day on which the order takes effect:
  - (a) a corporation is constituted with the corporate name and functions specified in the order, and
  - (b) the *State Owned Corporations Act 1989* is amended by inserting in Schedule 5 the corporate name specified in the order (to establish the corporation as a statutory State owned corporation under that Act), and
  - (c) the State owned corporation thereby established is a transaction SOC for the purposes of this Act.
- (4) The portfolio Minister of a SOC established under this section is the Minister administering section 13 (Creation of additional energy services corporations) of the *Energy Services Corporations Act 1995*.
- (5) Schedule 2 has effect with respect to a transaction SOC. The provisions of that Schedule are in addition to and (except to the extent to which that Schedule otherwise provides) do not derogate from the provisions of the *State Owned Corporations Act 1989*.

## **9 Transaction companies**

- (1) The Treasurer may for the purposes of an authorised transaction establish, or direct the establishment of, companies as transaction companies in any of the following ways:
  - (a) the formation or acquisition by or on behalf of the State or a SOC of a company limited by shares, so that all the issued shares in the company are held by or on behalf of the State or a SOC (or both),
  - (b) the formation or acquisition of a company as a wholly owned subsidiary company of a transaction company,
  - (c) the conversion of an electricity generator or transaction SOC into a company limited by shares as provided by Schedule 3.
- (2) A transaction company that is a public sector agency may be converted from one kind of company to any other kind of company.
- (3) Except by express agreement with the Treasurer:
  - (a) a transaction company is not and does not represent the State, and
  - (b) the debts, liabilities and obligations of a transaction company are not guaranteed by the State.
- (4) The Treasurer may act for or on behalf of the State, a SOC or a transaction company that is a public sector agency in connection with the rights, privileges and benefits, and the duties, liabilities and obligations of the State, a SOC or transaction company as the holder of shares or other securities in a transaction company.
- (5) Shares and other securities in a transaction company that is a public sector agency may be issued, sold or transferred in accordance with the directions of the Treasurer. The Treasurer may on behalf of the State, a SOC or a transaction company that is a public sector agency enter into and carry out transaction arrangements for the issue, sale or transfer of shares and other securities in a transaction company.
- (6) An electricity generator that becomes a transaction company remains an electricity generator for the purposes of this Act (despite ceasing to be a statutory State owned corporation constituted by the *Energy Services Corporations Act 1995*).

## **10 Functions of electricity generators and transaction entities**

- (1) Each electricity generator and transaction entity has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction.
- (2) The functions conferred by this section are in addition to any other functions that an electricity generator or transaction entity has apart



- (2) The affairs of the Corporation are to be managed by the Treasurer who may authorise another Minister to exercise functions in relation to particular assets, rights and liabilities.
- (3) Any act, matter or thing done in the name of, or on behalf of, the Corporation by the Treasurer or a Minister authorised by the Treasurer, or with the authority of the Treasurer or any such Minister, is taken to have been done by the Corporation.
- (4) The Corporation has the functions conferred or imposed on it by or under this or any other Act.
- (5) The functions of the Corporation are:
  - (a) to hold, on behalf of the Crown, electricity generator assets acquired by it or transferred to it by or under this or any other Act, and
  - (b) to carry on any activities or business that relate to any electricity generator assets held by it, including demanding, collecting and receiving charges, levies, rates and fees, and
  - (c) such other functions for the purposes of an authorised transaction as may be prescribed by the regulations.

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## Part 4 Arrangements for transfer of assets, staff and functions

### 13 Vesting orders

The Treasurer may make vesting orders under Schedule 4 for the purposes of an authorised transaction.

### 14 Staff transfers

- (1) The Treasurer may, for the purposes of an authorised transaction, by order in writing, transfer the employment of an employee of an electricity generator (a *transferred employee*) to the employment of another public sector agency.
- (2) A transferred employee is (until other provision is duly made under any Act or law) to be employed in accordance with any relevant statutory provisions, awards, agreements and determinations that would have applied to the employee had the employee remained an employee of the electricity generator concerned.
- (3) On the transfer by order under this section of an employee's employment from one employer (*the current employer*) to another employer (*the new employer*) the following provisions have effect:
  - (a) the employee is entitled to continue as a contributor, member or employee for the purposes of any superannuation scheme in respect of which he or she was a contributor, member or employee (as an employee of the current employer) immediately before the transfer of employment and remains so entitled subject to any variation to that entitlement made either by agreement or otherwise in accordance with law,
  - (b) the new employer is taken to be an employer for the purposes of any superannuation scheme in respect of which the employee continues as a contributor, member or employee pursuant to an entitlement under this section,
  - (c) the continuity of the employee's contract of employment is taken not to have been broken by the transfer of employment, and service of the employee with the current employer (including service deemed to be service with the current employer) that is continuous service up to the time of transfer is taken for all purposes to be service with the new employer,
  - (d) the employee retains any rights to sick leave, annual leave or long service leave accrued or accruing immediately before the transfer (except accrued leave for which the employee has, on ceasing to be an employee of the current employer, been paid the monetary value in pursuance of any other entitlement of the employee).

- (4) The Treasurer may negotiate and enter into agreements or industrial instruments concerning workplace relations for or on behalf of a public sector agency in connection with the operation of this section.

**15 Payments to employees leaving public sector employment**

- (1) The Treasurer or another public sector agency may enter into agreements or other arrangements with respect to the making of transfer payments to employees of an electricity generator in connection with the transfer of employment of those employees to employment in the private sector as a result of a transaction arrangement.
- (2) A transfer payment is not to exceed an amount equivalent to 30 weeks of pay at the rate of an employee's base salary (that is, salary less any allowances).
- (3) Without affecting any entitlement to a transfer payment under this section, an employee of an electricity generator is not entitled to receive any payment or other benefit (including in the nature of severance pay or redundancy compensation) merely because the employee ceased to be an employee of a public sector agency as a result of a transaction arrangement.

**16 Employment guarantee for employees transferred to private sector and maintenance of apprenticeships**

- (1) If the employment of an eligible employee of an electricity generator is transferred to employment in the private sector as a result of a transaction arrangement, the employment of the employee cannot be terminated by the private sector employer during the employee's employment guarantee period, except:
- (a) for serious misconduct, or
  - (b) pursuant to the proper application of reasonable disciplinary procedures, or
  - (c) by agreement with the employee.
- (2) An employee's *employment guarantee period* is:
- (a) for eligible employees who are permanent employees—the period of 2 years (the *standard period*) after the transfer date, or
  - (b) for eligible employees who are temporary employees—the remainder of the employee's current term of employment (as specified in the arrangements under which the employee was engaged as a temporary employee) immediately before the transfer date, or the period of 2 years (the *standard period*) after the transfer date, whichever period ends first.

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- (3) The object of this subsection is to provide an additional job maintenance guarantee because the transfer of electricity generator assets under this Act is by way of sale. The standard period of 2 years is extended by an additional period of 2 years for eligible employees.
- (4) The Treasurer is to take all reasonable steps to ensure that, under the transaction arrangements with all private sector employers, a total of at least 150 apprenticeships is maintained in the electricity generation businesses of those employers in NSW during any employment guarantee period under this section.
- (5) In this section:
- casual employee* means an employee whose employment is in a category of employment that is described in or classified under a relevant award as casual employment or who is otherwise engaged as a casual employee.
- contract employee* means an employee whose terms and conditions of employment are provided by an individual contract and not by a relevant award.
- eligible employee* means a permanent employee or temporary employee and does not include a contract employee or casual employee.
- permanent employee* means an employee whose employment is of indefinite duration and who is not a casual employee, temporary employee or contract employee.
- private sector employer* means the employer in the private sector to whose employment the employment of an eligible employee is transferred as a result of a transaction arrangement.
- relevant award* means any award, agreement or other industrial instrument (under a law of the State or the Commonwealth) that provides for the terms and conditions of employment of employees.
- temporary employee* means an employee (other than a casual employee or contract employee) whose employment is in a category of employment that is described in or classified under a relevant award as temporary employment or whose employment is, under the terms of his or her employment, for a limited period.
- transfer date* means the date on which an eligible employee is transferred to employment in the private sector as a result of a transaction arrangement.

#### **17 Effect of transfer of electricity generator assets between public sector agencies**

- (1) When the business of an electricity generator is transferred to another public sector agency for the purposes of an authorised transaction:

- (a) the public sector agency becomes the *new operator* of the business and that business is to be conducted as the *electricity business* of the new operator, and
  - (b) the new operator is deemed to be an electricity generator for the purposes of this Act in respect of the business that comprises its electricity business as conducted by the new operator from time to time, but only while the new operator is a public sector agency and not in respect of any other business of the new operator, and
  - (c) the new operator has and may exercise all such functions as may be necessary or convenient for the purpose of the carrying on of its electricity business, and
  - (d) the new operator has the benefit of any relevant operating licence for the purpose of the carrying on of its electricity business, and
  - (e) a public sector agency responsible for the issue of any such relevant operating licence must, at the request of the new operator, re-issue the licence in the name of the new operator and subject to terms, conditions and endorsements that are the same (or to substantially the same effect) as those to which it was subject before its re-issue.
- (2) If the business comprising the electricity business of the new operator is transferred to another public sector agency, this section also operates in respect of that transfer (and any further transfer for the purposes of an authorised transaction).
- (3) This section applies to the transfer of part of, or an interest in, a business in the same way as it applies to a transfer of the whole business.
- (4) In this section:  
*relevant operating licence*, in relation to a transferred business of an electricity generator, means any licence, permit, entitlement, accreditation or other authority that was held by the electricity generator before the transfer and that is necessary or convenient for the carrying on of any aspect of the electricity business of the new operator.

## 18 Grant of relevant authorisations

- (1) The Treasurer may give directions to a public sector agency for or with respect to the grant of any relevant authorisation to a person who becomes or who it is proposed will become the new operator of any electricity generator assets pursuant to an authorised transaction, including directions for or with respect to any of the following:
- (a) requiring the grant of any such relevant authorisation without the necessity for the making or determination of any application,

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- (b) the displacement or modification of any provision of a relevant law in its application to the grant of any such relevant authorisation,
- (c) the conditions or endorsements subject to which any such relevant authorisation is to be granted or that are to be attached to any such relevant authorisation.
- (2) A direction may only be given under this section for the grant of a relevant authorisation that:
- (a) operates to transfer or replace an existing relevant authorisation that is currently in force, and
- (b) is subject to terms, conditions or endorsements that are the same (or to substantially the same effect) as those to which that existing relevant authorisation is subject.
- (3) The Treasurer must consult with a public sector agency before giving a direction to the public sector agency under this section.
- (4) A public sector agency exercising functions under a relevant law must comply with a direction of the Treasurer under this section.
- (5) Anything done by an electricity generator in compliance with a condition or endorsement of a relevant authorisation in relation to electricity generator assets of which a person is the new operator is taken to have been done by the new operator for the purposes of any corresponding condition or endorsement of a relevant authorisation granted to the new operator pursuant to a direction under this section.
- (6) A relevant authorisation granted to an electricity generator or to the new operator of electricity generator assets may not be suspended or cancelled on the ground of the conversion of the electricity generator or new operator to a company or on the ground of any change that has occurred in the officers or shareholders of the company as a result of that conversion or pursuant to a transaction arrangement.
- (7) In this section:
- grant** includes issue and transfer.
- new operator** of electricity generator assets means:
- (a) a public sector agency to which any electricity generator assets are transferred for the purposes of an authorised transaction, or
- (b) a person (or the nominee of a person) in whom electricity generator assets are vested, or to whom electricity generator assets are transferred, pursuant to an authorised transaction.
- relevant authorisation** means a licence, permit, consent, entitlement, accreditation or other authorisation under a relevant law.

**relevant law** means any of the following Acts and any regulations or instruments under those Acts:

*Electricity Supply Act 1995*

*Energy Services Corporations Act 1995*

*Gas Supply Act 1996*

*Protection of the Environment Operations Act 1997*

*Water Act 1912*

*Water Management Act 2000*

#### **19 Acquisition of land by Electricity Assets Ministerial Holding Corporation**

- (1) The Electricity Assets Ministerial Holding Corporation may, for the purposes of an authorised transaction, acquire land (including an interest in land) by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* that the Corporation determines to be:
  - (a) land on which electricity generator assets of an electricity generator were situated on the date of assent to this Act and continue to be situated, or
  - (b) land that on the date of assent to this Act was used or occupied by an electricity generator for or in connection with the exercise of any function of the electricity generator and that continues to be so used or occupied.
- (2) In the case of land used (but not occupied) by an electricity generator for or in connection with the exercise of any function of the electricity generator, such as land used for the purposes of access, the power conferred by this section to acquire the land is limited to a power to acquire an interest in the land sufficient to allow that use of the land to continue.
- (3) A public sector agency is not entitled to compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* as the owner of land acquired pursuant to this section.
- (4) Land acquired by the Corporation pursuant to this section is deemed to be an asset of an electricity generator for the purposes of this Act and the Corporation is deemed to be an electricity generator for the purposes of this Act while it holds the land.

**Note.** Land acquired pursuant to this section is an electricity generator asset for the purposes of an authorised transaction (whether or not it was an electricity generator asset before it was acquired).

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## Part 5 Operation of other laws

### 20 State taxes

(1) In this section:

*relevant matter* means any of the following:

- (a) the transfer of electricity generator assets for the purposes of an authorised transaction,
- (b) a vesting of assets, rights or liabilities by operation of Schedule 4 (Vesting of assets, rights and liabilities) and anything certified by the Treasurer as having been done in consequence of such a vesting (for example, the transfer or registration of an interest in land),
- (c) the issue, disposal or purchase of shares or other securities in a company for the purposes of an authorised transaction,
- (d) any matter connected with the corporate conversion of an electricity generator or transaction SOC for the purposes of an authorised transaction,
- (e) such other matters for the purposes of an authorised transaction as may be prescribed by the regulations.

*State tax* means application or registration fees, duty under the *Duties Act 1997* or any other tax, duty, fee or charge imposed by any Act or law of the State.

- (2) State tax is not payable by a public sector agency in relation to a relevant matter.
- (3) State tax is not payable by a person or body (other than a public sector agency) in relation to a relevant matter to such extent (if any) as the Treasurer may direct by order in writing, either generally or in a particular case.
- (4) An order may be made by the Treasurer under this section before or after the liability to pay the State tax concerned accrues.
- (5) The Treasurer must give a copy of an order under this section to the Chief Commissioner of State Revenue.

### 21 Management of electricity trading risks—competition exemption

(1) The following are specifically authorised by this Act for the purposes of the *Competition and Consumer Act 2010* of the Commonwealth and the *Competition Code of New South Wales*:

- (a) any agreement (including any electricity derivative agreement) entered into by an electricity generator or transaction entity in connection with the management of electricity trading risks and

certified by the Treasurer for the purposes of this section to be an agreement entered into with the approval of or at the direction of the Treasurer,

- (b) the conduct of the parties in negotiating and entering into any such agreement,
  - (c) the conduct of the parties (and of the successors, substitutes or assigns of the parties) in performing any such agreement.
- (2) Anything authorised to be done by this section is authorised only to the extent (if any) that it would otherwise contravene Part IV of the *Competition and Consumer Act 2010* of the Commonwealth or the *Competition Code of New South Wales*.

## **22 General relationship of Act with other State legislation**

- (1) None of the following provisions operate to prevent, restrict or otherwise limit the carrying out of a transaction arrangement or the exercise of a function for the purposes of an authorised transaction:
  - (a) any provision of the *State Owned Corporations Act 1989*,
  - (b) any provision of the constitution of a statutory SOC or a subsidiary of a statutory SOC,
  - (c) section 11 (Prohibition on privatisation of energy services corporations) of the *Energy Services Corporations Act 1995*.
- (2) In the event of any inconsistency between the provisions of this Act or the regulations and a provision of any other State legislation that is prescribed by the regulations as an inconsistent provision for the purposes of this section, the provisions of this Act or the regulations (as the case may be) prevail to the extent of the inconsistency.
- (3) The requirements of any other Act (whether enacted before or after this Act) for the approval by resolution of either or both Houses of Parliament (or by Act) of any act that constitutes the transfer of electricity generator assets for the purposes of an authorised transaction is satisfied by the enactment of this Act.

## **23 Release of information by Auditor-General**

Section 38 (Secrecy) of the *Public Finance and Audit Act 1983* does not apply to or in respect of a report or communication that the Treasurer authorises the Auditor-General to make to a person for the purposes of an authorised transaction.

**24 Contracts for sale of land**

Section 52A (Contracts for sale of land) of the *Conveyancing Act 1919* does not apply to a contract for the sale of land that is entered into for the purposes of an authorised transaction.

**25 Protection of contractual and other obligations**

- (1) This section applies to the following:
  - (a) the operation of this Act (including any order under this Act and anything done or omitted to be done under or for the purposes of this Act),
  - (b) the transfer of electricity generator assets for the purposes of an authorised transaction,
  - (c) the entering into or performance of obligations under a transaction arrangement by a public sector agency,
  - (d) a disclosure of information by, on behalf of or with the consent of a public sector agency for the purposes of an authorised transaction.
- (2) None of the matters or things to which this section applies are to be regarded as:
  - (a) a breach of contract or confidence or otherwise as a civil wrong, or
  - (b) a breach of any instrument (including, without limitation, any provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities) or as requiring any act to be done under an instrument, or
  - (c) giving rise to any right or remedy by a party to a contract or other instrument, or as causing or permitting the termination of, or exercise of rights under, any contract or other instrument, or
  - (d) an event of default under any contract or other instrument, or
  - (e) giving rise to a breach of or an offence against a provision of an Act that prohibits or restricts the disclosure of information, or
  - (f) releasing a surety or other obligee wholly or in part from an obligation.
- (3) Subsection (2) does not affect the rights and obligations of the parties to a transaction arrangement in respect of the performance of obligations under the transaction arrangement.
- (4) In this section:

***instrument*** means an instrument (other than an instrument made under this Act) or any other document that creates, modifies or extinguishes rights or liabilities (or would do so if lodged, filed or registered in

accordance with any law), and includes any judgment, order, process or other instrument issued by a court or tribunal.

## **26 Compensation not payable**

- (1) Compensation is not payable by or on behalf of the State:
  - (a) because of the enactment or operation of this Act, or for any consequence of that enactment or operation, or
  - (b) because of any statement or conduct relating to the enactment of this Act.
- (2) This section does not extend to compensation payable under a transaction arrangement to a party to the transaction arrangement in connection with the performance of obligations under the transaction arrangement.
- (3) In this section:

*compensation* includes damages or any other form of monetary compensation.

*conduct* includes any act or omission, whether unconscionable, misleading, deceptive or otherwise.

*operation of this Act* includes the operation of any notice or order under this Act and any agreement entered into under or for the purposes of this Act.

*statement* includes a representation of any kind:

  - (a) whether made verbally or in writing, and
  - (b) whether negligent, false, misleading or otherwise.

*the State* means the Crown within the meaning of the *Crown Proceedings Act 1988*, and includes a public sector agency and an officer, employee or agent of the Crown or a public sector agency.

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## Part 6 Miscellaneous

### 27 Delegation

The Treasurer may delegate to the Secretary of the Treasury, or to any other officer of the Government Service prescribed by the regulations, any function of the Treasurer under this Act except this power of delegation.

### 28 Act to bind State and other jurisdictions

- (1) This Act binds the State and, in so far as the legislative power of the Parliament of New South Wales permits, the other States, the Territories and the Commonwealth.
- (2) Without limiting subsection (1), this Act has effect despite any privilege or immunity of the Crown in any of its capacities.
- (3) This Act does not make any State or Territory, the Commonwealth, or the Crown in any of its capacities, liable to be prosecuted for an offence.
- (4) A reference in this section to a State, Territory or the Commonwealth includes a reference to the Government of the State, Territory or Commonwealth.

### 29 Extraterritorial operation of Act

- (1) It is the intention of the Parliament of New South Wales that the operation of this Act should, as far as possible, include operation in relation to the following:
  - (a) things situated in or outside the territorial limits of the State,
  - (b) acts, transactions and matters done, entered into or occurring in or outside the territorial limits of the State,
  - (c) things, acts, transactions and matters (wherever situated, done, entered into or occurring) that would, apart from this Act, be governed or otherwise affected by the law of another State, a Territory, the Commonwealth or a foreign country.
- (2) Without limiting subsection (1), it is the intention of the Parliament of New South Wales that the provisions of this Act have an operation in relation to the things, acts, transactions and matters referred to in that subsection even if the rules of private international law (whether at general law or as provided by legislation) would require the application of a law other than this Act instead of the provisions of this Act.

**30 Construction of Act and instruments so as not to exceed legislative power**

- (1) Unless a contrary intention appears, if a provision of this Act or an instrument made under this Act:
- (a) would, apart from this section, have an invalid application, but
  - (b) also has at least one valid application,
- it is the intention of the Parliament of New South Wales that the provision is not to have the invalid application, but is to have every valid application.
- (2) Despite subsection (1), the provision is not to have a particular valid application if:
- (a) apart from this section, it is clear, taking into account the provision's context and the purposes or objects underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the legislative power of the Parliament of New South Wales, or
  - (b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application, or a particular invalid application, of the provision had been within the legislative power of the Parliament of New South Wales.
- (3) Subsection (2) does not limit the cases in which a contrary intention may be taken to appear for the purposes of subsection (1).
- (4) This section is in addition to, and not in derogation of, section 31 of the *Interpretation Act 1987*.
- (5) In this section:
- application** means an application in relation to:
- (a) one or more particular persons, things, matters, places, circumstances or cases, or
  - (b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.
- invalid application**, in relation to a provision, means an application because of which the provision exceeds the legislative power of the Parliament of New South Wales.
- valid application**, in relation to a provision, means an application which, if it were the provision's only application, would be within the legislative power of the Parliament of New South Wales.

**31 Certificate evidence**

A certificate purporting to be signed by the Treasurer or an officer prescribed by the regulations certifying that an order specified or referred to in the certificate is an order made by the Treasurer under a specified provision of this Act is admissible in evidence in any legal proceedings and is evidence of the matters certified.

**32 Service or giving of documents**

- (1) A document that is authorised or required by this Act or the regulations to be served on or given to any person may be served or given:
  - (a) in the case of a natural person:
    - (i) by delivering it to the person personally, or
    - (ii) by sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
    - (iii) by sending it by facsimile transmission to the facsimile number of the person, or
  - (b) in the case of a body corporate:
    - (i) by leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents, or
    - (ii) by sending it by facsimile transmission to the facsimile number of the body corporate.
- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person in any other manner.

**33 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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## Schedule 1 Interpretative provisions

(Section 3)

### 1 Definitions

In this Act:

**assets** means any legal or equitable estate or interest (whether present or future, whether vested or contingent and whether personal or assignable) in real or personal property of any description (including money), and includes securities, choses in action and documents.

**authorised transaction**—see section 3.

**business** of a body means all of the assets, rights and liabilities of the body.

**corporate conversion**, in relation to an electricity generator or transaction SOC, means the registration of the corporation as a company under the Corporations Act.

**Corporations Act** means the *Corporations Act 2001* of the Commonwealth.

**Corporations legislation** means the Corporations legislation to which Part 1.1A of the Corporations Act applies.

**Electricity Assets Ministerial Holding Corporation or the Corporation** means the Electricity Assets Ministerial Holding Corporation constituted by this Act.

**electricity generator**—see section 3.

**electricity generator assets**—see section 3.

**function** includes a power, authority or duty, and **exercise** a function includes perform a duty.

**general law** means the common law and equity (as modified from time to time by legislation).

**initial public offer** means the offer to the public of securities quoted or to be quoted on a stock exchange that is a prescribed financial market under the Corporations Act.

**legislation** includes:

- (a) any statute of a legislature (whether enacted or made in Australia or elsewhere), and
- (b) any proclamation, regulation, rule, by-law, order or any other kind of subordinate legislation (however described) made under the authority of a statute (whether enacted or made in Australia or elsewhere).

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**liabilities** means any liabilities, debts or obligations (whether present or future, whether vested or contingent and whether personal or assignable).

**modification** includes addition, exception, omission or substitution.

**private sector** means any person other than a public sector agency.

**Note.** A person who is a public sector agency of another jurisdiction is a private sector person for the purposes of this Act.

**public sector agency** means any of the following:

- (a) the State (including the Crown in right of the State),
- (b) a Minister,
- (c) the Ministerial Holding Corporation constituted by the *State Owned Corporations Act 1989*,
- (d) the Electricity Assets Ministerial Holding Corporation,
- (e) a SOC,
- (f) a public authority of the State,
- (g) any other person acting on behalf of the State (or the Crown in right of the State),
- (h) a transaction company, but only while all the shares in the transaction company are held by or on behalf of the State or a SOC or the transaction company is the subsidiary of another transaction company all the shares in which are held by or on behalf of the State or a SOC.

**rights** means any rights, powers, privileges or immunities (whether present or future, whether vested or contingent and whether personal or assignable).

**SOC** means a State owned corporation within the meaning of the *State Owned Corporations Act 1989*.

**State legislation** means any legislation of the State.

**the State** means the State of New South Wales.

**transaction arrangement** means a transaction, agreement or other arrangement entered into by or on behalf of a public sector agency for the purposes of an authorised transaction.

**transaction company** means a company established as a transaction company pursuant to this Act.

**transaction entity** means a transaction SOC or a transaction company.

**transaction SOC** means a SOC established as a transaction SOC pursuant to this Act.

## 2 Functions for the purposes of an authorised transaction

For the purposes of this Act, any act, matter or thing is done or has effect for the purposes of an authorised transaction if it is done or has effect for the purpose of effecting or facilitating an authorised transaction or is done or has effect for any purpose that is ancillary or incidental to or consequential on an authorised transaction.

## 3 Transfer of electricity generator assets—interpretation

- (1) When this Act authorises the transfer of electricity generator assets it is authorising any transaction, arrangement or other action that results in electricity generator assets becoming vested in the transferee.
- (2) The following are examples of the ways in which electricity generator assets can be transferred:
  - (a) direct sale to the transferee,
  - (b) sale to the transferee of a transaction entity,
  - (c) any other transaction whereby the transferee becomes an owner of an interest in electricity generator assets.
- (3) The transfer of electricity generator assets does not require a transfer of electricity generator assets by or from an electricity generator and could, for example, be effected by the corporate conversion of an electricity generator (to establish a transaction company) and the transfer of shares in the transaction company to the transferee (including by means of an initial public offer of shares in the company).
- (4) In this clause:

*entity* includes a transaction company.

*sale* of an entity includes a sale of securities in the entity.

*transaction entity* means:

  - (a) an entity that holds electricity generator assets or into which an electricity generator is converted, or
  - (b) an entity that is the holding company of an entity referred to in paragraph (a), or
  - (c) an entity that has control (within the meaning of the Corporations Act) of an entity referred to in paragraph (a), or
  - (d) any other entity the sale of which results in electricity generator assets being vested in the transferee.

**4 Words and expressions defined in Corporations Act**

Words and expressions used in this Act that are defined in section 9 of the Corporations Act have the same meanings as in that section, except in so far as they are defined differently in this Act or the context or subject-matter otherwise indicates or requires.

**5 When events occur**

If this Act provides for an event or other thing to occur on a particular day, that event or thing is taken to occur at the beginning of that day.

**6 Notes**

Notes included in this Act do not form part of this Act.

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## Schedule 2 Provisions concerning transaction SOCs

(Section 8)

### 1 Board of directors

- (1) Each transaction SOC is to have a board of directors.
- (2) The board is to consist of:
  - (a) the chief executive officer, and
  - (b) at least 3 and not more than 5 other directors appointed by the voting shareholders.
- (3) Of the directors appointed under subclause (2) (b), one is (in and by the director's instrument of appointment as director or in and by another instrument executed by the voting shareholders) to be appointed as Chairperson of the Board.
- (4) The board is accountable to the voting shareholders in the manner set out in Part 4 of the *State Owned Corporations Act 1989* and in the constitution of the transaction SOC.
- (5) The voting shareholders may remove a director, or the chairperson, from office at any time for any or no reason and without notice and, in that event, the office of the director or chairperson is taken to have become vacant for the purposes of Schedule 8 to the *State Owned Corporations Act 1989*.
- (6) Except as provided by this clause, Schedule 8 to the *State Owned Corporations Act 1989* has effect with respect to the constitution and procedure of the board.
- (7) The provisions of section 20J of the *State Owned Corporations Act 1989*, and of clauses 2 (1) and (2), 4 and 7 (1) (d) and (2) of Schedule 8 to that Act, do not apply to a transaction SOC or to the chairperson.
- (8) The provisions of clause 6 of Schedule 8 to the *State Owned Corporations Act 1989* do not apply to the chief executive officer, and the chief executive officer is not entitled to remuneration under that clause, in his or her capacity as a director.

### 2 Chief executive officer

- (1) The chief executive officer of a transaction SOC is to be appointed by the board after consultation with the voting shareholders.
- (2) The board may remove a person from office as chief executive officer, at any time, for any or no reason and without notice, but only after consultation with the voting shareholders.

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- (3) The chief executive officer is entitled to be paid such remuneration (including travelling and subsistence allowances) as the board may determine.
  - (4) The board may, after consultation with the voting shareholders, fix the conditions of employment of the chief executive officer in so far as they are not fixed by or under any other Act or law.
  - (5) The *Public Sector Employment and Management Act 2002* (Chapter 5 included) does not apply to the chief executive officer.
  - (6) Subject to subclause (7), Schedule 9 to the *State Owned Corporations Act 1989* has effect with respect to the chief executive officer.
  - (7) The provisions of section 20K of the *State Owned Corporations Act 1989*, and of clauses 2, 3 and 6 of Schedule 9 to that Act, do not apply to the chief executive officer.

### **3 Acting chief executive officer**

- (1) The board may, from time to time, appoint a person to act in the office of chief executive officer during the illness or absence of the chief executive officer.
- (2) The board may remove a person from office as acting chief executive officer, at any time, for any or no reason and without notice.
- (3) A person, while acting in the office of chief executive officer:
  - (a) has all the functions of the chief executive officer and is taken to be the chief executive officer, and
  - (b) is entitled to be paid such remuneration (including travelling and subsistence allowances) as the board may determine.
- (4) For the purposes of this clause, a vacancy in the office of chief executive officer is regarded as an absence from office.
- (5) Clause 5 of Schedule 9 to the *State Owned Corporations Act 1989* does not apply to an acting chief executive officer of a transaction SOC.

### **4 Dividends**

- (1) The voting shareholders of a transaction SOC, in consultation with the board, are to determine the corporation's share dividends scheme.
- (2) The dividends to be paid by a transaction SOC are to be declared by the board in accordance with the share dividends scheme so determined.
- (3) The provisions of section 20S (1) of the *State Owned Corporations Act 1989* do not apply to a transaction SOC.

**5 Supply of information to portfolio Minister**

The provisions of section 29 (2) of the *State Owned Corporations Act 1989* do not apply to a transaction SOC.

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## Schedule 3 Corporate conversion of electricity generators and transaction SOCs

(Section 9)

### 1 Direction for corporate conversion of electricity generators and transaction SOCs

- (1) The Treasurer may direct by order in writing (*a corporate conversion direction*) that an electricity generator or transaction SOC be converted into a company limited by shares of a specified type.
- (2) An electricity generator cannot be the subject of a corporate conversion direction unless it is an electricity generator on the date of assent to this Act or is a transaction SOC.

### 2 Application for conversion to company

- (1) An electricity generator to which a corporate conversion direction has been given is authorised to apply to be registered under Part 5B.1 of the Corporations Act as a company limited by shares of the type specified in the direction.
- (2) That application can only be made if the Treasurer has issued a certificate to the corporation that certifies that the Treasurer is satisfied that the provisions of this Act have been complied with concerning the transfer of its incorporation to the Corporations Act.
- (3) A certificate issued by the Treasurer for the purposes of this clause:
  - (a) cannot be challenged, reviewed or called into question in proceedings before any court or tribunal, and
  - (b) is conclusive evidence in any proceedings before a court or tribunal that all the requirements of this Act have been complied with concerning the transfer of the incorporation of the corporation to the Corporations Act.

### 3 Effect of conversion

- (1) The following provisions are taken to have had effect immediately before an electricity generator to which a corporate conversion direction has been given is registered as a company under the Corporations Act:
  - (a) the corporation ceases to be a statutory State owned corporation for the purposes of the *State Owned Corporations Act 1989* or any other State legislation,
  - (b) the corporation ceases to be an energy services corporation under the *Energy Services Corporations Act 1995* unless the regulations provide otherwise,

- (c) the voting shareholders (within the meaning of the *State Owned Corporations Act 1989*) of the corporation cease to be members of the corporation,
  - (d) the board of directors of the corporation is dissolved and each member (including any acting member) of the board ceases to hold office as such,
  - (e) any person who holds a statutory office of the corporation ceases to hold that office,
  - (f) any person who ceases to be a member of the corporation or to hold an office because of the operation of this subclause is not entitled to any compensation for the loss of that membership or office.
- (2) Nothing in this clause prevents any person from becoming an officer of the company into which the corporation is being converted in accordance with its constitution and the provisions of the Corporations Act.
- (3) An electricity generator to which a corporate conversion direction has been given becomes a transaction company for the purposes of this Act only when it is registered as a company under the Corporations Act.

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## Schedule 4 Vesting of assets, rights and liabilities

(Section 13)

### 1 Definitions

In this Schedule:

*transferee* means the person or body in whom any assets, rights or liabilities are vested by a vesting order.

*transferor* means the person or body from whom any assets, rights or liabilities are divested by a vesting order.

*vesting order* means a vesting order under this Schedule.

### 2 Making of vesting order

The Treasurer may, by order (*a vesting order*), vest assets, rights and liabilities of a public sector agency that is an electricity generator or transaction entity in a person specified in the order as the transferee.

### 3 Vesting of assets, rights and liabilities in transferee

- (1) When any assets, rights or liabilities are vested by a vesting order, the following provisions have effect (subject to the vesting order):
  - (a) the assets vest in the transferee by virtue of this clause and without the need for any conveyance, transfer, assignment or assurance,
  - (b) the rights and liabilities become, by virtue of this clause, the rights and liabilities of the transferee,
  - (c) all proceedings relating to the assets, rights or liabilities pending by or against the transferor are taken to be proceedings pending by or against the transferee,
  - (d) the transferee has all the entitlements and obligations of the transferor in relation to the assets, rights and liabilities that the transferor would have had but for the order, whether or not those entitlements and obligations were actual or potential at the time the order took effect,
  - (e) any act, matter or thing done or omitted to be done in relation to the assets, rights or liabilities by, to or in respect of the transferor is (to the extent that the act, matter or thing has any force or effect) taken to have been done or omitted by, to or in respect of the transferee,
  - (f) a reference in any Act, in any instrument made under any Act or in any document of any kind to the transferor or a predecessor of the transferor is (to the extent that it relates to those assets or

liabilities but subject to the regulations), to be read as, or as including, a reference to the transferee.

- (2) No attornment to the transferee by a lessee from the transferor is required.

**4 Terms and conditions of vesting**

A vesting order may be made on such terms and conditions as are specified in the order.

**5 Consideration for vesting**

A vesting order may specify the consideration for which a vesting to which it applies is made and the value or values at which assets, rights or liabilities are vested.

**6 Date of vesting**

A vesting order takes effect on the date it is made or on such other date as may be specified in the order.

**7 Vesting of interests in land**

- (1) A vesting order may vest an interest in respect of land vested in the transferor without vesting the whole of the interests of the transferor in that land.
- (2) If the interest vested is not a separate interest, the order operates to create the interest vested in such terms as are specified in the order.
- (3) This clause does not limit any other provision of this Schedule.

**8 Confirmation of vesting**

- (1) The Treasurer may by order in writing confirm a vesting of particular assets, rights or liabilities by operation of this Schedule.
- (2) Such an order is evidence of that vesting.

**9 Determinations by Treasurer**

For the purposes of the making of a vesting order, the Treasurer may determine whether or not particular assets, rights or liabilities comprise assets, rights or liabilities of an electricity generator or transaction entity at a particular time, and such a determination is conclusive as to the matters determined.

## **10 Certification to registration authorities**

- (1) In this clause:  
*registration authority* means a person or body that has functions under any law in connection with the keeping of a register in respect of assets, rights or liabilities.
- (2) A public sector agency that is the transferee or transferor under a vesting order may lodge with a registration authority a certificate certifying as to such information as may reasonably be required by the registration authority to enable the registration authority to exercise any function of the authority arising in connection with the vesting of any asset, right or liability pursuant to the vesting order.
- (3) Such a certificate is to be accepted and acted upon by the registration authority and, despite any other law, the registration authority is not entitled to require that the information concerned be provided to it in any particular form or in any particular manner.
- (4) No fee or charge is payable by the transferee to a registration authority for or in respect of the exercise of any function by the registration authority in connection with the vesting of an asset, right or liability by a vesting order.

## **11 Evidence of orders and certificates**

A document purporting to be a vesting order or an order or certificate made or given under a provision of this Schedule is, unless the contrary is established, taken to be such an order or certificate and to have been properly made or given.

## **12 Public sector accounting policies**

The Treasurer may give directions to public sector agencies for or with respect to accounting policies to be applied by public sector agencies in connection with the transfer between public sector agencies of assets, rights and liabilities of an electricity generator or transaction entity for the purposes of an authorised transaction (in place of public sector accounting policies that would otherwise be applicable in respect of any such transfer).

## Schedule 5 Ownership restrictions in floated transaction companies

### Part 1 Ownership restrictions

**Note.** Some of the terms and expressions used in this Part are defined in Part 5 (Interpretative provisions) of this Schedule.

#### 1 Maximum ownership level

- (1) If electricity generator assets are transferred pursuant to an authorised transaction by means of an initial public offer of shares in a transaction company, this Schedule applies to impose ownership restrictions in relation to the company.
- (2) The *maximum ownership level* for the purposes of this Schedule is set at the percentage prescribed by the regulations.
- (3) This Schedule ceases to apply in relation to a transaction company at the end of the period of 2 years (or such longer period may be prescribed by the regulations as the period for which this Schedule is to apply to the company) beginning on the day on which the company is first listed on a stock exchange that is a prescribed financial market under the Corporations Act.
- (4) A regulation may not be made under this clause in respect of a company after the commencement of the period during which an offer of shares in the company (for the purposes of the initial public offer concerned) can be accepted.

#### 2 Meaning of “prohibited ownership situation”

For the purposes of this Schedule, a *prohibited ownership situation* exists in relation to a floated transaction company and in relation to a particular person if the person holds a particular type of stake in the company of more than the maximum ownership level set by clause 1.

**Note.** A person’s *stake* includes the interests of the person’s associates—see Part 5 of this Schedule.

#### 3 Acquisition of shares that result in prohibited ownership situation

A person, or 2 or more persons under an arrangement, who acquire shares in a floated transaction company are each guilty of an offence if:

- (a) the acquisition has any of the following results:
  - (i) a prohibited ownership situation comes into existence in relation to the company and in relation to a person,

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- (ii) if a prohibited ownership situation already exists in relation to the company and in relation to a person—there is an increase in any type of stake held by the person in the company, and
  - (b) the person or persons under the arrangement knew, or were reckless as to whether, the acquisition would have that result.
- Maximum penalty: 400 penalty units.

**4 Floated transaction company to take reasonable steps to prevent contraventions of ownership restrictions**

- (1) A floated transaction company must take all reasonable steps to ensure that a prohibited ownership situation does not exist in relation to the company.
  - (2) A floated transaction company is guilty of an offence if it engages in conduct that contravenes a requirement of subclause (1).
- Maximum penalty: 500 penalty units.

**Note.** If a floated transaction company contravenes this subclause, clause 22 operates to make each person who is a director of the company or who is concerned in the management of the company liable for the offence if the person knowingly authorised or permitted the contravention.

- (3) An offence under subclause (2) is a strict liability offence.

**5 Contravention of Part does not affect validity of acts**

An act is not invalidated only because it constitutes an offence under this Part.

**Part 2 Location of Member Registers of floated transaction companies**

**6 Member Register to be within the State**

A floated transaction company must not, without the written approval of the Treasurer:

- (a) change the location where any Member Register of the company is kept to a location that is outside of the territorial limits of the State, or
- (b) keep any Member Register of the company at a location that is outside of the territorial limits of the State.

Maximum penalty: 500 penalty units.

**Note.** If a floated transaction company contravenes this clause, clause 22 operates to make each person who is a director of the company or who is concerned in the management of the company liable for the offence if the person knowingly authorised or permitted the contravention.

## Part 3 Records and information

### 7 Record-keeping and information giving

- (1) The regulations may make provision for or with respect to requiring a person:
  - (a) to keep and retain records, where the records are relevant to an ownership matter, and
  - (b) to give information to the Treasurer or a floated transaction company that is relevant to:
    - (i) an ownership matter, or
    - (ii) ascertaining whether Part 1 of this Schedule has been or is being complied with.
- (2) The regulations may provide that information given in accordance with a requirement of regulations made for the purposes of subclause (1) (b) must be verified by statutory declaration.
- (3) A person is not excused from giving information in accordance with a requirement of regulations made for the purposes of subclause (1) (b) on the ground that the information may tend to incriminate the person or expose the person to a penalty.
- (4) However, any information obtained from a natural person in compliance with a requirement of regulations made for the purposes of subclause (1) (b) is not admissible against the person in criminal proceedings other than proceedings for an offence under this clause.
- (5) A person must keep records, and provide information, in compliance with any requirements of regulations made for the purposes of subclause (1) (b).

Maximum penalty: 50 penalty units.
- (6) In this clause:

**control** includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

**ownership matter** means any of the following matters:

  - (a) whether a person holds a particular type of stake in a floated transaction company and, if so, the level of that stake,
  - (b) whether the directors of a floated transaction company are accustomed or under an obligation, whether formal or informal,

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- to act in accordance with the directions, instructions or wishes of a person (either alone or together with associates),
- (c) whether a person (either alone or together with associates) is in a position to exercise control over a floated transaction company.

## **Part 4 Remedial orders**

### **8 Applications to Supreme Court for remedial orders**

- (1) If a prohibited ownership situation exists in relation to a floated transaction company, the company or the Treasurer (or both) may apply to the Supreme Court to make such orders as the Court considers appropriate for the purpose of ensuring that the situation ceases to exist.
- (2) Without limiting subclause (1), the Court may make any of the following orders on any such application:
- (a) an order directing the disposal of shares,
  - (b) an order restraining the exercise of any rights attached to shares,
  - (c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person,
  - (d) an order that any exercise of rights attached to shares be disregarded.
- (3) The Supreme Court may, before making an order under this clause, direct that notice of the application be given to such persons as it thinks fit or be published in such manner as it thinks fit, or both.
- (4) A floated transaction company and its directors and secretary are specifically authorised and required to ensure that any rights attached to shares are not exercised in contravention of an order made under this clause (including ensuring that meetings of the company are conducted in accordance with requirements of any such order).

### **9 Injunctions**

If a person has engaged, is engaging or is proposing to engage in any conduct in contravention of this Schedule, the Supreme Court may, on the application of a floated transaction company or the Treasurer (or both), grant an injunction:

- (a) restraining the person from engaging in the conduct, or
- (b) requiring the person to do something.

## Part 5 Interpretative provisions

### 10 Definitions

In this Schedule:

**acquisition** includes an agreement to acquire, but does not include:

- (a) an acquisition by will or by devolution by operation of law, or
- (b) an acquisition by way of enforcement of a loan security.

**aggregate substantial interest**, in relation to a trust estate, has the meaning given by clause 20.

**arrangement** has the meaning given by clause 11.

**associate** has the meaning given by clause 12.

**company** means a body corporate.

**constituent document**, in relation to a company, means:

- (a) the constitution of the company, or
- (b) any rules or other documents constituting the company or governing its activities.

**contravene** includes fail to comply with.

**direct control interest** has the meaning given by clause 19.

**director** includes any person occupying the position of director of a company, by whatever name called.

**discretionary trust** means a trust where:

- (a) a person (who may include the trustee) is empowered (either unconditionally or on the fulfilment of a condition) to exercise any power of appointment or other discretion, and
- (b) the exercise of the power or discretion, or the failure to exercise the power or discretion, has the effect of determining, to any extent, either or both of the following:
  - (i) the identities of those who may benefit under the trust,
  - (ii) how beneficiaries are to benefit, as between themselves, under the trust.

**engage in conduct** means do an act or omit to do an act.

**floated transaction company** means a transaction company in relation to which the ownership restrictions set out in this Schedule apply.

**increase**, in relation to a stake in a company, includes an increase from a starting point of nil.

**interest in a share** has the meaning given by clause 15.

**lender**, in relation to a loan security, means the person who is entitled to enforce the security.

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***lending money*** includes providing non equity finance where the provision of the finance may reasonably be regarded as equivalent to lending money.

***loan security*** means a security held solely for the purposes of a moneylending agreement.

***Member Register*** of a company means a register of members of the company kept under Chapter 2C of the Corporations Act.

***moneylending agreement*** means an agreement entered into in good faith in the ordinary course of carrying on a business of lending money, but does not include an agreement dealing with any matter unrelated to the carrying on of that business.

***officer***, in relation to a company, includes:

- (a) a director, secretary or employee of the company, or
- (b) a receiver and manager of any part of the undertaking of the company appointed under a power contained in any instrument, or
- (c) a liquidator of the company appointed in a voluntary winding up.

***power to appoint a director of a company*** has a meaning affected by clause 13.

***relative***, in relation to a person, means:

- (a) the person's spouse or the person's de facto partner (being the other party to a de facto relationship, within the meaning of the *Property (Relationships) Act 1984*, with the person), or
- (b) a parent or remoter lineal ancestor of the person, or
- (c) a child or remoter issue of the person, or
- (d) a sibling of the person.

***share***, in relation to a company, means a share in the share capital of the company, and includes an interest in such a share.

***stake***, in relation to a company, has the meaning given by clause 18.

***substantial interest***, in relation to a trust estate, has the meaning given by clause 20.

***voting power*** has the meaning given by clause 17.

## 11 Entering into an agreement or arrangement

- (1) For the purposes of this Schedule, a person is taken to have proposed to enter into an agreement or arrangement if the person takes part in, or proposes to take part in, negotiations with a view to entering into the agreement or arrangement.

- (2) A reference in this Schedule to *entering into an agreement or arrangement* includes a reference to altering or varying an agreement or arrangement.
- (3) A reference in this Schedule to *entering into an arrangement* is a reference to entering into any formal or informal scheme, arrangement or understanding, whether expressly or by implication and, without limiting the generality of the foregoing, includes a reference to:
- (a) entering into an agreement, or
  - (b) creating a trust, whether express or implied, or
  - (c) entering into a transaction,
- and a reference in this Schedule to an arrangement is to be construed accordingly.
- (4) A reference in this Schedule to an *arrangement* does not include a reference to a moneylending agreement.

## 12 Associates

- (1) For the purposes of this Schedule, the following persons are, subject to subclause (3), *associates* of a person:
- (a) a relative of the person,
  - (b) a partner of the person,
  - (c) a company of which the person is an officer,
  - (d) if the person is a company—an officer of the company,
  - (e) an employee or employer of the person,
  - (f) an officer of a company of which the person is an officer,
  - (g) an employee of an individual of whom the person is an employee,
  - (h) the trustee of a discretionary trust where the person or another person who is an associate of the person by virtue of another paragraph of this subclause benefits, or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust, either directly or through any interposed companies, partnerships or trusts,
  - (i) a company whose directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person,
  - (j) a company where the person is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the company,
  - (k) a company in which the person has, apart from this paragraph, a particular type of stake of not less than 15 percent,

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- (l) if the person is a company—a person who holds, apart from this paragraph, a particular type of stake in the company of not less than 15 percent,
  - (m) a person who is, because of this subclause, an associate of any other person who is an associate of the person (including a person who is an associate of the person by any other application or applications of this paragraph).
- (2) If a person (*the first person*) enters, or proposes to enter, into an arrangement with another person (*the second person*) that relates to any of the following matters:
- (a) the first person and the second person being in a position, by acting together, to control any of the voting power in a company,
  - (b) the power of the first person and the second person, by acting together, to appoint or remove a director of a company,
  - (c) the situation where one or more of the directors of a company are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the first person and the second person acting together,
- the second person is taken to be an associate of the first person for the purposes of the application of a provision of this Schedule in relation to the matter concerned.
- (3) The regulations may provide that, for the purposes of this Schedule, a specified person (or class of persons) is not an associate of another specified person (or class of persons).

### **13 Power to appoint director**

- (1) A reference in this Schedule to a *power to appoint a director* includes a reference to such a power whether exercisable with or without the consent or concurrence of any other person.
- (2) For the purposes of this Schedule, a person is taken to have the power to appoint a director if:
  - (a) the person has the power (whether exercisable with or without the consent or concurrence of any other person) to veto such an appointment, or
  - (b) a person's appointment as a director of the company follows necessarily from that person being a director or other officer of the first mentioned person.

**14 Meaning of entitled to acquire**

For the purposes of this Schedule, a person is *entitled to acquire* anything if the person is absolutely or contingently entitled to acquire it, whether because of any constituent document of a company, the exercise of any right or option or for any other reason.

**15 Meaning of interest in a share**

- (1) Subject to this clause, a person holds an *interest in a share* if the person has any legal or equitable interest in the share.
- (2) Without limiting subclause (1), a person is taken to hold an interest in a share if:
  - (a) the person has entered into a contract to purchase the share, or
  - (b) the person has a right (otherwise than because of having an interest under a trust) to have the share transferred to the person or to the person's order (whether the right is exercisable presently or in the future and whether or not on the fulfilment of a condition), or
  - (c) the person has a right to acquire the share, or an interest in the share, under an option (whether the right is exercisable presently or in the future and whether or not on the fulfilment of a condition), or
  - (d) the person is otherwise entitled to acquire the share or an interest in the share, or
  - (e) the person is entitled (otherwise than because of having been appointed as a proxy or representative to vote at a meeting of members of the company or of a class of its members) to exercise or control the exercise of a right attached to the share.
- (3) A person is taken to hold an interest in a share even if the person holds the interest in the share jointly with another person.
- (4) For the purpose of determining whether a person holds an interest in a share, it is immaterial that the interest cannot be related to a particular share.
- (5) An interest in a share is not to be disregarded only because of:
  - (a) its remoteness, or
  - (b) the manner in which it arose, or
  - (c) the fact that the exercise of a right conferred by the interest is, or is capable of being made, subject to restraint or restriction.

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**16 Certain interests and stakes to be disregarded**

- (1) For the purposes of this Schedule, the following interests and stakes must be disregarded:
- (a) an interest in a share held by a person whose ordinary business includes the lending of money if the person holds the interest as a loan security,
  - (b) an interest in a share held by a person, being an interest held by the person because the person holds an office (or an office belonging to a class of offices) prescribed by the regulations,
  - (c) an interest of a prescribed kind in a share, being an interest held by such persons (or persons belonging to a class of persons) as are prescribed by the regulations,
  - (d) an interest in a share held by the State or a public sector agency,
  - (e) a stake of a kind prescribed by the regulations in a company, being a stake held by a person (or person belonging to a class of persons) prescribed by the regulations.
- (2) For the purposes of this Schedule, if:
- (a) a person holds an interest in a share as a loan security, and
  - (b) the ordinary business of the person includes the lending of money, and
  - (c) the loan security is enforced, and
  - (d) as a result of the enforcement of the loan security, the person becomes the holder of the share, and
  - (e) the person holds the share for a continuous period (*the holding period*) beginning at the time when the security was enforced,
- the person's interest in the share must be disregarded at all times during so much of the holding period as occurs during whichever of the following periods is applicable:
- (f) the period of 90 days beginning when the security was enforced,
  - (g) if the Treasurer, by written notice given to the person, allows a longer period—the end of that longer period.
- (3) For the purposes of this Schedule, if:
- (a) a person acquires an interest in a share in a floated transaction company, and
  - (b) the interest was acquired in the person's capacity as an underwriter or a sub-underwriter in connection with the sale or issue of shares in the company by or on behalf of a public sector

agency or the company (whether under an initial public offer of the company or otherwise),

the person's interest in the share must be disregarded at all times during whichever of the following periods is applicable:

- (c) the period of 90 days beginning when the person acquired the interest,
- (d) if the Treasurer, by written notice given to the person, allows a longer period—that longer period.

#### **17 Voting power**

- (1) A reference in this Schedule to the *voting power* in a company is a reference to the total rights of shareholders to vote, or participate in any decision making, concerning any of the following:
  - (a) the making of distributions of capital or profits of the company to its shareholders,
  - (b) the constituent document of the company,
  - (c) any variation of the share capital of the company.
- (2) A reference in this Schedule to *control of the voting power* in a company is a reference to control that is direct or indirect, including control that is exercisable as a result of or by means of arrangements or practices:
  - (a) whether or not having legal or equitable force, and
  - (b) whether or not based on legal or equitable rights.
- (3) If the percentage of total rights to vote or participate in decision making differs as between different types of voting or decision making, the highest of those percentages applies for the purposes of this clause.
- (4) If a company:
  - (a) is limited both by shares and by guarantee, or
  - (b) does not have a share capital,this clause has effect as if the members or policy holders of the company were shareholders in the company.

#### **18 Stake in a company**

- (1) A particular type of *stake* that a person holds in a company at a particular time is the aggregate of:
  - (a) the direct control interests in the company of that type that the person holds at that time, and
  - (b) the direct control interests in the company of that type held at that time by associates of the person.

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- (2) In calculating the stake that a person holds in a company, a direct control interest held because of clause 19 (5) is not to be counted under subclause (1) (a) to the extent to which it is calculated by reference to a direct control interest in the company that is taken into account under subclause (1) (b).

### 19 Direct control interests in a company

- (1) A person holds a *direct control interest* in a company at a particular time equal to the percentage of the total paid-up share capital of the company in which the person holds an interest at that time.
- (2) A person also holds a *direct control interest* in a company at a particular time equal to the percentage of the voting power in the company that the person is in a position to control at that time.
- (3) A person also holds a *direct control interest* in a company at a particular time equal to the percentage that the person holds, or is entitled to acquire, at that time of the total rights to distributions of capital or profits of the company to its shareholders on winding up.
- (4) A person also holds a *direct control interest* in a company at a particular time equal to the percentage that the person holds, or is entitled to acquire, at that time of the total rights to distributions of capital or profits of the company to its shareholders, otherwise than on winding up.
- (5) If:
- (a) a person holds a particular type of direct control interest (including a direct control interest that is taken to be held because of one or more previous applications of this subclause) in a company (*the first level company*), and
  - (b) the first level company holds the same type of direct control interest in another company (*the second level company*),

the person is taken to hold that type of direct control interest in the second level company equal to the percentage worked out using the formula:

first level percentage  $\times$  second level percentage

where:

*first level percentage* means the percentage of the direct control interest held by the person in the first level company.

*second level percentage* means the percentage of the direct control interest held by the first level company in the second level company.

## **20 Substantial interests in trust estates**

- (1) For the purposes of this Schedule:
  - (a) a person is taken to hold a *substantial interest* in a trust estate if the person, alone or together with an associate or associates, holds a beneficial interest in not less than 15 percent of the corpus or income of the trust estate, and
  - (b) 2 or more persons are taken to hold an *aggregate substantial interest* in a trust estate if the persons, together with an associate or associates, hold, in the aggregate, beneficial interests in not less than 40 percent of the corpus or income of the trust estate.
- (2) For the purposes of subclause (1), if, under the terms of a trust, a trustee has a power or discretion as to the distribution of the income or corpus of the trust estate to beneficiaries, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or corpus of the trust estate that the trustee is empowered to distribute to that beneficiary.

## **Part 6 Miscellaneous**

### **21 Displacement of Corporations legislation**

The provisions of this Schedule are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of the Corporations legislation generally.

### **22 Offences by corporations**

- (1) If a corporation contravenes, whether by act or omission, any provision of this Schedule, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to subclause (1) whether or not the corporation has been proceeded against or has been convicted under the provision.
- (3) Nothing in this clause affects any liability imposed on a corporation for an offence committed by the corporation under this Schedule.

### **23 Proceedings for offences**

- (1) Proceedings for an offence under this Schedule may be dealt with summarily before the Local Court or before the Supreme Court in its summary jurisdiction.

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- (2) If proceedings for an offence to which this clause applies are brought in the Local Court, the maximum penalty that the Court may impose in respect of the offence is, despite any other provision of this Schedule, \$50,000 or the maximum penalty provided by this Schedule, whichever is the lesser.
  - (3) If proceedings for an offence to which this clause applies are brought in the Supreme Court in its summary jurisdiction, the Supreme Court may impose a penalty not exceeding the maximum penalty provided by this Schedule in respect of the offence.

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## Schedule 6 Savings, transitional and other provisions

### Part 1 General

#### 1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.
- (2) For the avoidance of doubt, any such provision may, if the regulations so provide, have effect despite any specified provision of this Schedule.
- (3) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (4) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### Part 2 Provisions consequent on enactment of this Act

#### 2 Provisions relating to Shoalhaven or Warragamba electricity assets

- (1) In this clause:

**power station** means electricity generating plant and the land on which that plant is situated. A power station of an electricity generator is a power station that is owned, controlled or operated by the electricity generator.

**private person** means any person other than the Sydney Catchment Authority, TransGrid or any other public sector agency.

**Shoalhaven or Warragamba electricity assets** means:

  - (a) any power stations or pumping stations located at or within Kangaroo Valley by means of which Eraring Energy generates electricity (including any associated pipelines, switching stations, substations and transmission lines) but excluding all other assets (including dams, pipelines, tunnels and channels)

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- owned, maintained and operated by the Sydney Catchment Authority at or within Kangaroo Valley, or
- (b) any power station located at or within Warragamba Dam by means of which Eraring Energy generates electricity (including any associated pipelines, switching stations and substations).
- (2) The Treasurer may:
- (a) certify, by order in writing (*a certification order*), that any specified assets, rights or liabilities that the Treasurer considers are used for the purposes of, or in connection with, any Shoalhaven or Warragamba electricity assets are the assets, rights or liabilities of an electricity generator, TransGrid or other public sector agency (*a nominated public sector agency*), and
- (b) without limiting paragraph (a)—acquire, on behalf of the Crown, any land (including any interest in land) by agreement or compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* that the Treasurer considers is land that is used for the purposes of, or in connection with, any Shoalhaven or Warragamba electricity assets.
- (3) The following provisions apply in relation to any assets, rights or liabilities that the Treasurer, by certification order, certifies to be the assets, rights or liabilities of a nominated public sector agency:
- (a) any of the assets, rights or liabilities that are not already the assets, rights or liabilities of the agency (other than any assets, rights or liabilities of a private person) are transferred to the agency and, for this purpose, Schedule 4 (Vesting of assets, rights and liabilities) applies in relation to the certification order as if it were a vesting order under that Schedule having effect on the day on which the certification order has effect,
- (b) the certification order is evidence that the assets, rights or liabilities specified in the order are the assets, rights or liabilities of the agency.
- (4) The following provisions apply in relation to any acquisition of land by the Treasurer that is authorised by this clause:
- (a) Division 1 (Pre-acquisition procedures) of Part 2 of the *Land Acquisition (Just Terms Compensation) Act 1991* does not apply to such an acquisition,
- (b) any owner of an interest in the land is not entitled to be paid compensation (whether under the *Land Acquisition (Just Terms Compensation) Act 1991* or otherwise) if the land is acquired by compulsory process and the owner is the Sydney Catchment Authority or any other public sector agency,

- (c) the land may be acquired even if any consent or permission required under State legislation (other than under the *Land Acquisition (Just Terms Compensation) Act 1991*) has not been obtained or granted,
  - (d) land that is acquired may be transferred, by order of the Treasurer in writing, to an electricity generator, TransGrid or other public sector agency and Schedule 4 (Vesting of assets, rights and liabilities) applies in relation to such an order.
- (5) Without limiting section 22 (General relationship of Act with other State legislation), the provisions of this clause (including the provisions of any order made under this clause) have effect despite the following:
- (a) the *Crown Lands Act 1989* or any statutory rule or order made under that Act (whether made before or after the commencement of this clause),
  - (b) the *Energy Services Corporations Act 1995* or any statutory rule or order made under that Act (whether made before or after the commencement of this clause),
  - (c) the *Sydney Water Catchment Management Act 1998* (including, without limitation, Division 2 of Part 5 of that Act) or any statutory rule or order made under that Act (whether made before or after the commencement of this clause).
- (6) Nothing in this clause limits section 13 (Vesting orders).

### **3 Dissolution of electricity generators**

- (1) The Governor may, by proclamation, amend Part 1 of Schedule 1 to the *Energy Services Corporations Act 1995* by omitting the corporate name of an electricity generator.
- (2) On the day on which a proclamation under this clause takes effect:
  - (a) the electricity generator whose corporate name is omitted by the proclamation is dissolved, and
  - (b) the *State Owned Corporations Act 1989* is amended by omitting that name from Schedule 5.
- (3) Section 15 (Transfer of staff, assets, rights and liabilities of dissolved energy services corporations) of the *Energy Services Corporations Act 1995* applies in respect of the dissolution of an electricity generator by proclamation under this clause in the same way as it applies to the dissolution of an energy services corporation by that Act.

Electricity Generator Assets (Authorised Transactions) Bill 2012

Schedule 7      Amendment of Subordinate Legislation Act 1989 No 146

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## **Schedule 7      Amendment of Subordinate Legislation Act 1989 No 146**

### **Schedule 4 Excluded instruments**

Insert at the end of the Schedule (with appropriate item number):

Regulations under the *Electricity Generator Assets (Authorised Transactions) Act 2012*.