

ERARING POWER STATION ACT, 1981, No. 107

New South Wales



ANNO TRICESIMO

ELIZABETHÆ II REGINÆ

Act No. 107, 1981.

An Act to enable The Electricity Commission of New South Wales to enter into certain agreements, arrangements and understandings relating to the Eraring Power Station and to exercise and perform certain functions in relation to that power station, and for associated purposes. [Assented to, 14th December, 1981.]

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BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the "Eraring Power Station Act, 1981".

Commencement.

2. (1) This section and section 1 shall commence on the date of assent to this Act.

- (2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Interpretation.

3. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"affiliate" means any company in which the Commission has a controlling interest by virtue of its shareholding in the capital of the company;

"associated facilities" means works and facilities connected solely with the delivery of raw materials to, the generation or supply of electricity from, the sale or disposal of electricity generated from, or the disposal of waste from, the Eraring Power Station, but does not include the Eraring Power Station itself;

"Commission" means The Electricity Commission of New South Wales constituted under the Electricity Commission Act, 1950;

"Court" means the Supreme Court of New South Wales;

"Eraring Power Station" means the power station erected or constructed or to be erected or constructed on the site;

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“special arrangement” means an agreement, arrangement or understanding to which the Commission is a party and which was entered into pursuant to section 4;

“the site” means such land as is, pursuant to orders under subsection (4), for the time being declared to be or form part of the site.

(2) A reference in this Act to—

- (a) law includes a reference to equity;
- (b) proceedings includes a reference to legal proceedings or proceedings by way of arbitration;
- (c) purchase includes a reference to repurchase; and
- (d) transfer of land includes a reference to the conveyance or assurance of land.

(3) Without limiting the operation that this Act would have if this subsection had not been enacted—

- (a) a reference in this Act to the Eraring Power Station includes a reference to any unit or other part of the Eraring Power Station, and this Act applies to and in respect of any such unit or part as if references in this Act to the Eraring Power Station were references to the unit or part; and
- (b) a reference in this Act to the site includes a reference to any part of the site, and this Act applies to and in respect of any such part as if references in this Act to the site were references to the part.

(4) The Governor may, by order published in the Gazette, declare land described in the order to be or form part of the site.

Power to enter into special arrangements.

4. The Commission, with the approval of the Governor given on the recommendation of the Minister and with the concurrence of the Treasurer, may enter into agreements, arrangements or understandings for the purpose of or in connection with the financing, erection, construction, development,

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disposition, sale, purchase, ownership, operation, maintenance or management of the Eraring Power Station, the site (including easements or rights of way appurtenant to the site) or any associated facilities.

Acquisition of shares by the Commission.

5. (1) For the purposes of this Act, the Commission may—

- (a) join in the formation of any company to be incorporated in New South Wales; and
- (b) purchase, hold, dispose of or deal with shares in, or subscribe to the issue of shares by, any company incorporated in New South Wales.

(2) The Commission may do, omit to do or suffer to be done any act, matter or thing arising from or incidental or ancillary to the purchase, holding, disposition or dealing by it of or with shares in, or the subscription by it to issues of shares by, any such company.

(3) Any payment by the Commission required for or in connection with the formation of a company, the purchase of shares, or the subscription to issues of shares, as referred to in this section, shall be made out of such fund of the Commission as the Commission may determine.

(4) An affiliate formed for a commercial purpose is not and does not represent the Crown.

(5) The Commission may authorise or empower an affiliate to enter, as principal, into an agreement, arrangement or understanding for any of the purposes or any of the matters referred to in section 4, whether or not the Commission is also a party to the agreement, arrangement or understanding, and, where an affiliate is so authorised or empowered, it may enter into the agreement, arrangement or understanding.

(6) Nothing in this Act shall be construed as preventing the inclusion in an agreement, arrangement or understanding, to which an affiliate is, but the Commission is not, a party, of provisions which could have been included had section 6 not been enacted.

(7) Nothing in this Act shall be construed as preventing an affiliate from being or acting as agent of the Commission.

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Provisions of special arrangements.

6. (1) A special arrangement may make provision for or with respect to—

- (a) the incurring and performing by the Commission or an affiliate of any obligation or liability, absolute, qualified or contingent, present or future; or
- (b) the subordination by the Commission or an affiliate of any of its rights arising under or in respect of any charge, loan or unpaid purchase money or otherwise,

in connection with the financing, erection, construction, development, disposition, sale, purchase, ownership, operation, maintenance or management of the Eraring Power Station, the site (including easements or rights of way appurtenant to the site or any part of the site) or any associated facilities.

(2) A special arrangement may contain absolute and unconditional covenants and promises, and in particular may contain—

- (a) absolute and unconditional covenants or promises by the Commission or an affiliate to pay for, or to make payments calculated by reference to, the output, or the prospect of obtaining the output, of the Eraring Power Station, whether or not that output is, at any relevant time, produced or delivered or capable of being produced or delivered, and whether or not the Eraring Power Station is, at any relevant time, erected, in existence, available to be operated or capable of being operated;
- (b) absolute and unconditional covenants or promises by the Commission or an affiliate to purchase, and pay for, any one or more of the following, namely, the Eraring Power Station, the site, easements or rights of way appurtenant to the site and any associated facilities in the events or circumstances specified in the special arrangement; and
- (c) absolute and unconditional covenants or promises by the Commission or an affiliate to make loans (at interest or otherwise) in the events or circumstances specified in the special arrangement,

or any of them.

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(3) A covenant or promise referred to in subsection (2) (a) may contain an obligation to make payment in advance.

(4) Where the Commission, in any special arrangement, makes a covenant or promise to make any payment irrespective of any event or circumstance which otherwise would or might at law terminate, or permit termination of, the arrangement or excuse compliance with, or performance of, or provide a defence to, any proceedings to enforce the covenant or promise, the covenant or promise shall operate and be enforceable in accordance with its terms notwithstanding any provision of the Frustrated Contracts Act, 1978, any other Act or statute or any rule of law to the contrary.

(5) A special arrangement may contain a provision that the arrangement shall not be terminated on account of any matter or thing referred to in the special arrangement and shall be enforceable notwithstanding any such matter or thing, being or including (without limiting the generality of the foregoing) any default, event of force majeure or other event which would or might at law otherwise terminate, or permit termination of, the arrangement or excuse compliance with, or performance of, or provide a defence to, any proceedings to enforce the arrangement, and where any special arrangement so provides the provision—

(a) shall operate in accordance with its terms so that the special arrangement shall not be capable of being terminated except by express agreement between the parties or in the events or circumstances expressly provided for in the special arrangement; and

(b) shall be enforceable in accordance with its terms,

notwithstanding any provision of the Frustrated Contracts Act, 1978, any other Act or statute or any rule of law to the contrary.

(6) A special arrangement may include an express waiver by the Commission of its immunity (if any) under any Act or rule of law from proceedings, either in whole or in part, and any such waiver shall operate in accordance with its terms notwithstanding the provisions of any Act or rule of law to the contrary.

(7) A special arrangement may include a guarantee by the Commission of all or any of the covenants, promises, obligations or liabilities undertaken by or imposed upon an affiliate under any special arrangement.

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(8) A special arrangement may provide—

- (a) that ownership of specified buildings, structures or other fixtures, or all buildings, structures or other fixtures or those of a specified class or description, on the site shall not vest in the owner of the land on which they are situated or in any other person having or claiming an interest in the land; and
- (b) that those buildings, structures or other fixtures are not realty and shall be transferable, in accordance with the provisions of that or any other special arrangement, to another person,

and any such provision shall operate in accordance with its terms notwithstanding any rule of law to the contrary.

(9) Upon lodgment with the Registrar-General by the Commission of a plan of subdivision of the site, or of a transfer of the site, excepting thereout any specified buildings, structures or other fixtures, or all buildings, structures or fixtures or those of a specified class or description, situated on the site, the Registrar-General shall, without requiring any survey or other plan of the land indicating where the buildings, structures or other fixtures are situated and upon being satisfied that the land comprises the site and that the plan of subdivision or transfer is otherwise in registrable form, register the plan of subdivision or transfer.

(10) A special arrangement may provide that ownership of or property in specified assets, or assets of a specified class or description, on, in or over land the subject of an easement appurtenant to the site shall vest in a specified person, and any such provision shall operate in accordance with its terms notwithstanding any rule of law to the contrary.

(11) A vesting of assets or property under subsection (8) or (10) does not, except to such extent and subject to such conditions (which may include a condition that compensation is to be payable by the Commission as if the assets had been appropriated or resumed, under Division 1 of Part V of the Public Works Act, 1912, for the purpose of carrying out an authorised work within the meaning of that Act) as the Governor may, by proclamation published in the Gazette, declare, divest any proprietary rights of a person or class of persons not a party to the special arrangement.

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(12) Nothing in any provision of this section limits any other provision of this section, and nothing in this section prevents the inclusion in a special arrangement of provisions that are not of a kind referred to in this section.

Secondment of Commission staff.

7. The Commission may, with the approval of the Minister, make arrangements for the secondment of any of its servants for the purpose of carrying into effect and implementing the terms of any special arrangement, and any such arrangements shall have effect in accordance with their terms, notwithstanding section 64 (3) of the Electricity Commission Act, 1950.

Partnerships, etc.

8. (1) Where the Minister certifies to the Governor that he is satisfied that a partnership, joint venture or other association has been formed principally for purposes connected with the purposes of this Act, the Governor may, by proclamation published in the Gazette, declare that this subsection applies to the partnership, joint venture or association, and thenceforth the following provisions have effect:—

- (a) the partnership, joint venture or association shall not, throughout the period from the date of its formation until the date that is 6 months after the date of its formation or, where some other date is prescribed, the prescribed date, be dissolved by reason of any person becoming a member of the partnership, joint venture or association; and
- (b) the partnership, joint venture or association shall, as from the expiration of that period, be deemed to have consisted, throughout that period, of those persons who, at the expiration of that period, are members of the partnership, joint venture or association, in accordance with the interest of each of those members at the expiration of that period, but not so as to affect the liability of any person who ceased to be a member of the partnership during that period.

(2) Where the Minister certifies to the Governor that a partnership, joint venture or association consisting of more than 20 persons has been formed principally for purposes connected with the purposes of this Act, the

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Governor may, by proclamation published in the Gazette, declare that this subsection applies to the partnership, joint venture or association, and thenceforth the following provisions have effect:—

- (a) without limiting the provisions of any other Act applicable to the partnership, joint venture or association, the partnership, joint venture or association shall be deemed to be and always to have been formed in pursuance of this Act; and
- (b) the partnership, joint venture or association is, accordingly, not prohibited by section 14 (3) of the Companies Act, 1961.

Power to carry out special arrangements.

9. The Commission, an affiliate and each other party to a special arrangement may do all things authorised or required by the special arrangement to be done by them respectively and all things incidental thereto and may also do such things as are necessary or convenient to be done for the purposes of carrying into effect and implementing the terms of any special arrangement.

Charging income and revenue.

10. (1) The Commission, with the approval of the Governor given on the recommendation of the Minister and with the concurrence of the Treasurer, may charge its income and revenue from whatever source arising to secure any obligations or liabilities, absolute, qualified or contingent, present or future, of the Commission created by or arising out of a special arrangement.

(2) Any charge referred to in subsection (1) does not operate to prevent the Commission from dealing with its income and revenue in the ordinary course of the exercise or performance of its powers, authorities, duties or functions under this or any other Act or in such manner as may be expressly permitted under the charge.

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Priorities.

11. (1) Notwithstanding the provisions of any other Act, obligations or liabilities of the Commission which are secured upon the income and revenue of the Commission by reason of a charge created pursuant to section 10 (1) shall rank *pari passu* with—

- (a) all other obligations and liabilities of the Commission which are so secured; and
- (b) all obligations and liabilities of the Commission to repay financial accommodation the repayment of which is, or to make other payments which are, secured upon the income and revenue of the Commission (whether pursuant to the Public Authorities (Financial Accommodation) Act, 1981, or otherwise and whether obtained before, on or after the day appointed and notified under section 2 (2)),

without any preference one above another by reason of priority of date or otherwise, except to the extent that the charge by which the obligations or liabilities are secured under this Act expressly provides that those obligations or liabilities shall rank subsequent to any such other obligations or liabilities, in which event they shall rank as so provided.

(2) A reference in this section to obligations or liabilities of the Commission includes a reference to the charge securing those obligations or liabilities.

Form, etc., of special arrangements.

12. (1) A special arrangement, any obligations or liabilities created by or arising out of a special arrangement, or any charge in respect of those obligations or liabilities, shall, if the Governor so directs, be—

- (a) in such form;
 - (b) in such amounts and such currencies;
 - (c) expressed in such manner and on such terms and conditions;
 - (d) expressed to be assignable, not assignable or assignable on such terms and conditions; and
 - (e) upon such security,
- as the Governor may approve.

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(2) A direction or approval under this section shall be given on the recommendation of the Minister and with the concurrence of the Treasurer.

Electricity Development Act, 1945, not to apply.

13. Except as prescribed, nothing in the Electricity Development Act, 1945, applies to or in relation to the Eraring Power Station or (without limiting the generality of the foregoing provisions of this section) to or in relation to electricity generated at the Eraring Power Station, any transmission line (within the meaning of that Act) to or from the Eraring Power Station or anything for which the approval of the Governor may be required under this Act.

Exemption from stamp duty.

14. (1) Any special arrangement entered into, or any charge created, pursuant to this Act or any instrument or transaction executed or entered into as a consequence of, ancillary to or collaterally with, the special arrangement or charge, or approved by the Governor, on the recommendation of the Minister and with the concurrence of the Treasurer, as being for the purposes of this Act shall be deemed to be included in the general exemptions from stamp duty under Part III of the Stamp Duties Act, 1920, contained in the Second Schedule to that Act, unless the special arrangement, charge, instrument or instrument evidencing the transaction otherwise expressly provides.

(2) Subsection (1) applies, where relevant, in respect of an instrument referred to in that subsection as regards both the issue and any transfer of the instrument.

Receivers.

15. (1) If default is made by the Commission in making any payment due by the Commission payment of which is secured by a charge created pursuant to section 10 (1) and the default is continued for 6 months or, where some

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other period is specified in the instrument by which the charge is created, the period so specified, the chargee may apply to the Court for the appointment of a receiver of the income and revenue of the Commission.

(2) On application made in accordance with subsection (1), the Court shall appoint a receiver in respect of the income and revenue of the Commission either generally or as regards income and revenue specified in the charge concerned.

(3) The Court may make such orders and give such directions as it considers proper for or with respect to—

- (a) the appointment of a receiver;
- (b) the removal of a receiver; or
- (c) the appointment of a receiver in place of a receiver previously appointed.

(4) The receiver shall be deemed to be an officer of the Court and shall act under its directions.

Powers and duties of receiver.

16. (1) A receiver shall have power to collect all income and revenue in respect of which he has been appointed and for that purpose the receiver shall be deemed to be the Commission and may exercise all the powers of the Commission.

(2) The receiver shall discharge such duties of the Commission or any servants of the Commission as may be prescribed.

Commission to receiver.

17. The receiver shall be entitled to such commission or remuneration for his services as the Court may order and the commission or remuneration shall be payable out of the income and revenue in respect of which he has been appointed receiver.

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Application of money received.

18. (1) The receiver shall, subject to any order of the Court, pay and apply all money received by him in the following order, that is to say—

- (a) firstly, in the payment of the costs, charges and expenses of collection, and of his commission or remuneration;
- (b) secondly, in the payment of the amount due and payable to the chargee having regard to the ranking of obligations secured by the charge in relation to other obligations with which those obligations, pursuant to section 11, rank *pari passu*; and
- (c) thirdly, in the payment of all the residue of the money to the Commission.

(2) Without limiting the powers of the Court, the Court may make an order determining the amount referred to in subsection (1) (b).

Acquisition of land.

19. (1) The Commission may, for the purposes of this Act, acquire land, including land previously appropriated or resumed for any purpose, by lease or purchase or by appropriation or resumption in accordance with the provisions of this section, and may dispose of and otherwise deal with any such land.

(2) An appropriation or resumption for the purposes of this Act shall be effected by the Governor under the Public Works Act, 1912, and without affecting the generality of the foregoing, appropriation under that Act may be effected in respect of any land vested in Her Majesty or any person in trust for Her Majesty.

(3) Such an appropriation or resumption shall be deemed to be for an authorised work within the meaning of the Public Works Act, 1912, and the Commission shall be deemed to be the Constructing Authority.

(4) Notwithstanding subsection (2), sections 34, 35, 36 and 37 of the Public Works Act, 1912, do not apply to or in respect of any works authorised or expenditure incurred for the purposes of this Act.

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(5) Without limiting the generality of the foregoing provisions of this section, section 4A of the Public Works Act, 1912, applies to and in respect of an easement or right acquired for the purposes of this Act in the same way as it applies to and in respect of an easement or right acquired in cases where that section is otherwise applicable.

(6) For the purposes of this section and not otherwise, the Public Works Act, 1912, shall be deemed to be amended in the manner set forth in Schedule 7 to the Environmental Planning and Assessment Act, 1979, but nothing in this section affects the operation or effect of the lastmentioned Act.

Easements.

20. (1) The Governor may, by order published in the Gazette, declare easements described in the order (whether acquired or created pursuant to section 19 or otherwise) to be appurtenant to the site, and the declaration shall, subject to subsection (5), have effect according to its terms.

(2) An easement appurtenant to the site may, where the Commission is not the owner or registered proprietor of the land to which the easement is appurtenant, be released, varied or modified by the owner or registered proprietor for the time being of the land to which the easement is appurtenant with the consent in writing of the Commission.

(3) Upon lodgment in a form approved by the Registrar-General of a copy of an order published under subsection (1), the Registrar-General shall—

- (a) where the land to which the order relates is land under the provisions of the Real Property Act, 1900—make such recordings in the Register kept under that Act in respect of the easement to which the order relates as he considers appropriate; or
- (b) in any other case—cause the copy of the order to be registered in the General Register of Deeds kept under the Registration of Deeds Act, 1897.

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(4) For the purposes of the Registration of Deeds Act, 1897, a copy of an order registered pursuant to subsection (3) (b) shall be deemed to be a registration copy of an instrument duly registered under that Act.

(5) An order published under subsection (1) has no force or effect unless—

- (a) a recording is made in respect of the easement to which it relates; or
- (b) the copy of the order is registered,

pursuant to subsection (3), and the order takes effect when the recording is so made or the copy is so registered.

(6) Section 88 (1) of the Conveyancing Act, 1919, does not apply to an easement to which an order under subsection (1) relates.

Development of the site.

21. (1) In this section—

“approved purposes” means—

- (a) the purposes of electricity generating works, public utility undertakings, the transmission or supply of electricity, the storage of water and coal, coal conveyors, coal loading facilities, the storage and use of hazardous substances, the construction of dams, the storage and disposal of spoiled water, ash and waste, bulk stores, offices, recreation facilities and parking or any of those purposes;
- (b) purposes connected with facilities associated with the generation, transmission or supply of electricity; or
- (c) purposes ancillary to or associated with any of the foregoing purposes;

“development” means—

- (a) buildings, structures and improvements erected or constructed or to be erected or constructed on, in or over land comprising the whole or any part of the site;
- (b) works carried out or to be carried out on, in or over any such land; and

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(c) subdivision effected or to be effected of any such land, whether erected, constructed, carried out or effected before, on or after the day appointed and notified under section 2 (2).

(2) All development on the site for approved purposes is hereby authorised and approved, and shall be deemed always to have been authorised and approved, for the purposes of any other Act or instrument under any other Act.

(3) The site and any development on the site may be used, and shall be deemed always to have been able to be used, for approved purposes, notwithstanding any other Act or instrument under any other Act to the contrary.

(4) Without affecting the generality of the foregoing provisions of this section, the Height of Buildings Act, 1912, does not apply, and shall be deemed never to have applied, to or in respect of the site or any development on the site.

Evidence.

22. (1) A declaration by the Governor, by proclamation published in the Gazette, that his approval has, in accordance with this Act, been given to—

- (a) the entering into, by the Commission, of an agreement, arrangement or understanding specified in the proclamation; or
- (b) the creation of a charge specified in the proclamation,

shall be conclusive evidence in favour of all persons that that approval was duly given, that the agreement, arrangement or understanding was entered into, or the charge was created, pursuant to, and complies with, this Act and was not entered into pursuant to any other Act and that the agreement, arrangement or understanding constitutes a special arrangement within the meaning of this Act.

(2) A declaration under subsection (1) may relate to a specified agreement, arrangement, understanding or charge or an agreement, arrangement, understanding or charge of a specified class or description.

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(3) Nothing in this Act requires the Commission to obtain the approval of the Governor under this Act in respect of any agreement, arrangement, understanding or charge which the Commission enters into or creates otherwise than pursuant to this Act, and nothing in this Act restricts any power that the Commission has or would have apart from this Act.

Regulations.

23. 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.
