

Passed by both Houses



New South Wales

Energy and Utilities Administration Amendment Bill 2022

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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,*

, 2022



New South Wales

Energy and Utilities Administration Amendment Bill 2022

Act No _____, 2022

An Act to amend the *Energy and Utilities Administration Act 1987* in relation to coal market price emergencies.

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.

The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Energy and Utilities Administration Amendment Act 2022*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Energy and Utilities Administration Act 1987 No 103

[1] Section 47 Proceedings for offences

Insert “, other than Schedule 3 or regulations made for the purposes of that Schedule,” after “regulations” in section 47(1).

[2] Section 47(1A)

Insert after section 47(1)—

- (1A) Proceedings for an offence against Schedule 3 or regulations made for the purposes of that Schedule may be dealt with summarily before the Supreme Court in its summary jurisdiction.

[3] Schedule 2 Savings, transitional and other provisions

Insert after clause 14—

Part 7 Provision consequent on enactment of Energy and Utilities Administration Amendment Act 2022

15 Appointment of inspectors

- (1) Despite Schedule 3, clause 13, the Minister may, during the relevant period, appoint a Public Service employee as an inspector for the purposes of the Schedule.
- (2) To avoid doubt, if the Minister appoints an inspector under subclause (1) during the relevant period—
- (a) the inspector is taken to have all the functions of an inspector appointed under Schedule 3, clause 13, and
- (b) a reference in Schedule 3 to an inspector is taken to include an inspector appointed under this clause.
- (3) In this clause—
- Public Service employee** has the same meaning as in the *Government Sector Employment Act 2013*.
- relevant period** means the period—
- (a) starting on the commencement of this clause, and
- (b) ending on the later of the following—
- (i) 30 June 2023,
- (ii) a day, not later than 30 September 2023, prescribed by the regulations.

[4] Schedule 3

Insert after Schedule 2—

Schedule 3 Coal Market Price Emergency

Part 1 Preliminary

1 Object

The object of this Schedule is to put downward pressure on electricity prices during coal market price emergencies by allowing for the giving of directions in relation to the price and domestic supply of coal used to generate energy.

2 Definitions

In this Schedule—

AER means the Australian Energy Regulator established by the *Competition and Consumer Act 2010* of the Commonwealth.

declaration means a declaration by the Premier under clause 3.

direction means a direction by the Minister under clause 6.

inspector means a person appointed under clause 13.

IPART means the Independent Pricing and Regulatory Tribunal established by the *Independent Pricing and Regulatory Tribunal Act 1992*, section 5.

regulator means the regulator appointed under clause 10.

supply, of coal, includes—

- (a) the distribution, provision, sale, treatment, storage and transport of coal, and
- (b) the production or extraction of coal.

Part 2 Coal market price emergency declarations

3 Declaration of coal market price emergency by Premier

- (1) The Premier may, by written order, declare a coal market price emergency if the Premier is satisfied the declaration is necessary to reduce the risk that either of the following will adversely affect members of the community—
 - (a) increases in coal prices, whether past or projected increases,
 - (b) insufficient domestic supply of coal.
- (2) The Premier is not required to consult with any person or otherwise comply with any requirement of procedural fairness before making or revoking a declaration.
- (3) Without limiting subclause (1), an increase in coal prices may adversely affect members of the community if the increase contributes or may contribute to an increase in electricity prices.

4 Duration of declaration

A declaration—

- (a) takes effect—
 - (i) when the order making the declaration is made, or
 - (ii) if a later date is specified in the order making the declaration—on the date specified, and
- (b) continues in force until—
 - (i) the date specified in the order making the declaration, or

- (ii) if the order making the declaration does not specify a date—the end of the day that is 6 months after the date of the declaration taking effect, or
- (iii) the earlier day on which the Premier revokes the declaration by written order.

5 Publication of declaration

An order making or revoking a declaration must be published in the Gazette or on the NSW legislation website as soon as practicable after the order is made.

Part 3 Directions to impose price caps and other measures

6 Giving of directions by Minister

- (1) While a declaration is in force, the Minister may, by written notice, give the directions the Minister considers reasonably necessary to respond to the coal market price emergency for which the declaration was made.
- (2) The Minister is not required to consult with any person or otherwise comply with any requirement of procedural fairness before giving, amending or revoking a direction.
- (3) Without limiting subclause (1), a direction may—
 - (a) impose a cap or different caps on the price at which coal may be sold, offered for sale or supplied, or
 - (b) require a person to supply, or offer to supply, coal to a particular person specified in the direction, or
 - (c) require a person to comply with terms and conditions determined by the Minister for the supply of, or offer to supply, coal or in relation to a cap imposed under subclause (a), or
 - (d) impose terms and conditions on a person who purchases or acquires coal, including terms restricting or prohibiting on-selling the coal at a higher price, or
 - (e) provide for another matter prescribed by a regulation.
- (4) A direction may—
 - (a) operate throughout the whole of the State or in a specified part of the State, or
 - (b) operate for a specified period, time or occasion, or
 - (c) otherwise apply generally, or be limited in its application by reference to specified exceptions or factors, including by reference to—
 - (i) a person or class of persons, and
 - (ii) a time, place, circumstance, condition or restriction, or

Example— by reference to a proportion of the coal produced or supplied by a person
 - (d) apply differently according to different factors of a specified kind.

7 Offence for failure to comply with directions

- (1) A person must not, without reasonable excuse, fail to comply with a direction.
Maximum penalty—

- (a) for an individual—1,000 penalty units, or
 - (b) for a corporation—the greater of the following—
 - (i) \$10 million,
 - (ii) if the court can determine the value of the benefit the corporation, and any corporation related to the corporation, have obtained directly or indirectly that is reasonably attributable to the commission of the offence—3 times the value of the benefit,
 - (iii) if the court cannot determine the value of the benefit the corporation, and any corporation related to the corporation, have obtained directly or indirectly that is reasonably attributable to the commission of the offence—10% of the corporation's adjusted turnover during the breach turnover period for the offence.
- (2) For subclause (1), it is not a reasonable excuse that complying with the direction would cause the person to be in breach of contractual obligations entered into on or after 9 December 2022.
- (3) In this clause—
adjusted turnover has the same meaning as in the *Competition and Consumer Act 2010* of the Commonwealth.
breach turnover period, for a corporation for an offence, means the longer of the following periods—
- (a) the period of 12 months ending at the earlier of the following—
 - (i) the date of the month in which the corporation ceased committing the offence,
 - (ii) the date of the month on which the corporation was charged with the offence,
 - (b) the period ending at the same time as the period determined under paragraph (a) and starting at the beginning of the month in which the corporation committed, or began committing, the offence.

8 Amendment and revocation of directions

The Minister may, by written notice, amend or revoke a direction.

9 Publication of directions and revocation of directions

- (1) A notice giving, or amending or revoking, a direction must be published in the Gazette or on the NSW legislation website as soon as practicable after the notice is made.
- (2) On its publication, a notice under subclause (1) is taken to have been served on, or brought to the attention of, all persons to whom the notice relates or affected by a direction to which the notice relates.

Part 4 Regulator

10 Regulator to be appointed

The Minister must appoint one of the following as the regulator—

- (a) the AER,
- (b) IPART,
- (c) a person prescribed by the regulations.

11 Functions of regulator

- (1) The primary function of the regulator is to ensure compliance with—
 - (a) this Schedule, including directions, and
 - (b) regulations made for the purposes of this Schedule.
- (2) Without limiting subclause (1), the functions of the regulator also include the following—
 - (a) to provide advice and recommendations to the Premier or Minister on energy markets and the exercise of the Premier's or Minister's functions under this Schedule,
 - (b) to do any of the following for the purpose of ensuring compliance with this Schedule—
 - (i) enter into agreements,
 - (ii) publish information,
 - (iii) make applications for injunctions, declarations or other orders to courts with relevant jurisdiction,
 - (c) to institute proceedings for offences under this Schedule,
 - (d) other functions conferred or imposed on the regulator under this Act or another Act or by the regulations.

12 Independence of regulator

The regulator is not subject to the control or direction of the Premier or Minister in the exercise of the regulator's functions.

Part 5 Inspectors

13 Appointment of inspectors

- (1) The regulator may appoint the following persons to be inspectors for the purposes of this Schedule—
 - (a) a person who is a member of staff of the regulator,
 - (b) a member of the AER appointed under the *Competition and Consumer Act 2010* of the Commonwealth, section 44AM or 44AP,
 - (c) a member of IPART appointed under the *Independent Pricing and Regulatory Tribunal Act 1992*, section 6,
 - (d) a person who is a member of a class of persons prescribed by the regulations for this paragraph.
- (2) The regulator must provide an inspector with a certificate of the inspector's appointment.
- (3) An inspector, in exercising in a place a function conferred or imposed under this Part, must, if asked by a person apparently in charge of the place, produce the certificate of appointment to the person.

14 Functions of inspectors

- (1) An inspector has the functions conferred or imposed by this Schedule or the regulations.
- (2) The functions of an inspector under this clause may be exercised for the following purposes—

- (a) to determine whether there has been compliance with, or a contravention of, this Schedule, regulations made for the purposes of this Schedule or a direction,
 - (b) to obtain documents or information for a purpose connected with the administration of this Schedule, including—
 - (i) in connection with the making of a declaration or direction, or
 - (ii) to determine whether a declaration or direction should be given,
 - (c) generally for administering this Schedule,
 - (d) another purpose prescribed by the regulations.
- (3) Nothing in this Part affects a function under another provision of this Act or under another Act.

15 Powers of inspectors

- (1) An inspector may enter premises, other than residential premises, for a purpose mentioned in clause 14.
- (2) An inspector may, on premises lawfully entered under subclause (1), do anything that, in the inspector's opinion, is necessary to be done for the purposes of this Schedule, including the following—
 - (a) examine and inspect a part of the premises or a thing on the premises,
 - (b) make the other examinations and inquiries the inspector considers necessary,
 - (c) take photographs, films, audio, video or other record the inspector considers necessary,
 - (d) require a person to produce accounts, records, books or other documents, or
 - (e) take copies of, or extracts or notes from, the accounts, records, books or other documents,
 - (f) require a person to answer questions or otherwise provide information,
 - (g) require the owner or occupier of the land or place to give the inspector the assistance and facilities reasonably necessary to enable the inspector to exercise the inspector's functions under this Part.

16 Power to require documents or information

- (1) An inspector may, by written notice given to a person, require the person to give the inspector a document or information, specified in the notice, in connection with a matter arising under or in connection with this Schedule.
- (2) To avoid doubt, a requirement to give an inspector information under subclause (1) may include a requirement to attend at a specified place and time to answer questions if attendance at that place is reasonably required for the questions to be properly put and answered.
- (3) A notice under subclause (1) must specify—
 - (a) the way in which the document or information must be provided, and
 - (b) a reasonable time by which the document or information must be provided.
- (4) Unless the notice specifies otherwise, a requirement in a notice to provide a document that is in an electronic, mechanical or similar form is a requirement to provide the document in a written form.

- (5) A person is not excused from a requirement under this clause to provide documents or information, including answering a question, on the ground the document, information or answer might incriminate the person or make the person liable to a penalty.
- (6) However, a document or information, including the answer to a question, given by an individual in compliance with a requirement under this clause is not admissible in evidence against the person in criminal proceedings, other than proceedings for an offence against this clause if—
 - (a) the individual objected at the time to giving the document or information on the ground that it might incriminate the individual, or
 - (b) the individual was not warned the individual may object to giving the document or information on the ground the document or information may incriminate the person.
- (7) Subsection (6) extends to a further document or information obtained as a consequence, directly or indirectly, of the giving of the document or information in compliance with a requirement under this clause.
- (8) An inspector to whom a document is provided under this clause may take a copy of the document.
Note— See the *Interpretation Act 1987*, section 21, definition of **document**, which provides that a document means any record of information.

17 Inspector may take assistants on premises

A person may accompany an inspector, and take all reasonable steps to assist the inspector in the exercise of the inspector's functions under this Part, if in the inspector's opinion the person is capable of providing assistance to the inspector in the exercise of the functions.

18 Offences

- (1) A person must not, without reasonable excuse, refuse or fail to comply with a requirement made of the person under this Part.
Maximum penalty—100 penalty units.
- (2) A person is not guilty of an offence of failing to comply with a requirement to provide records or other documents or to answer a question or provide other information unless the person was warned on that occasion that a failure to comply with the requirement is an offence.
- (3) A person must not give information, or do another thing, in purported compliance with a requirement made under this Part knowing the information or other thing is false or misleading in a material particular.
Maximum penalty—100 penalty units.
- (4) A person must not intentionally delay or obstruct, or attempt to induce another person to delay or obstruct, an inspector in the exercise of the inspector's powers under this Part.
Maximum penalty—100 penalty units.

Part 6 Miscellaneous

19 Duty of confidentiality

A person who is or was an inspector must not disclose information obtained in connection with the exercise of the person's functions under this Schedule unless the disclosure is made—

- (a) with the agreement of the person from whom the information was obtained, or
 - (b) for the purposes of and in accordance with this Act, or
 - (c) for the purpose of legal proceedings under this Act or a report about the legal proceedings, or
 - (d) to the Premier or another Minister, or
 - (e) the regulator, or
 - (f) to a member of staff of the regulator, or
 - (g) to a person—
 - (i) employed under the *Members of Parliament Staff Act 2013*, or
 - (ii) engaged to provide services to a political office holder or State agency, or
 - (h) to a person employed in a State agency, or
 - (i) to a public authority or government agency of the Commonwealth, or
 - (j) to a person prescribed by the regulations or who is a member of a class of persons prescribed by the regulations, or
 - (k) in accordance with a requirement under the *Ombudsman Act 1974*, or
 - (l) with another lawful excuse.
- Maximum penalty—20 penalty units.

20 Special provisions for regulations made for purposes of this Schedule

Despite section 53(3), a regulation made under that section for the purposes of this Schedule may create an offence punishable by a penalty of not more than—

- (a) 2,000 penalty units for a corporation, and
- (b) 500 penalty units for an individual.

21 Penalty notices

- (1) An inspector may issue a penalty notice to a person if it appears to the inspector that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Schedule or regulations made under this Schedule that is prescribed by the regulations as a penalty notice offence.
- (3) The *Fines Act 1996* applies to a penalty notice issued under this clause.
Note— The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.
- (4) The amount payable under a penalty notice issued under this clause is the amount prescribed for the alleged offence by the regulations, not exceeding the maximum amount of penalty that could be imposed for the offence by a court.
- (5) This clause does not limit the operation of any other provision of, or made under, this Act or any other Act relating to proceedings that may be taken in relation to offences.

22 Miscellaneous matters

- (1) This Schedule has effect despite anything, whether expressed or implied, in—

- (a) another provision of this Act or another Act, or
 - (b) a judgment or order, or
 - (c) a contract or agreement, whether oral or in writing, or
 - (d) a deed, document, security or other instrument.
- (2) Powers given by or under this Schedule, or in a regulation, order, declaration, notice or direction made or given under this Schedule, do not affect powers given by another provision of this Act or another Act.

23 No liability in relation to enactment or operation of Schedule etc

No action, claim or demand lies, or may be made or allowed by or in favour of a person, against the Crown or the Premier or Minister, or a person acting in the execution of this Schedule, or a regulation, order, declaration or notice made or direction given under this Schedule, for or in relation to any damage, loss or injury sustained or alleged to be sustained because of—

- (a) the enactment of this Schedule or its operation, or
- (b) anything done or purporting to be done under this Schedule or under a regulation, order, declaration, notice or direction made or given under this Schedule.

24 Repeal and saving of operation of Schedule

- (1) This Schedule is repealed on 30 June 2024.
- (2) The *Interpretation Act 1987*, section 30 applies to the repeal of this Schedule in the same way as it applies in relation to the repeal of an Act.