

National Electricity (Victoria) Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 is formal. It states the purpose of the Act, being to make provision for the national market.
- Clause 2 is a commencement provision. It allows the timing of the implementation of the national market to be managed by the State by proclaiming certain provisions of the legislation when all necessary arrangements are in place.
- Clause 3 contains a number of definitions for the purposes of the Act.
- Clause 4 provides that the Act, the National Electricity (Victoria) Law and the National Electricity (Victoria) Regulations are to bind the Crown.
- Clause 5 provides for the extra-territorial effect of the Act, the National Electricity (Victoria) Law and the National Electricity (Victoria) Regulations.

PART 2—NATIONAL ELECTRICITY (VICTORIA) LAW AND NATIONAL ELECTRICITY (VICTORIA) REGULATIONS

- Clause 6 applies the National Electricity Law set out in the schedule to the National Electricity (South Australia) Act 1996 as a law of Victoria. The clause also provides that the Law as so applying may be referred as the National Electricity (Victoria) Law.
- Clause 7 provides that the regulations in force under Part 4 of the National Electricity (South Australia) Act 1996 are to apply as regulations in force for the purposes of the National Electricity (Victoria) Law and, as so applying, may be referred to as the National Electricity (Victoria) Regulations.
- Clause 8 contains a number of definitions for the purposes of the National Electricity (Victoria) Law and the National Electricity (Victoria) Regulations.

PART 3—INTERPRETATION OF LEGISLATION ACT 1984

- Clause 9 provides that the provisions of the National Electricity (Victoria) Law may be incorporated by reference in a subordinate instrument as if it were an Act.

Clause 10 provides for the interpretation of references to the National Electricity (Victoria) Law and National Electricity (Victoria) Regulations.

**NOTES ON THE NATIONAL ELECTRICITY LAW SET OUT IN THE SCHEDULE TO
THE NATIONAL ELECTRICITY (SOUTH AUSTRALIA) ACT 1996 OF SOUTH
AUSTRALIA**

PART 1—PRELIMINARY

- Clause 1 states that the Law may be cited as the National Electricity Law.
- Clause 2 states that the Law is to commence in accordance with provision under the **National Electricity (Victoria) Act 1996**.
- Clause 3 contains the principal definitions of words and expressions used in the Law.
- Clause 4 states that Schedule 1 contains miscellaneous provisions relating to interpretation of the Law.
- Clause 5 sets out the States that are taken to be participating jurisdictions for the purpose of the Law and the circumstances in which another jurisdiction may become a participating jurisdiction or a participating jurisdiction will cease to be a participating jurisdiction.

PART 2—NATIONAL ELECTRICITY CODE

- Clause 6 provides for approval of the initial National Electricity Code by the Ministers of the participating jurisdictions, and for notice to be given of that approval and of any amendment of the code. The clause also contains evidentiary provisions as to the contents and making of amendments of the code.
- Clause 7 provides that certain provisions of the code are to prevail in the event of inconsistency with other provisions of the code and that those provisions may not be amended without unanimous approval of the Ministers of all the participating jurisdictions.
- Clause 8 sets out the requirements for availability of the code.

PART 3—REGISTRATION WITH NEMMCO

- Clause 9 requires any person owning, controlling or operating a transmission or distribution system for supply of electricity to wholesale or retail customers that is connected to another such system to be registered by NEMMCO in accordance with the code unless that person is the subject of a derogation or otherwise exempt under the code from the requirement to be registered.

Similarly, any person owning, controlling or operating a generation system that supplies electricity to such a transmission or distribution system will be required to be registered by NEMMCO unless subject to such a derogation.

A person other than NECA or NEMMCO will be required to obtain authorisation under the code in order to administer or operate a wholesale market for the dispatch of electricity generating units or loads.

A person will also be required to be registered with NEMMCO in order to purchase electricity from the wholesale market for the dispatch of electricity generating units or loads unless that person is the subject of a derogation or otherwise exempt under the code from the requirement to be registered.

A breach of this provision is to attract a maximum penalty of \$100 000 and \$10 000 for each day that the offence continues.

PART 4—PROCEEDINGS AND CIVIL PENALTIES

Clause 10 prohibits proceedings from being brought against a person to whom the code applies in respect of an alleged contravention of the code unless the Law or the code recognises that the contravention gives rise to an obligation or liability to the person bringing the proceedings. NECA may, however, bring proceedings against Code participants for any alleged contraventions of the code.

In proceedings, alleged contraventions of the code may only be relied on by NECA, or by a Code participant in relation to another Code participant.

Clause 11 enables NECA to demand, by notice in writing, the civil penalty prescribed by regulation for a breach of a Class A provision of the code. If a penalty so demanded is not paid within 28 days and no application is made for review of NECA's decision to demand the penalty, NECA may apply to the Tribunal under Part 5 for an order for payment of the penalty.

Clause 12 provides that NECA may apply to the Tribunal for an order under Part 5 if NECA considers a Code participant to be in breach of a provision of the code.

Clause 13 requires civil penalties paid to NECA to be paid into the civil penalties fund established by NECA under Part 6.

Clause 14 provides that an order of the Tribunal for payment of a civil penalty may be registered and enforced in a court with jurisdiction for recovery of debts up to the amount of the penalty.

Clause 15 provides that an amount due by a Code participant to another Code participant which is not paid within 28 days after it is due in accordance with the code may be recovered in a court of competent jurisdiction.

PART 5—NATIONAL ELECTRICITY TRIBUNAL

Division 1—Tribunal

Clause 16 provides that the Tribunal is the National Electricity Tribunal to be established under Part 3 of the National Electricity (South Australia) Act 1996 and that the Tribunal has the functions and powers conferred on it under the National Electricity Law.

Clause 17 provides that the functions of the Tribunal are—

- to review decisions of NECA under clause 11 and decisions of NECA or NEMMCO that are, under the national electricity legislation or the code, reviewable decisions;
- to hear and determine applications to the Tribunal by NECA alleging breaches of the code by code participants.

The clause provides that a decision of NECA not to bring proceedings in respect of a Code breach will not be reviewable.

Clause 18 provides for the composition of the Tribunal.

Clause 19 provides for appointments to the Tribunal to be made by the Governor of Victoria on the recommendation of a majority of the Ministers of the participating jurisdictions. Appointments are to be made on a part-time basis.

Clause 20 provides that the chairperson or a deputy chairperson of the Tribunal is to be a practitioner of the High Court or a Supreme Court of not less than five years' standing.

Clause 21 provides for the terms and conditions of appointment of a member of the Tribunal.

Clause 22 provides for the resignation and termination of the appointment of a member of the Tribunal.

Clause 23 provides for the appointment of an acting chairperson of the Tribunal and the terms and conditions of such an appointment.

Clause 24 requires the disclosure of conflicts of interest by the members of the Tribunal and provides for the non-participation of members in proceedings in which they are interested.

Division 2—Proceedings Before Tribunal

Clause 25 enables the chairperson of the Tribunal to give directions as to the constitution of the Tribunal and the arrangement of the business of the Tribunal for particular proceedings.

Clause 26 requires the Tribunal to be constituted by the chairperson or a deputy chairperson or 2 or 3 members at least one of whom is the chairperson or a deputy chairperson.

Clause 27 deals with the situation in which a member ceases to be available for the hearing of a proceeding during the course of that hearing.

Clause 28 states that sittings of the Tribunal may be held at any place in a State or Territory that is a participating jurisdiction.

Clause 29 specifies the persons who will be parties to a proceeding before the Tribunal.

Clause 30 enables the Tribunal to decide whether the interests of a person are affected by a decision of NECA or NEMMCO and hence whether the person should be joined as a party to a proceeding for review of the decision.

Clause 31 enables a person to be represented before the Tribunal by some other person who need not be a legal practitioner.

Clause 32 provides for the Tribunal to follow an informal procedure in its proceedings and enables procedural directions to be given.

Clause 33 enables the chairperson of the Tribunal to direct the parties to a proceeding for the review of a decision to hold a conference. If agreement is reached by the parties at the conference, the Tribunal may make a decision in accordance with that agreement.

Clause 34 requires the proceedings of the Tribunal to be held in public. The Tribunal may, in appropriate circumstances, prohibit or restrict the publication or disclosure of evidence given before the Tribunal.

Clause 35 requires the Tribunal to give every party to a proceeding a reasonable opportunity to present its case, inspect relevant documents and make submissions in relation to those documents.

- Clause 36 sets out the particular powers of the Tribunal for the purpose of a proceeding such as power to take evidence on oath or affirmation, to proceed in the absence of a party, to adjourn proceedings and to issue summonses.
- Clause 37 enables the Tribunal to make an order staying or otherwise affecting the operation or implementation of a decision to which the proceeding before the Tribunal relates.
- Clause 38 sets out the way in which questions arising in proceedings before the Tribunal are to be decided, that is, by majority opinion with questions of law being decided by the person presiding in the proceeding or by the chairperson.
- Clause 39 enables the Tribunal, in a proceeding on an application for review of a decision, to dismiss the application if the applicant fails to appear at a conference or a hearing of the proceeding or to strike out a party who fails to appear at a conference or a hearing.
- Clause 40 gives the Tribunal the power to do all things necessary for the hearing and determination of a proceeding.
- Clause 41 sets out the powers that may be exercised by the Tribunal for the purpose of reviewing a decision. It also provides that decisions of the Tribunal are to be in writing and when they come into effect.
- Clause 42 requires the Tribunal to give written reasons for a decision made by it.
- Clause 43 provides that a person whose interests are affected by a reviewable decision may apply to the Tribunal for review of the decision, and sets out the time frame for making such an application.
- Clause 44 sets out the orders that the Tribunal may make where NECA applies to the Tribunal alleging a breach of the code by a Code participant. The orders include orders imposing civil penalties, orders of an injunctive nature and orders suspending the registration of code participants or other rights of code participants under the code.
- Clause 45 empowers the Tribunal to order a Code participant to pay an unpaid amount demanded by NECA as a civil penalty. The clause makes it clear that any enquiry as to whether the breach occurred must take place in a proceeding for review of NECA's decision to demand payment of the civil penalty and not in the proceedings for recovery of the penalty.

- Clause 46 makes provision for appeals to the Supreme Court against decisions of the Tribunal on questions of law, including any question as to whether a person's interests are affected by a decision of NECA or NEMMCO.
- Clause 47 enables the Supreme Court to make an order staying or otherwise affecting the operation or implementation of a decision of the Tribunal that is the subject of an appeal to the Supreme Court.
- Clause 48 enables the Tribunal to refer a question of law arising in a proceeding before the Tribunal to the Supreme Court.
- Clause 49 enables the Tribunal to direct a party to a proceeding to pay the costs of the proceeding. In the absence of such a direction, each party is to bear its own costs.
- Clause 50 gives a member of the Tribunal, a person representing a party before the Tribunal, and a person summoned to attend or appear before the Tribunal the same protection and immunity as if the proceeding were a proceeding in the High Court.
- Clause 51 makes it an offence if a person who is summoned to appear fails to appear as a witness before the Tribunal without reasonable excuse (maximum penalty: \$5000).
- Clause 52 makes it an offence if a person appearing as a witness before the Tribunal refuses to be sworn or to answer a question or produce a document without reasonable excuse (maximum penalty: \$5000).
- Clause 53 provides a penalty for a person appearing as a witness before the Tribunal who knowingly gives evidence that is false or misleading (maximum penalty: \$10 000).
- Clause 54 creates offences dealing with contempt of the Tribunal (maximum penalty: \$10 000).
- Clause 55 prohibits a person from obstructing or improperly influencing the conduct of a hearing of the Tribunal (maximum penalty: \$10 000).
- Clause 56 prohibits a person from contravening an order of the Tribunal under clause 34 restricting publication of confidential material (maximum penalty: \$50 000) or any other order of the Tribunal (maximum penalty: \$20 000).
- Clause 57 exempts a person from giving evidence or producing a document in a court if to do so would be contrary to an order of the Tribunal under clause 34 restricting publication of confidential material.

Clause 58 provides for the payment of allowances and expenses to witnesses appearing before the Tribunal.

Division 3—Miscellaneous

Clause 59 states that the chairperson of the Tribunal is responsible for managing the administration affairs of the Tribunal.

Clause 60 requires that there be a Registrar and Deputy Registrar of the Tribunal in each participating jurisdiction appointed and employed by NECA.

Clause 61 requires the chairperson of the Tribunal to submit a draft budget to NECA for each financial year. NECA is to determine the budget but may only vary it with the agreement of the Tribunal's chairperson or the approval of a majority of the Ministers of the participating jurisdiction.

Clause 62 requires NECA to provide funds to the Tribunal in accordance with the Tribunal's budget.

Clause 63 requires the chairperson of the Tribunal to provide an annual report to the Minister of each participating jurisdiction.

Clause 64 enables the chairperson of the Tribunal to delegate his or her powers.

PART 6—STATUTORY FUNDS OF NECA AND NEMMCO

Clause 65 provides definitions for this Part of the National Electricity Law.

Clause 66 makes provision for NECA to establish a civil penalties fund, into which all civil penalties received or recovered by NECA under the national electricity legislation will be paid. Payments out of the fund are also governed by this provision.

Clause 67 makes provision for NEMMCO to establish and maintain Code funds as required by the code. The code will contain provisions governing payments into and out of the funds.

Clause 68 enables NECA and NEMMCO to invest money standing to the credit of the civil penalty fund and the code funds.

Clause 69 declares that neither NECA or NEMMCO, nor a director of NECA or NEMMCO, is a trustee or trustees of the money in the civil penalty fund or the code funds.

Clause 70 states that in the winding up of NECA or NEMMCO money in the civil penalty fund and the code funds will be applied in accordance with the Corporations Law in discharging debts and claims but only to the extent that the debts or claims are liabilities referable to those funds.

PART 7—GENERAL

Clause 71 makes provision for a person authorised by NECA to obtain a search warrant from a Magistrate conferring power to enter and search for things reasonably suspected of being connected with a breach of the code.

Clause 72 requires the person executing a search warrant first to attempt to obtain permission for entry from any person at the place to which the warrant relates unless there is reason to believe that immediate entry is required to ensure the safety of a person or the effective execution of the warrant.

Clause 73 requires a person executing a search warrant to identify himself or herself to the occupier or a person apparently representing the occupier at the place to which the warrant relates and to give a copy of the warrant to such a person.

Clause 74 sets out various further powers of a person executing a search warrant such as power to inspect, examine or photograph anything in the place to which the warrant relates and power to take extracts from and copy documents.

Clause 75 allows the person executing a search warrant to seize things connected with a breach of the code other than the things named or described in the warrant if there are reasonable grounds to believe that the seizure of the things is necessary to prevent their concealment, loss or destruction or their use in further breaches of the code.

Clause 76 provides that NEMMCO may, for public safety or electricity system security purposes, authorise a person to switch off or re-route a generator, to call equipment into service or take equipment out of service or to exercise other similar powers.

Clause 77 makes it an offence if a person, without reasonable excuse, obstructs or hinders a person in the exercise of a power under a search warrant or a power under clause 76.

Clause 78 provides that, subject to any agreement to the contrary, a Code participant will not be liable to damages for any partial or total failure to supply electricity unless the failure is due to anything done or omitted to be done by the code participant in bad faith or to the negligence of the code participant.

- Clause 79 provides for a certificate signed by a director of NECA to be evidence of a person's status as a Code participant.
- Clause 80 provides that where a corporation contravenes the National Electricity Law or Regulations or is in breach of the code, each officer of the Corporation will also be guilty of that contravention or breach if he or she knowingly authorised or permitted the contravention or breach.
- Clause 81 makes it clear that for the purpose of determining the civil penalty for a Code breach that consists of a failure to do something that is required to be done, the breach is to be regarded as continuing until the act is done despite the fact that any period within which or time before which the act is required to be done has expired or passed.

SCHEDULE 1

Miscellaneous Provisions Relating to Interpretation

Schedule 1 contains uniform interpretation provisions of a kind which are usually contained in the Interpretation Act of a State or Territory.