

15 October 2018

Answer to question on notice

Senator Patrick has asked: am I aware of any provisions in any other legislation in Australia that is comparable to Schedule 1, clause 5(6) of the Electricity Corporations (Restructuring and Disposal) Act 1999 (SA).

Summary to response to question on notice:

- My research indicates that clause 5(6) of Schedule 1 of the *Electricity Corporations (Restructuring and Disposal) Act 1999* (SA) is unique to South Australian law.
- Clause 5(6) is unique to other jurisdictions because it confers a power on the Minister, provided it is approved by the South Australian Environment Protection Authority, to specifically override environmental laws.
- There are some instances where other State laws are reminiscent of Clause 5 of Schedule 1 of the Act. However as noted above it appears that the clause is unique to South Australia in that the Minister can enter into an agreement that can bypass environmental laws.

In preparing this answer I have investigated legislation that concerns the sale and transfer of state-owned electricity generators to non-State owners, and legislation concerning state-owned electricity generators (listed below).

New South Wales

1. Under the *Eraring Power Station Act 1981* (EPS Act), the NSW Electricity Commission was able to enter into a special arrangement with respect to, inter alia, the maintenance or management of the Eraring Power station or any associated facilities.¹ A 'special arrangement' means defined as 'an agreement, arrangement or understanding'.² These arrangements must be approved by the NSW Governor and recommended by the Minister and with the concurrence of the Treasurer.³

¹ Eraring Power Station Act 1981 (NSW) s. 4.

² Eraring Power station Act 1981 (NSW) s. 3.

³ Eraring Power Station Act 1981 (NSW) s. 4.

2. 'Maintenance and management' are not defined in the EPS Act, meaning it is possible that 'maintenance and management' could refer to environmental management or activities required, or not, for the maintenance of the site, including on-site facilities such as ash dams.
3. Although the Act provides some guidance as to what a special arrangement may entail, mostly concerning finance and proprietary rights,⁴ the Act states that nothing preventing the inclusion in a special arrangement of provisions that are not of the kind referred to in the section that outlines what provisions of a special arrangement may entail. This leaves the special arrangement provision quite broad, and potentially open to the types of arrangements outlined in the Special Agreement.
4. It is unclear whether any special arrangements were entered in to regarding the Eraring power stations. If such agreements exist they are not Gazetted or not publicly available.
5. Regardless of whether special arrangements were entered in to, the provisions of the EPS Act are quite different to that of Clause 5, Schedule 1 of the Act. The EPS Act does not expressly provide for an agreement to be made between a Minister and a licensee, and do not confer power on the Minister to override or impose environmental obligations on a licensee in the event that a special arrangement is entered in to.

Queensland

6. Under the *Gladstone Power Station Agreement Act*,⁵ environmental standards set out in the Gladstone Power Station Environmental Policy Schedule – a Schedule to the Act – applied to and regulated the environmental effects and emissions from or in connection with the Gladstone power station despite any other environmental law or law to the contrary.⁶ However to the extent that there is an inconsistency between environmental legislations and the standards, parameters and conditions set out in the environmental policy schedule, the application of the environmental policy schedule is modified to the extent of the inconsistency so that at the power station must be operated in accordance with environmental law. This includes liabilities under environmental laws where it is not complied with, meaning that remedies, penalties and offences for noncompliance or breaches of the law will apply.

⁴ See generally: *Eraring Power Station Act 1981* (NSW) ss. 6(1 – 11).

⁵ The Agreement was contained in Schedule 1 of the Act. Schedule 1 now reads: *Editorial: Consistent with the provisions of the Act, this schedule only contains the proposed agreement authorized to be entered into by the Act as originally enacted. It does not purport to be either the agreement actually entered into or that agreement as amended from time to time.*

⁶ *Gladstone Power Station Agreement Act 1993* (Qld) No. 84, assented 17 December 1993, Schedule Sate Agreement, Cl. 13.

7. However despite this being an agreement entered in to by a Minister, it does not confer a power to override environmental protection laws. Rather, it acknowledged the environmental protection laws in place, including the remedies for breaches, and addressed inconsistency by deferring to the law that was in place.

Tasmania

8. Under the *Electricity Companies Act 1997* (EC Act), the Minister may enter in to agreement with an electricity generating company provided the Minister has approval from the Tasmanian Treasurer and the board of directors of the company.⁷ Such agreements may be for the company or its subsidiary to perform, to cease to perform activities.⁸ 'Activities' is not defined in the Act,⁹ and theoretically could refer to power generation or waste disposal from the power generation process. It is unclear whether such agreements have been entered in to.
9. Regardless of whether special arrangements were entered in to, the provisions of the EC Act are different to that of Clause 5, Schedule 1 of the Act. The EC Act does not expressly provide for an agreement to be made between a Minister and a licensee, and do not confer power on the Minister to override or impose environmental obligations on a licensee in the event that a special arrangement is entered in to.

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Legislation considered

New South Wales:

Essential Services Act 1988

Energy Services Corporations Act 1995,

Energy and Utilities Administration Act 1987

Electricity Generator Assets (Authorised Transactions) Regulations 2016

⁷ *Electricity Companies Act 1997* (Tas) s. 19(1).

⁸ *Electricity Companies Act 1997* (Tas) s. 19(1).

⁹ See: *Electricity Companies Act 1997* (Tas) s. 3.

Victoria:

Electricity Industry Act 2000
Electricity Industry (Residual Provisions) Act 1993
Essential Services Act 1958
Essential Services Commission Act 2001
Mineral Resources (Sustainable Development) Act 1990
Mines (Aluminium Agreement) Act 1961
Extractive Industries (Lysterfield) Act 1986
Loy Yang B Act 1992
State Electricity Commission Act 1958

Western Australia:

Electricity Industry Act 2004
Electricity Corporations (Electricity Generation & Retail Corporations) Regulations 2013

Queensland:

Electricity Act 1994
Electricity Regulations 2006
Gladstone Power Station Agreement Act 1993

Tasmania:

Electricity Companies Act 1997
Electricity Supply Industry Act 1995
Electricity Supply Industry Regulations 1998
Electricity Reform Act 2012