

ELECTRICITY CORPORATIONS AMENDMENT BILL 2013

EXPLANATORY MEMORANDUM

The Electricity Corporations Amendment Bill 2013 (the Bill) contains amendments to the *Electricity Corporations Act 2005* (the Act) to implement the merger of the Electricity Retail Corporation (currently trading as Synergy) and the Electricity Generation Corporation (currently trading as Verve Energy). It is intended that the merger will take effect on 1 January 2014.

The Bill acts to discontinue the Electricity Retail Corporation and vest its assets, liabilities and rights in the Electricity Generation Corporation. The continuing Electricity Generation Corporation is then renamed the "Electricity Generation and Retail Corporation". The Bill will also provide for the transfer of employees of the Electricity Retail Corporation to the Electricity Generation and Retail Corporation at the time of the merger.

The Bill will provide for regulations to be made to segregate certain functions within the Electricity Generation and Retail Corporation, and to approve wholesale product arrangements for the Electricity Generation and Retail Corporation.

The Bill also contains several amendments designed to provide more flexibility in terms of the governance of the corporations, and to provide the option to remove limitations on where in the State the electricity corporations are permitted to function.

Part 1 – Preliminary

Clause 1: Short title

This clause formally titles the Bill.

Clause 2: Commencement

This clause provides the commencement dates for the various Parts of the Bill. Various provisions need to come into effect at different times.

The short title and commencement clause come into operation on the day of Royal Assent.

The heading to Part 2 and sections 3, 32, 33 and 35 come into operation on the day after the day of Royal Assent.

The remaining provisions will come into operation on a day or days fixed by proclamation.

Part 2 – *Electricity Corporations Act 2005* amended

Clause 3: Act amended

This clause provides that the amendments in this Part are to the *Electricity Corporations Act 2005*.

Clause 4: Long title replaced

This clause deletes and replaces the long title of the *Electricity Corporations Act 2005* to simplify the summary description of the instrument and remove specific references to four electricity corporations.

Clause 5: Section 3 amended

This clause amends the definitions in section 3 of the *Electricity Corporations Act 2005* to:

- remove references to the Electricity Generation Corporation (currently trading as Verve Energy) and the Electricity Retail Corporation (currently trading as Synergy); and
- insert a definition for the Electricity Generation and Retail Corporation.

Clause 6: Section 4 amended

This clause amends section 4 of the Act by deleting the Electricity Retail Corporation from the list of corporations established under the *Electricity Corporations Act 2005*.

This clause also renames the Electricity Generation Corporation as the Electricity Generation and Retail Corporation from the time that the Electricity Retail Corporation ceases to exist.

Clause 7: Section 5 amended

This clause amends section 5 to the effect that, for the purposes of any Western Australian law, a corporation is to be regarded as not being an agent of the State and does not have the status, immunities and privileges of the State.

The amendment clarifies that the provision only applies for the purposes of Western Australian law and does not apply for the purposes of Commonwealth law.

Clause 8: Section 8 amended

Subclause (1) of this clause amends section 8 by increasing the maximum size of the Board of a corporation established under the *Electricity Corporations Act 2005* from 6 to 8 persons.

Subclause (2) removes the requirement for the majority of Horizon Power directors to be domiciled in an area that is not serviced by the South West Interconnected System.

Subclause (3) is a consequential change to a clause reference resulting from the amendment made by subclause (2).

Clause 9: Section 14 amended

This clause removes the requirement for the Horizon Power Chief Executive Officer to be domiciled in or near the town where the head office is located. The head office of Horizon Power cannot be located within the area serviced by the South West Interconnected System.

Clause 10: Part 3 Division 1 Subdivision 2 heading amended

This clause amends the title of Part 3, Division 1, Subdivision 2 of the Act to reflect the change of name of the Electricity Generation Corporation to the Electricity Generation and Retail Corporation following the merger.

Clause 11: Section 35 amended

This clause amends section 35 of the Act to the effect that the functions of the merged entity include the functions of both the current Synergy and the current Verve Energy. As the Verve Energy legal vehicle will continue as the merged entity, this clause adds the principal functions of Synergy (previously contained in section 44 of the *Electricity Corporations Act 2005*) to the principal functions of Verve Energy. Section 44 of the Act is then deleted by clause 17 of this Bill.

Clause 12: Section 36 amended

This clause contains a consequential amendment following the amendment made by clause 11.

Clause 13: Section 37 amended

This clause amends the restrictions on the area in which the merged entity may operate. The existing clause limits the merged entity's operations within the State to the area serviced by the South West Interconnected System, except to the extent this clause permits otherwise.

Subclause (1) inserts new sections 37(3A) and (3B) which allow the merged entity to acquire and transport gas anywhere within the State. This removes any doubt that the merged entity can acquire gas from gas producers operating in the north west of Western Australia and transport it to the area covered by the South West Interconnected System. Subclause (1) also allows the merged entity to supply gas outside the area serviced by the South West Interconnected System to the extent it is supplying gas to Horizon Power.

This Act also introduces a complementary ability for Horizon Power to acquire and supply gas within the area serviced by the South West Interconnected System to the extent it is acquiring from, or supplying to, the merged entity (see clause 19 of this Bill).

Subclause (2) introduces a regulation-making power to authorise the merged entity to perform one or more of its functions in an area (or multiple areas) of the State not serviced by the South West Interconnected System.

Subclause (2) provides that such regulations are in addition to the other restrictions in section 37, unless the regulations explicitly provide that they have effect despite any conflict or inconsistency.

Clause 14: Sections 38 to 40 replaced

This clause removes the previous sections 38, 39 and 40 from the *Electricity Corporations Act 2005*.

Section 38 previously restricted the ability of the Electricity Generation Corporation to retail electricity to a person for their own consumption. The merged entity will have both electricity generation and electricity retail functions under the amended *Electricity Corporations Act 2005*. The restriction on the generation corporation from retailing electricity is therefore no longer relevant.

Section 39 previously provided for a review of the restriction imposed by section 38. As section 38 is being deleted, section 39 is no longer relevant.

Section 40 provided for an extension of the restriction imposed by the previous section 38. As the previous section 38 is being deleted, section 40 is no longer relevant.

New Sections 38 and 39

The new section 38 introduces a regulation-making head of power regarding the wholesale acquisition and supply of electricity by the merged entity. Regulations under this head of power can also authorise the Minister for Energy to approve wholesale arrangements in respect of the merged entity. The new section 39 sets out the matters that regulations or wholesale arrangements can deal with.

Wholesale arrangements will not be subsidiary legislation. It is envisaged that, to the extent appropriate, the regulations will require wholesale arrangements to be published and laid before Parliament. However, in some instances wholesale arrangements may not be made public, for example if they contain matters of a commercially sensitive nature.

It is intended that the regulation-making power in sections 38 and 39 will be used to oblige the merged entity to offer a range of standard wholesale electricity products (“standard products”) on a non-discriminatory basis across the merged entity’s own retail area and other wholesale electricity customers.

The standard products will be required to be offered under approved terms and conditions to third party retailers, and the prices and terms offered will need to be non-discriminatory as compared with the price notionally paid by the merged entity’s own retail arm for an equivalent product under the transfer pricing methodology.

Under regulations, the Minister for Energy can be given the power to approve the terms and conditions of the standard products. The Minister for Energy may also approve the pricing methodology for the standard products.

The purpose of these provisions is to prevent unfair discrimination and provide transparency to the market, in order to mitigate concerns of private sector market participants. It is expected that there will be a transitional period (likely six months) after the merger before an obligation to offer standard products is imposed on the merged entity.

It is intended that the regulations will also set out a compliance and audit framework. The regulations may confer functions on the Minister or any other specified person in relation to compliance monitoring, audit, or any other matter relevant to the regulations.

To ensure the merged entity is held accountable to its obligations under the regulations, the regulations may also impose civil penalties on the corporation for non-compliance. It is acknowledged that it is unusual for such penalties to apply to a government trading entity but, in this instance, it demonstrates that the merged entity will be appropriately penalised for non-compliance with the regulatory regime. Civil penalties are to be imposed on the merged entity itself, not its directors or staff. The regulations may provide for a right of review by a person or body specified in the regulations.

New Section 40

The new section 40 essentially replicates section 50A of the Act, which is deleted by clause 17 of this Bill. Section 50A required disclosure of certain information to the Registrar appointed under the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

Clause 15: Section 41 amended

This clause makes a minor consequential amendment to section 41.

Clause 16: Section 43 amended

This clause amends section 43 which provides for restrictions on the area in which the Electricity Networks Corporation (Western Power) may operate. The existing section limits Western Power's operations within the State to the area serviced by the South West Interconnected System, except to the extent this section permits otherwise.

This clause introduces a regulation-making power to authorise Western Power to perform one or more of its functions in an area (or multiple areas) of the State not serviced by the South West Interconnected System.

This clause provides that such regulations are in addition to the other restrictions in section 43, unless the regulations explicitly provide that they have effect despite any conflict or inconsistency.

Clause 17: Part 3 Division 1 Subdivision 4 deleted

This clause removes Part 3, Division 1, Subdivision 4 from the *Electricity Corporations Act 2005*, comprising sections 44 to 50A inclusive. This subdivision set out the functions and powers of the Electricity Retail Corporation (the current Synergy).

As the Electricity Retail Corporation will cease to exist, this Subdivision is no longer relevant.

Clause 18: Section 50 amended

This clause makes minor consequential amendments to section 50.

Clause 19: Section 52 amended

This clause amends the restrictions on the area in which the Regional Power Corporation (Horizon Power) may operate. The existing clause limits Horizon Power's operations within the State to the areas not serviced by the South West Interconnected System, except to the extent this clause permits otherwise.

This clause allows Horizon Power to acquire and supply gas within the area serviced by the South West Interconnected System to the extent it is acquiring from, or supplying to, the merged entity.

This Bill also introduces a complementary ability for the merged entity to acquire gas from and supply gas to Horizon Power in areas of the State not serviced by the South West Interconnected System (see clause 13 of this Bill).

This clause also introduces a regulation-making power to authorise Horizon Power to perform one or more of its functions in an area (or multiple areas) of the State serviced by the South West Interconnected System.

This clause provides that such regulations are in addition to the other restrictions in section 52, unless the regulations explicitly provide that they have effect despite any conflict or inconsistency.

Clause 20: Section 54 amended

This clause makes a minor consequential amendment to section 54.

Clause 21: Section 59 amended

This clause makes a minor consequential amendment to section 59.

Clause 22: Section 62 replaced

This clause amends the head of power in the *Electricity Corporations Act 2005* to make regulations to segregate the functions of electricity corporations.

This clause replaces the existing section 62 and inserts a new section 63A. These sections allow regulations to be made in relation to the segregation of functions within a corporation, and introduces the power for the regulations to authorise the Minister to approve “segregation arrangements”.

It is intended that these “segregation arrangements” and associated regulations will be used to impose obligations relating to transfer pricing, ring-fencing and restrictions on information flows within the merged entity.

The segregation arrangements can also confer functions on a person; for example, they might confer compliance and monitoring functions on a regulatory body.

Segregation arrangements will not be subsidiary legislation. It is envisaged that, to the extent appropriate, the regulations will require segregation arrangements to be published and laid before Parliament. However, in some instances segregation arrangements may not be made public, for example if they contain matters of a commercially sensitive nature.

The regulations may also impose civil penalties on the corporation for non-compliance. It is acknowledged that it is unusual for such penalties to apply to a government trading entity but, in this instance, it demonstrates that the merged entity will be appropriately penalised for non-compliance with the regulatory regime. Civil penalties are to be imposed on the merged entity itself, not its directors or staff. The regulations may provide for a right of review by a person or body specified in the regulations.

Clause 23: Part 3 Division 2 deleted

This clause is a consequential amendment which deletes Part 3, Division 2 from the *Electricity Corporations Act 2005*. This Division set out the role of the Economic Regulation Authority in relation to sections 39 and 48 (which have been deleted by clause 14 and 17 of the Bill).

Clause 24: Section 75 amended

This clause updates a reference in section 75 to the *Trade Practices Act 1974* (Cth) to refer to the *Competition and Consumer Act 2010* (Cth).

Clause 25: Section 81 amended

This clause amends section 81 which empowers the Minister for Energy to determine arrangements between the government-owned electricity corporations. Specifically, this clause gives the Minister the power to determine arrangements between the corporations in order to facilitate the economically efficient performance of their functions.

Clause 26: Section 83 amended

This clause makes a minor consequential amendment to section 83.

Clause 27: Section 87 amended

This clause updates a reference in section 87 to the *Trade Practices Act 1974* (Cth) to refer to the *Competition and Consumer Act 2010* (Cth).

Clause 28: Section 106 amended

This clause amends section 106 by imposing a requirement on a corporation to produce a quarterly report for each segment of the corporation required under regulations or segregation arrangements, in addition to the consolidated quarterly report.

Subclause (2) requires quarterly reports to comply with segregation arrangements.

Clause 29: Section 107 amended

This clause amends section 107 by imposing a requirement on a corporation to produce a separate report for each segment of the corporation required under regulations or segregation arrangements, in addition to the consolidated annual report.

Clause 30: Section 108 amended

This clause requires annual reports to also comply with segregation arrangements.

Clause 31: Section 114 amended

This clause makes minor consequential amendments to section 114.

Clause 32: Section 120 amended

This clause amends section 120 by extending the protection from liability for a corporation, a subsidiary of a corporation or a person performing functions under the *Electricity Corporations Act 2005* for certain acts or omissions. This protection from liability is extended to acts or omissions resulting from directions made by the Minister for Energy under section 198 of the Act to achieve the merger.

Clause 33: Section 134 amended

This clause amends section 134 to include directions made by the Minister for Energy under section 199 of the Act.

Clause 34: Section 140 amended

This clause amends section 140 which provides for the Minister for Energy to recommend consequential amendments to subsidiary legislation made under any Act to include consequential amendments arising from the enactment of this Bill.

Clause 35: Part 10 inserted

This clause inserts a new Part 10 into the *Electricity Corporations Act 2005* to provide for the merger of the Electricity Generation Corporation and Electricity Retail Corporation. The new Part 10 comprises sections 193 to 221.

Division 1 – Preliminary

The new section 193 inserts a purpose clause for the new Part 10. The purpose clause sets out that Part 10 implements the merger and provides for transitional matters.

The new section 194 defines the terms used in the new Part 10. Where relevant, these definitions are consistent with the definitions used in Part 9 of the *Electricity Corporations Act 2005*, which contains the transitional provisions used for the disaggregation of the previous Western Power Corporation into four electricity corporations.

The new section 195 is a saving provision which prevents the operation of a provision of the Bill from being regarded as a breach of contract, as giving rise to a remedy because of the change in the ownership of an asset or liability, as causing an instrument to be void or unenforceable, or as releasing or allowing the release of any surety. This provision is a usual statutory provision where a statutory transfer of assets and liabilities is provided for. It ensures that contracts can be assigned in the manner contemplated in the transfer order even though the terms of the contract may provide for assignment to be prohibited or limited.

Division 2 – Merger

The new section 196 provides that the Electricity Retail Corporation (the current Synergy) ceases to be a corporation and merges into the Electricity Generation and Retail Corporation. The Electricity Generation and Retail Corporation (the merged entity) is a continuation of the Electricity Retail Corporation (the current Synergy) from the merger time.

This merger takes place at the time section 4 of the *Electricity Corporations Act 2005* is amended by removing reference to the Electricity Retail Corporation.

The new section 197 requires Synergy, Verve Energy and the merged entity to do anything required by transitional regulations and that may be necessary to implement or facilitate the merger.

Division 3 – Directions by Minister

The new section 198 introduces a power for the Minister for Energy to direct the merging corporation (the current Synergy) and/or the continuing corporation (the current Verve Energy) to take a step, or refrain from taking a step, to achieve the merger.

A corporation must comply with such a direction despite any other provision in the *Electricity Corporations Act 2005*. This section of the Act has effect despite the restriction in the *Statutory Corporations (Liability of Directors) Act 1996* on a Minister giving a corporation a direction that would require the corporation to do something that it could not otherwise do, or not to do something that it is obliged to do.

The new section 199 requires any directions made under the section 198 to be laid before Parliament within 14 days after the direction is given.

Division 4 – Devolution of assets, rights, liabilities, proceedings and related provisions

The new section 200 vests the assets, rights and liabilities of the merging corporation (current Synergy) in the Electricity Generation and Retail Corporation (the merged entity). The vesting of the assets of the merging corporation in the Electricity Generation and Retail Corporation is not to be regarded as income in determining the profits of the Electricity Generation and Retail Corporation.

The new section 201 provides that any proceedings or remedies that were available to be brought by or against the merging corporation (the current Synergy) before the merger are available to be brought by or against the Electricity Generation and Retail Corporation (the merged entity) after the merger.

The new section 202 provides that guarantees given under section 130¹ or continued by section 173² for Synergy continue as if they were given in respect of the Electricity Generation and Retail Corporation (the merged entity). Any amount paid under a guarantee continued under this clause will constitute a charge on the assets of the merged entity.

The new section 203 preserves any joint tenancies on assets held by the merging corporation (the current Synergy), and provides that the joint tenancy is transferred to the Electricity Generation and Retail Corporation (the merged entity) when Synergy's assets are vested in the Electricity Generation and Retail Corporation.

The new section 204 exempts the merger transaction from State taxes, such as stamp duty.

The new section 205 provides for the registration of documents relating to transactions affecting any estate or interest in land or other property (such as land titles) to reflect the merger.

Division 5 – Staff

The new section 206 provides that all staff of the merging corporation (the current Synergy) are transferred to the Electricity Generation and Retail Corporation (the merged entity) at the time of the merger. This transfer does not constitute a retrenchment or redundancy.

The new section 207 acts to preserve the rights of employees transferred under section 206. Remuneration and terms and conditions of employment, leave entitlements, rights under a superannuation scheme and continuity of service are not affected by the transfer to the Electricity Generation and Retail Corporation.

Division 6 – Other provisions

The new section 208 provides that the renaming of the Electricity Generation Corporation as the Electricity Generation and Retail Corporation does not affect the entity's continuity or legal status.

The new section 209 provides a transitional exemption from the obligation for the merged entity to comply with a Strategic Development Plan and Statement of Corporate Intent for the rest of the financial year following the merger.

¹ Section 130 gives the Treasurer the power to guarantee the performance by a corporation of any financial obligation of the corporation.

² Section 173 provides for the continuation of guarantees after the disaggregation of the former Western Power Corporation into the current four electricity corporations.

Verve Energy and Synergy will both have Strategic Development Plans and Statements of Corporate Intent for the financial year 2013-14. However, these documents plan for the corporations as separate entities, and have limited applicability to the merged entity. Rather than impose the administrative burden of redeveloping these documents for the six-month period following the merger, the merged entity will instead be exempted from complying with its Strategic Development Plan and Statement of Corporate Intent until the next financial year.

The new section 210 provides for transitional arrangements for financial reporting following the merger. The Electricity Generation and Retail Corporation (the merged entity) will be responsible for completing the final quarterly and annual reports on behalf of the Electricity Retail Corporation (the current Synergy), to the extent that the Electricity Retail Corporation has not yet completed those reports.

The new section 211 provides that the Electricity Generation and Retail Corporation (the merged entity) will be responsible for completing a final annual report on behalf of the Electricity Generation Corporation (the current Verve Energy) for the partial year from the end of the last financial year until the merger time. It will need to produce a separate annual report for the period from the merger time until the end of the next financial year. This ensures that annual reports on Verve Energy and reporting on the merged entity are kept separate.

The new section 212 ensures that any Ministerial Directions made to the Electricity Retail Corporation (the current Synergy) under sections 111(1)³ and 114(2)⁴ continue to apply in relation to the Electricity Generation and Retail Corporation (the merged entity).

It is intended that any Ministerial Directions that should not continue to apply will be repealed outside the merger process.

The new section 213 requires the Electricity Generation and Retail Corporation (the merged entity) to pay any outstanding amounts due by the Electricity Retail Corporation (the current Synergy) to the Treasurer in lieu of rates.

The new section 214 requires the Electricity Generation and Retail Corporation (the merged entity) to pay dividends on behalf of the Electricity Retail Corporation (the current Synergy) if a dividend function has yet to be performed by the Electricity Retail Corporation at the time of the merger.

³ Section 111(1) provides for the Minister to make general directions to a corporation.

⁴ Section 114(2) provides for the Minister to make directions to Synergy or Verve Energy to limit its ability to sell or supply gas.

The new section 215 allows the Electricity Generation and Retail Corporation (the merged entity) to continue anything commenced before the merger time by the Electricity Retail Corporation (the current Synergy).

The new section 216 ensures things done or omitted to be done by, to or in respect of the Electricity Retail Corporation (the current Synergy) continue to have effect as if they were done by, to or in respect of the Electricity Generation and Retail Corporation (the merged entity) following the merger.

The new section 217 ensures that any immunity for the benefit of the Electricity Retail Corporation (the current Synergy) continues to the benefit of the Electricity Generation and Retail Corporation (the merged entity) following the merger.

The new section 218 provides that where agreements and instruments refer to either the Electricity Generation Corporation (the current Verve Energy) or the Electricity Retail Corporation (the current Synergy), that reference is to be read as a reference to the Electricity Generation and Retail Corporation (the merged entity) after the merger time.

Similarly, agreements and instruments referring to the former Western Power Corporation that, under Part 9 of the *Electricity Corporations Act 2005*⁵ are to be read as referring to the Electricity Generation Corporation or the Electricity Retail Corporation, are then to be read as a reference to the Electricity Generation and Retail Corporation as of the merger time.

Nothing in the legislation is intended to affect federal industrial instruments.

The new section 219 gives the Treasurer the power to grant an indemnity against liability or a guarantee of payment to certain persons (specifically, a current or former director, Chief Executive Officer or staff member of the Electricity Retail Corporation) in respect of anything done or omitted to be done to achieve the merger.

The new section 220 provides that the merger provisions do not affect any right or obligation of a party to a Government agreement.

The new section 221 provides the head of power to make transitional regulations in relation to the merger. The transitional regulations may prescribe things to be done by the existing corporations and the Electricity Generation and Retail Corporation to implement the merger and anything necessary or expedient to be prescribed for a matter or issue of a transitional nature that arises in relation to the merger.

⁵ Part 9 contains transitional provisions in respect of the disaggregation of the former Western Power Corporation into four electricity corporations.

Transitional regulations may take effect retrospectively, provided they do not take effect earlier than the time of the merger. This provision has been included to allow regulations to be made after the merger time which apply from the merger time so as to ensure that anything that must be done to implement the merger transaction can be done. The retrospective regulation-making power is limited to protect third parties, by ensuring that transitional regulations cannot have a retroactive prejudicial impact, or impose retroactive liabilities, on an entity other than the State, an authority of the State, or the merged entity.

Clause 36: Schedule 1 clause 6 amended

This clause amends the quorum for a Board meeting as a consequence of the increase in the maximum number of directors on the Board of a corporation.

Part 3 – Other Acts amended

Clause 37: *Constitution Acts Amendment Act 1899* amended

This clause makes a minor consequential amendment to the *Constitution Acts Amendment Act 1899*.

Clause 38: *Economic Regulation Authority Act 2003* amended

This clause makes a minor consequential amendment to the *Economic Regulation Authority Act 2003*.

Clause 39: *Electricity Industry Act 2004* amended

This clause makes minor consequential amendments to the *Electricity Industry Act 2004*.

Clause 40: *Energy Arbitration and Review Act 1998* amended

This clause amends the *Energy Arbitration and Review Act 1998*. Subclause (2) amends which legislation can confer functions on the Western Australian Electricity Review Board to include “any other written law”. This provides the flexibility for merger-related regulations made under the amended *Electricity Corporations Act 2005* to confer functions on the Western Australian Electricity Review Board.

Subclause (3) makes a minor consequential amendment to the *Energy Arbitration and Review Act 1998*.

Clause 41: *Energy Operators (Powers) Act 1979* amended

This clause makes a minor consequential amendment to the *Energy Operators (Powers) Act 1979*.

Clause 42: *Equal Opportunity Act 1984* amended

This clause makes a minor consequential amendment to the *Equal Opportunity Act 1984*.

Clause 43: *Fines, Penalties and Infringement Notices Enforcement Act 1994* amended

This clause makes minor consequential amendments to the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

Clause 44: *Public Sector Management Act 1994* amended

This clause makes a minor consequential amendment to the *Public Sector Management Act 1994*.

Clause 45: *Public Works Act 1902* amended

This clause makes a minor consequential amendment to the *Public Works Act 1902*.

Clause 46: *State Records Act 2000* amended

This clause makes a minor consequential amendment to the *State Records Act 2000*.