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## ELECTRICITY CORPORATIONS BILL 2005

### EXPLANATORY MEMORANDUM

The *Electricity Corporations Bill 2005* is a continuation of the Government's policy to introduce a competitive electricity market in Western Australia. Restructuring Western Power into four new entities is necessary to deliver enhanced reliability of supply, promote private sector investment in electricity generation and provide the competition to put downward pressure on electricity prices.

The *Electricity Corporations Bill 2005* (the Bill) essentially represents an amalgamation of the previously suspended *Electricity Corporations Bill 2003* and those provisions of the *Electricity Legislation (Amendments and Consequential Provisions) Bill 2003* which were necessary to restructure Western Power.

The Bill provides for:

- the restructure of Western Power by providing for the establishment of four new Government owned corporations and their functions, powers and governance arrangements (Parts 2, 3, 4, 5, 6 and 7 and Schedules 1, 2, 3 and 4);
- amendments to other written laws to reflect the restructure of Western Power (Part 8 and Schedule 5); and
- mechanisms to transfer Western Power's assets and liabilities to the four newly created entities (Part 9).

#### **Restructure of Western Power**

The Bill creates four new Government owned entities: the Electricity Generation Corporation, Electricity Retail Corporation, Electricity Networks Corporation and Regional Power Corporation.

The Electricity Generation Corporation, Networks Corporation and Retail Corporation will undertake Western Power's existing functions in the South West interconnected system. The Regional Power Corporation will assume responsibility for Western Power's functions in the North West interconnected system and non-interconnected regional systems.

The provisions within this Bill are modelled, to a large extent, on those contained in the *Electricity Corporation Act 1994* which provided for the establishment of Western Power. However, the opportunity has been taken to strengthen governance arrangements on such matters as strategic development plans, statements of corporate intent, powers of direction and ring-fencing arrangements.

In general, the majority of provisions contained in the Bill apply universally to the new corporations. This includes provisions relating to establishment, responsibility of directors, accountability, finance and Ministerial direction. In addition, the Bill sets out the specific functions of each corporation.

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The functions have been broadly defined to encompass the full range of activities that may possibly be performed by each corporation. Notwithstanding this, the Bill allows the Minister to restrict specific functions in order to encourage private competition in the generation and supply of electricity.

The Bill ensures that the four corporations will be well equipped functionally to address future growth opportunities. For example, the Bill provides that the Generation Corporation may undertake retail activities and the Retail Corporation may undertake generation activities following the expiry of a designated period.

Similarly, the Bill provides that the Retail Corporation and Generation Corporation may participate in the gas market. Functions of the Retail Corporation, Networks Corporation and Regional Power Corporation also enable these entities to provide telecommunication services.

The Bill also provides mechanisms to limit the Generation Corporation's ability to exercise market power in selling its output. These include the creation of a vesting contract and initial electricity supply contract between the Generation Corporation and Retail Corporation for such matters as electricity supply.

As evidence of the Government's commitment to establish a regional service provider, the Bill specifies that the Regional Power Corporation is to be located in a regional area. The Chief Executive of the corporation will be required to reside in the same location as the head office of the corporation. Similarly, the majority of Board members will be required to reside in areas outside of the South West interconnected system.

The Bill gives effect to Government's policy that the four new entities should remain in Government ownership. The Bill provides that the new corporations must not dispose of a significant asset, worth more than \$100 million or 5% of the asset base of the corporation, unless it is in accordance with a disposal order made by the Minister. Disposal orders will require the approval of both Houses of Parliament, giving the Western Power successor entities maximum protection from privatisation.

The Bill also places a requirement on the new entities to develop a job transfer policy. This policy provides for employment, training, exchange or secondment opportunities between the four new corporations and reflects the Government's desire that Western Power employees continue to have enhanced career prospects.

### **Transitional provisions and consequential amendments**

The Bill amends the *Electricity Corporation Act 1994* to repeal all provisions except those relating to access to Western Power's transmission and distribution systems. The Bill amends the name of the Act to the *Electricity Transmission and Distribution Systems (Access) Act 1994*. This Act will allow for the continuation of Western Power's obligations to provide third party access to its transmission and distribution capacity until such time as the Networks Corporation has its access arrangement approved by the Economic Regulation Authority under the *Electricity Networks Access Code 2004*, established following the passage of the *Electricity Industry Act 2004*.

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The Bill also provides for the making of a Transfer Order, by the Minister for Energy, specifying how the assets, rights and liabilities of Western Power are to be allocated to the four new corporations. The Transfer Order will give effect to the legal establishment of the new entities. The Bill also includes provision for unallocated assets or liabilities. This transfer order was modelled on the mechanism used to restructure the State Energy Commission of Western Australia and create Western Power and AlintaGas in 1994.

The Bill also safeguards the interests of Western Power employees as part of the restructure by ensuring that that the restructure will not affect an employee's remuneration, existing or accruing rights or interrupt continuity of service as well as requiring the new corporations to develop an employee transfer policy.

The Bill also makes consequential amendments to a number of other Acts to replace the term "Western Power Corporation" with reference to one or more of its successor entities.

## ELECTRICITY CORPORATIONS BILL 2005

### Part 1 - Preliminary

**Clause 1            Short title**

This clause formally titles the Bill.

**Clause 2            Commencement**

This clause states when the various Parts of the Bill come into effect. Various provisions need to come into effect at different times because the restructure of Western Power and creation of the successor entities will occur in several stages. Some provisions need to come into effect when the Bill receives Royal Assent as various powers are necessary to effect the restructure, specifically the transfer order mechanism contained in Part 9 of the Bill.

The remaining provisions come into effect upon proclamation. Proclamation is not to take place in respect of some provisions until the Minister for Energy is satisfied that the transfer order or transfer orders required under clause 145(1) (which provides for the transfer of Western Power's assets, rights, liabilities and legal proceedings to its successor entities) has or have been made.

**Clause 3            Terms used in this Act**

This clause defines the key terms used in the Bill. Most of the defined terms are the same as those contained within the *Electricity Corporation Act 1994*, although the definitions have been amended to refer to the successor Western Power entities.

New definitions of the successor Western Power entities ("Electricity Generation Corporation", "Electricity Networks Corporation", "Electricity Retail Corporation" and "Regional Power Corporation") and the terms "Economic Regulation Authority", "gas" and "South West interconnected system" have been included.

## **Part 2 - Electricity Corporations**

### **Division 1 - Establishment of corporations**

#### **Clause 4 Corporations established**

This is the clause which establishes the successor entities of Western Power. The clause establishes four bodies corporate being:

- (a) the Electricity Generation Corporation;
- (b) the Electricity Networks Corporation;
- (c) the Electricity Retail Corporation; and
- (d) the Regional Power Corporation.

Each of the successor Western Power entities has perpetual succession, and proceedings may be taken by or against each successor entity in its corporate name. These characteristics are equivalent to those of Western Power as set out in the existing section 4 of the *Electricity Corporation Act 1994*.

Subclause (3) sets out the parameters for the use of trading names by each successor entity. Trading names must be approved by the Minister. This subclause replicates the existing section 4(4) of the *Electricity Corporation Act 1994*.

#### **Clause 5 Corporations not agents of the State**

This clause essentially replicates the existing section 5 of the *Electricity Corporation Act 1994* and has been updated to refer to an agent of the "State" rather than the Crown.

This clause provides that the successor Western Power entities (established as corporations under clause 4) are not agents of the State.

This clause is in line with National Competition Principles relating to competitive neutrality.

#### **Clause 6 Corporations and officers not part of Public Service**

This clause essentially replicates the existing section 6 of the *Electricity Corporation Act 1994*.

This clause excludes the successor Western Power entities and their staff from the Public Service and the Senior Executive Service under the *Public Sector Management Act 1994*.

**Clause 7            Head office of Regional Power Corporation**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*.

This clause provides for the location of the head office of the Regional Power Corporation to be in a part of the State not served by the South West interconnected system.

**Division 2 - Boards of directors**

**Clause 8            Boards of directors**

This clause is similar to the existing section 7 of the *Electricity Corporation Act 1994*.

This clause prescribes that each successor Western Power entity is to have a board of at least four but not more than six directors, who are appointed by the Governor on the nomination of the Minister for Energy.

The CEO of a successor Western Power entity can be appointed as a director of the successor entity, but a member of staff cannot. Under the existing section 7 of the *Electricity Corporation Act 1994*, it is a mandatory requirement that the CEO be a director.

Subclause (4) sets out the procedure to be followed by the Minister in making nominations for directors. In making a nomination, the Minister must ensure that, except as set out in subclause (6), he or she first consults with the board and that, in the case of an appointment to the Regional Power Corporation, the nominee is a person ordinarily resident in a part of the State not served by the South West interconnected system so far as is necessary to ensure that a majority of the directors of that successor entity are ordinarily resident in a part of the State not served by the South West interconnected system.

Subclause (5) provides for recommendations for candidates to be made by the board to the Minister where there is a vacancy on the board.

Subclause (6) sets out the circumstances in which the Minister is not required to consult with the board before making a nomination. The Minister does not need to consult in respect of initial appointments or where the nominee has been recommended by the board.

**Clause 9            Role of boards**

This clause essentially replicates the existing section 8 of the *Electricity Corporation Act 1994* and is similar in effect to the standard empowering provision in respect of a board of directors contained in a public company's articles of association.

This clause provides that the board is the governing body of a successor Western Power entity and will be responsible for performing that successor entity's functions under the Bill (as set out in Part 3) and for determining its policies and controlling its affairs.

**Clause 10 Provisions about the constitution and proceedings of boards**

This clause replicates the existing section 9 of the *Electricity Corporation Act 1994*.

This clause refers to Schedule 1 of the Bill which sets out the constitution and proceedings of the boards of the successor Western Power entities.

**Clause 11 Remuneration**

This clause replicates the existing section 10 of the *Electricity Corporation Act 1994*.

This clause provides for the remuneration of non-executive directors of the successor Western Power entities to be determined by the Minister and resourced from that successor entity's funds.

Remuneration must not be paid to a non-executive director who holds a position that is remunerated out of moneys appropriated by Parliament.

**Clause 12 Conflict of duties**

This clause replicates the existing section 11 of the *Electricity Corporation Act 1994*.

This clause provides that if a public servant is also a director of a successor Western Power entity, then that person's duties as a director prevail over his or her duties as a public servant. This clause also excludes immunities of the State in respect of the performance by that person of his or her duties as a director.

**Clause 13 Committees**

The clause replicates the existing section 12 of the *Electricity Corporation Act 1994*.

This clause provides for the appointment, discharge, alteration and reconstitution of committees comprised of directors of a successor Western Power entity by its board. A committee can determine its own procedures, but must comply with any directions of the board. A committee can invite other persons to participate in committee meetings but such persons are not entitled to vote.

### **Division 3 - Staff**

#### Subdivision 1 – Chief Executive Officer

**Clause 14      Appointment**

The clause essentially replicates the existing section 13(1)-(3) and (6) of the *Electricity Corporation Act 1994*.

This clause provides that each successor Western Power entity is to have a CEO. The power to appoint and remove the CEO and to fix and alter the terms and conditions of his or her service are, except in the case of the initial CEO, vested in the board, subject to the board first obtaining the Minister's approval. The Minister will appoint the initial CEO of each successor entity.

This clause further requires that the CEO of the Regional Power Corporation must ordinarily reside in or near the location of the town in which the entity's head office is located for the duration of his or her term as CEO.

**Clause 15      Role of chief executive officer**

This clause replicates the existing section 14 of the *Electricity Corporation Act 1994*.

This clause sets out the responsibilities and powers of the CEO. The CEO is responsible for, and has the powers necessary to administer, the day to day operations of the successor Western Power entity. The CEO is subject to the control of the board in carrying out this role.

**Clause 16      Resignation**

This clause essentially replicates the existing section 13(4) of the *Electricity Corporation Act 1994*.

This clause provides for the resignation of the office of the CEO, provided that the resignation is consistent with the terms and conditions of service of the CEO.

**Clause 17      Acting appointments**

This clause essentially replicates the existing section 13(5) of the *Electricity Corporation Act 1994*.

This clause provides that the board is empowered to appoint an acting CEO during the period of any vacancy in the office of CEO and when the CEO is out of the State or unable to perform his or her duties.

Subdivision 2 – Other staff

**Clause 18 Powers in relation to staff**

This clause essentially replicates the existing section 15 of the *Electricity Corporation Act 1994*, subject to one exception.

This clause provides that the power to engage and manage staff is vested in the board. That power includes the power to remove, discipline, suspend and determine the remuneration and terms and conditions of service of staff members. The clause also sets out the minimum terms upon which the remuneration of staff members must be affixed. It also provides that nothing in the Bill, other than clause 19(2), affects the operation of Part VID of the *Industrial Relations Act 1979* (Employer-Employee Agreements).

**Clause 19 Certain industrial matters excluded from employment agreements**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included within the *Electricity Corporations Bill 2003*.

Subclause (1) excludes the operation of Part II Division 2B of the *Industrial Relations Act 1979* (which deals with industrial agreements) in respect of:

- matters dealt with by instrument under clause 21 (standards to be set out in instrument), except:
  - rates of remuneration;
  - leave;
  - hours of duty; and
  - matters that are similar to matters prescribed under section 99(1)(a)(iv) of the *Public Sector Management Act 1994*; and
- matters concerning the management of staff that are similar to the matters prescribed for the purposes of section 99(1)(c) of the *Public Sector Management Act 1994*.

Subclause (2) further provides that the matters referred to in subclause (1) cannot be varied by an employer-employee agreement made under Part VID of the *Industrial Relations Act 1979*.

**Clause 20 Designation of executive officers**

This clause replicates the existing section 18 of the *Electricity Corporation Act 1994*.

This clause provides for the designation of, and revocation of the designation of, members of staff as executive officers of a successor Western Power entity. Executive officers are to be designated by resolution passed by the board.

Subdivision 3 – Minimum standards for staff management

**Clause 21 Standards to be set out in instrument**

This clause replicates the existing section 16 of the *Electricity Corporation Act 1994*.

This clause provides that the board of a successor Western Power entity must, after consultation with the Commissioner for Public Sector Standards, set the minimum standards of merit, equity and probity applicable to the management of staff of that successor entity. In setting those minimum standards, the board must have regard to the relevant principles contained in section 8 of the *Public Sector Management Act 1994*.<sup>1</sup>

The requirement here is to have regard to those principles. The successor Western Power entities are not subject to or bound by the *Public Sector Management Act 1994*.

The Commissioner for Public Sector Standards has power to recommend changes to the minimum standards prepared by the board for the purposes of this clause, and the board may only amend or revoke those minimum standards after consultation with the Commissioner for Public Sector Standards.

**Clause 22 Reports to Commissioner for Public Sector Standards**

The clause replicates the existing section 17 of the *Electricity Corporation Act 1994*.

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<sup>1</sup> These principles include:

- all selection processes are to be directed towards and based on a proper assessment of merit and equity;
- no power with regard to human resource management is to be exercised on the basis of nepotism or patronage;
- employees are to be treated fairly and consistently and are not to be subjected to arbitrary or capricious administrative acts; and
- there is to be no unlawful discrimination against employees or persons seeking employment in the Public Sector on a ground referred to in the *Equal Opportunity Act 1984* or on any other ground.

This clause provides that the Commissioner for Public Sector Standards may at any time direct the board of a successor Western Power entity to prepare a report to him or her on the observance of minimum standards established under clause 21 (standards to be set out in instrument), and the board must comply with such a direction.

The Commissioner has the power to report to the Minister on the content or observance of the minimum standards in force. This clause enables the Commissioner to bring to the Minister's attention any deficiencies in minimum standards and any non-observance by the successor Western Power entity of the minimum standards prepared for the purpose of clause 21.

Subdivision 4 – Joint policy on staff transfers

**Clause 23 Corporations to have joint policy approved by Minister**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included within the *Electricity Corporations Bill 2003*.

The intent of the provision is to provide for staff career development in and between the new corporations.

This clause provides that the successor Western Power entities must have, and comply with, a joint policy on staff transfers between the successor entities and their subsidiaries that has been approved or determined by the Minister.

This clause specifies that the purpose of the joint policy is to ensure that members of staff of the successor Western Power entities and their subsidiaries can transfer between the successor entities and their subsidiaries without loss of entitlements:

- for temporary or permanent employment;
- on secondment or temporary deployment; or
- for training.

This clause further specifies the procedure for the drafting and approval of the joint policy. This procedure includes that the successor entities must jointly prepare a draft policy statement and submit it to the Minister within two months of the commencement of the section. The Minister may then approve or request amendments to the draft policy statement. If a policy statement has not been approved by the Minister within a reasonable period, then the Minister may determine the contents of the policy statement.

**Clause 24      Amendment of Policy Statement**

This clause specifies the procedure for amending, revoking and replacing policy statements.

**Clause 25      Consultation with Staff**

The successor entities must consult with their staff and the staff of their subsidiaries when preparing, amending or replacing a draft policy statement.

Subdivision 5 – General

**Clause 26      Superannuation**

This clause essentially replicates the existing section 19 of the *Electricity Corporation Act 1994*.

This clause allows a successor Western Power entity to establish, manage and make contributions to a superannuation fund, subject to section 30 of the *State Superannuation Act 2000* (which requires the Minister for Government Enterprises and the Treasurer to approve the establishment and management of the fund).

This clause also preserves the operation of the *State Superannuation Act 2000* in respect of a successor Western Power entity and its staff.

**Division 4 - Duties of, and relating to, directors and staff**

**Clause 27      Duties of, and relating to, directors**

This clause replicates the existing section 20 of the *Electricity Corporation Act 1994*.

The duties of the directors and of a successor Western Power entity in respect of directors and related persons are set out in Schedule 2 to the Bill (provisions about the duties of directors and related provisions).

**Clause 28      Chief executive officer, duties imposed**

This clause replicates the existing section 21 of the *Electricity Corporation Act 1994*.

Subclause (1) provides that clauses 2 - 11, 15 and 16 of Schedule 2 apply to the chief executive officer of a successor Western Power entity. These clauses are expressed to apply in addition to any application that they may already have to a chief executive officer in the capacity of director of a successor entity, if he or she is also a director of that successor entity.

Subclause (2) provides that clauses 4 and 7 – 11 of Schedule 2 apply to a former chief executive officer in his or her capacity as such, in addition to any application they may have if the former chief executive officer of a successor Western Power entity was also a director of that successor entity.

Subclause (3) provides that this clause and clause 27 do not operate to make a chief executive officer or former chief executive officer liable to be punished twice for the same action.

**Clause 29            Executive officers, duties imposed**

This clause replicates the existing section 22 of the *Electricity Corporation Act 1994*.

Subclause (1) provides for the application of clauses 2 – 5, 7 – 11, 15 and 16 of Schedule 2 to an executive officer as if the references to a director in those clauses were replaced with references to an executive officer.

Subclause (2) provides for the application of clauses 4 and 7 – 11 of Schedule 2 to a former executive officer as if references to a former director in those clauses were replaced with references to a former executive officer.

**Clause 30            Members of staff, duties imposed**

This clause replicates the existing section 23 of the *Electricity Corporation Act 1994*.

Subclause (1) extends the application of clauses 4, 5 and 7 – 11 of Schedule 2 to staff engaged under clause 18, other than executive officers. The subclause provides that references to a director in the relevant clauses of Schedule 2 are to be taken to be references to a person engaged under clause 18 of the Bill.

Subclause (2) extends the application of clauses 4 and 7 – 11 of Schedule 2 to staff formerly engaged under clause 18, other than executive officers. The subclause provides that references to a former director in the relevant clauses of Schedule 2 are to be taken to be references to a person formerly engaged under clause 18.

**Clause 31            Codes of conduct**

This clause essentially replicates the existing section 24 of the *Electricity Corporation Act 1994*.

This clause provides that the board of a successor Western Power entity must, after consultation with the Commissioner for Public Sector Standards, prepare and issue codes of conduct setting out the minimum standards of conduct and integrity to be observed by members of staff of that successor entity. When preparing these

minimum standards, the board must have regard to the principles set out in section 9 of the *Public Sector Management Act 1994*.<sup>2</sup>

Once the minimum standards have been issued a board can only amend, revoke or substitute a code of conduct after consultation with the Commissioner.

**Clause 32      Reports to Commissioner for Public Sector Standards**

This clause replicates the existing section 25 of the *Electricity Corporation Act 1994*.

This clause empowers the Commissioner for Public Sector Standards to require the board of a successor Western Power entity to report to him or her on the observance by the successor entity's staff of any code of conduct in force and to provide reports not more often half yearly to the Commissioner. The Commissioner may then report to the Minister on this issue.

**Clause 33      Reports to Minister**

This clause replicates the existing section 26 of the *Electricity Corporation Act 1994*.

This clause is an accountability mechanism. It provides that the board of a successor Western Power entity must deliver a separate report to the Minister on the observance by staff of any code of conduct at the time it delivers to the Minister its annual report. A copy of all such reports must be made available to the Commissioner for Public Sector Standards.

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<sup>2</sup> These principles include:

- acting with integrity in the performance of official duties;
- being scrupulous in the use of official information, equipment and facilities; and
- exercising proper courtesy, consideration and sensitivity in dealings with the public and employees.

## **Part 3 - Functions and powers of corporations**

### **Division 1 - Functions, powers and related provisions**

#### Subdivision 1 - Preliminary

#### **Clause 34 Terms used in this Division**

Subclause (1) defines the terms “acquire”, “ancillary services”, “renewable sources” and “telecommunication services” for the purposes of this Division.

Subclause (2) specifies a limitation of the performance of prescribed functions of the Electricity Generation Corporation, the Electricity Networks Corporation and the Electricity Retail Corporation to the South West interconnected system.

#### Subdivision 2 – Electricity Generation Corporation

#### **Clause 35 Principal functions**

This clause resembles section 28 of the *Electricity Corporation Act 1994*. However, unlike section 28 which specifies all functions of Western Power, this clause only includes those functions applicable to the Electricity Generation Corporation, namely:

- a) to generate, purchase or otherwise acquire, and supply electricity;
- b) to acquire, transport and supply gas and steam;
- c) to provide ancillary services;
- d) by agreement with the Regional Power Corporation, (i) to provide consultative services and advisory services to that corporation in relation to electricity generation, and (ii) to operate and maintain any electricity generation plant or equipment on behalf of that corporation;
- e) to undertake, maintain and operate any works, system, facilities, apparatus or equipment required for any purpose mentioned in this clause.

#### **Clause 36 Other functions**

This is a new clause that is generally consistent with section 28(1) and (2) of the *Electricity Corporation Act 1994*.

This clause sets out the other functions of the Electricity Generation Corporation, namely:

- a) in addition to its functions under clause 35(d)(i), to use its expertise and resources to provide consultative, advisory or other services for profit;
- b) to develop and turn to account any technology, software or other intellectual property that relates to a function under clause 35;
- c) to manufacture and market any product that relates to a function under clause 35 or paragraph (b);
- d) to use or exploit for profit the fixed assets it has for the purpose of performing a function under clause 35 so long as the proper performance of the function is not affected;
- e) to do anything that the corporation determines to be conducive or incidental to the performance of a function under clause 35 or this clause; or
- f) to do anything that it is authorised to do by any other written law.

**Clause 37                      Restriction on area in which corporation may operate**

This clause restricts the performance of the Electricity Generation Corporation's functions within Western Australia to the South West interconnected system, except in the case of generation and supply of electricity from renewable sources or the purchase or other acquisition and supply of electricity so generated.

The clause further provides that the limitation does not apply to the performance of the Electricity Generation Corporation's function under subparagraph (ii) of clause 35(d) (principles functions), which relates to the operation and maintenance of electricity and generation plant by the Electricity Generation Corporation of behalf of the Regional Power Corporation. Subclause (3) however precludes the Electricity Generation Corporation from owning or controlling any electricity generation plant or equipment on behalf of the Regional Power Corporation.

**Clause 38                      Restriction on sale of electricity to consumers**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was contained within the *Electricity Corporations Bill 2003*.

Subclause (1) provides that the Electricity Generation Corporation must not supply electricity under clause 35(a) (principles functions) to a person for the person's own consumption until the expiry of the designated period.

Subclause (2) provides that the designated period is 7 years after the commencement of this clause, or 10 years if an order is made under clause 40 (extension of designated period).

The clause further provides that the Minister may authorise the Electricity Generation Corporation to supply electricity to specified customers or any specified class of customers during the designated period by order published in the Government Gazette. The Minister may also amend or revoke any such order.

**Clause 39      Review of restriction**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was contained within the *Electricity Corporations Bill 2003*.

This clause provides that the Minister must review the operation of clause 38(1) (restriction on sale of electricity to consumers) within 5 years of the commencement of that clause to determine the effect the limitation has had, and is likely to have, on the encouragement of competition in the generation, retail and wholesale electricity markets.

The clause further provides that the Minister must obtain and take into account the views of the Economic Regulation Authority before carrying out the review.

**Clause 40      Extension of designated period**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was contained within the *Electricity Corporations Bill 2003*.

This clause provides that the Minister may, by order, declare that the designated period (referred to in clause 38 - restriction on sale of electricity to consumers) may be extended to 10 years after completion of the clause 39 review and before the expiry of the 7 year designated period.

The clause further provides that sections 41 and 42 of the *Interpretation Act 1984* apply to an order made under this clause as if it were a regulation. This requires the order to be published in the Gazette and laid before both Houses of Parliament.

Subdivision 3 – Electricity Networks Corporation

**Clause 41      Principal functions**

This clause resembles section 28 of the *Electricity Corporation Act 1994*. However, unlike section 28 which specifies all functions of Western Power, this clause only includes those functions applicable to the Electricity Networks Corporation.

This clause sets out the functions of the Electricity Networks Corporation, namely:

- a) to manage, develop, expand, enhance and reinforce electricity transmission and distribution system and provide electricity transmission and distribution services;
- b) to do anything that it is authorised or required to do by Part 8 of the *Electricity Industry Act 2004* (which relates to network access) and regulations and Code made under that Part. This is necessary to ensure there is consistency of Network's functions under the Bill and Network's rights and obligations under Part 8 of the *Electricity Industry Act 2004*;
- c) to do anything that it is authorised or required to do by Part 9 of the *Electricity Industry Act 2004* (which relates to the wholesale market) and regulations and market rules made under that Part. This is necessary to ensure there is consistency of Network's functions under the Bill and Network's wholesale electricity market rights and obligations under Part 9 of the *Electricity Industry Act 2004*;
- d) to provide ancillary services;
- e) by agreement with the Regional Power Corporation, to operate and maintain electricity transmission and distribution systems on behalf of that corporation;
- f) by agreement with the Electricity Generation Corporation, the Electricity Retail Corporation and the Regional Power Corporation, to provide procurement, commercial and financial services to those corporations;
- g) to provide telecommunication services; and
- h) to undertake, maintain and operate any works, system, facilities, apparatus or equipment required for any purpose mentioned in this clause.

**Clause 42      Other functions**

This is a new clause that is generally consistent with section 28(1) and (2) of the *Electricity Corporation Act 1994*.

This clause sets out the other functions of the Electricity Networks Corporation, namely:

- a) in addition to the functions in clause 41(e) and (f) (principal functions), to use its expertise and resources, other than those relating to the functions referred to in clause 41(a), to provide consultative, advisory and other services for profit;

- b) to develop and turn to account any technology, software or other intellectual property that relates to a function under clause 41, other than a function referred to in paragraphs (b) or (c);
- c) to manufacture and market any product that relates to a function (i) under clause 41, other than a function referred to in paragraph (b) or (c), or (ii) under paragraph (b) of this clause;
- d) to use or exploit for profit the fixed assets it has for the purpose of performing a function under clause 41, other than a function referred to in paragraph (b) or (c), so long as the proper performance of the function is not affected;
- e) to do anything that the corporation determines to be conducive or incidental to the performance of a function under clause 41 or this clause; or
- f) to do anything that it is authorised to do by any other written law.

**Clause 43                    Restriction on area in which corporation may operate**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was contained within the *Electricity Corporations Bill 2003*.

This clause provides that the performance of the Networks Corporation's functions under clause 41 (principal functions) are limited within Western Australia to the South West interconnected system, unless the performance relates to the Networks Corporation's function under clause 41(e) and (f) to operate and maintain electricity transmission and distribution systems on behalf of the Regional Power Corporation or to provide procurement, commercial and financial services to the Generation Corporation, Retail Corporation or Regional Power Corporation.

The clause further provides that the functions under clause 41(e) or (h) do not authorise the corporation to own or control any electricity transmission or distribution system.

Subdivision 4 – Electricity Retail Corporation

**Clause 44                    Principal functions**

This clause resembles section 28 of the *Electricity Corporation Act 1994*. However, unlike section 28 which specifies all functions of Western Power, this clause only includes those functions applicable to the Electricity Retail Corporation.

This clause sets out the functions of the Electricity Retail Corporation, namely:

- a) to supply electricity to consumers;
- b) to purchase or otherwise acquire electricity for the purposes of paragraph (a);
- c) to generate electricity, but only after the expiry of the designated period under clause 47 (prohibition on generation of electricity for a designated period);
- d) to provide ancillary services;
- e) by agreement with the Regional Power Corporation, to provide retail support services to that corporation;
- f) to acquire gas and supply it to consumers;
- g) to provide telecommunication services;
- h) to undertake, maintain and operate any works, system, facilities, apparatus, or equipment required for any purpose mentioned in paragraph (a), (c), (e) or (g).

**Clause 45      Other functions**

This is a new clause that is generally consistent with section 28(1) and (2) of the *Electricity Corporation Act 1994*.

This clause sets out the other functions of the Electricity Retail Corporation, namely:

- a) in addition to its functions under clause 44(e) (principal functions), to use its expertise and resources to provide consultative, advisory or other services for profit;
- b) to develop and turn to account any technology, software or other intellectual property that relates to a function under clause 44;
- c) to manufacture and market any product that relates to a function under clause 44 or paragraph (b);
- d) to use or exploit for profit the fixed assets it has for the purpose of performing a function under clause 44 so long as the proper performance of the function is not affected;
- e) to do anything that the corporation determines to be conducive or incidental to the performance of a function under clause 44 or this clause; or
- f) to do anything that it is authorised to do by any other written law.

**Clause 46            Restriction on area in which corporation may operate**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included within the *Electricity Corporations Bill 2003*.

This clause provides that the performance of the Retail Corporation's functions under clause 44 are limited within Western Australia to the South West interconnected system, unless the performance relates to the Retail Corporation's function under clause 44(e) to provide retail support services to the Regional Power Corporation.

**Clause 47            Prohibition on generation of electricity for a designated period**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included within the *Electricity Corporations Bill 2003*.

This clause provides that the Retail Corporation must not generate electricity until after the expiry of the designated period. The designated period is 7 years after the commencement of this clause, or 10 years if an order is made under clause 49 (extension of designated period).

**Clause 48            Review of prohibition**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was contained within the *Electricity Corporations Bill 2003*.

This clause provides that the Minister must review the operation of clause 47 (prohibition on generation for a designated period) within 5 years of the commencement of that clause to determine the effect the limitation has had, and is likely to have, on the encouragement of competition in the generation, retail and wholesale electricity markets.

The clause further provides that the Minister must obtain and take into account the views of the Economic Regulation Authority before carrying out the review.

**Clause 49            Extension of designated period**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was contained within the *Electricity Corporations Bill 2003*.

This clause provides that the Minister may, by order, declare that the designated period (referred to in clause 47 - restriction on generation for a designated period) may be extended to 10 years after completion of the clause 48 review and before the expiry of the 7 year designated period.

The clause further provides that sections 41 and 42 of the *Interpretation Act 1984* apply to an order under this clause as if it were a regulation. The effect of these provisions has been described in relation to clause 40 (extension of a designated period).

Subdivision 5 – Regional Power Corporation

**Clause 50**      **Principal functions**

This clause resembles section 28 of the *Electricity Corporation Act 1994*. However, unlike section 28 which specifies all functions of Western Power, this clause only includes those functions that relate to the Regional Power Corporation.

This clause sets out the functions of the Regional Power Corporation, namely:

- a) to generate, purchase or otherwise acquire electricity;
- b) to manage, develop, expand, enhance and reinforce electricity transmission and distribution systems and to provide electricity transmission and distribution services;
- c) to supply electricity to consumers;
- d) to acquire, transport and supply gas and steam;
- e) to provide ancillary services;
- f) by agreement with the Electricity Generation Corporation, to operate and maintain any electricity generation plant or equipment on behalf of that corporation;
- g) to provide telecommunication services; and
- h) to undertake, maintain and operate any works, system, facilities, apparatus or equipment required for any purpose mentioned in this clause.

**Clause 51**      **Other functions**

This is a new clause that is generally consistent with section 28(1) and (2) of the *Electricity Corporation Act 1994*.

This clause sets out the other functions of the Regional Power Corporation, namely:

- a) to use its expertise and resources to provide consultative, advisory or other services for profit;

- b) to develop and turn to account any technology, software or other intellectual property, that relates to a function under clause 50 (principal functions);
- c) to manufacture and market any product that relates to a function under clause 50 or paragraph (b);
- d) to use or exploit for profit the fixed assets it has for the purpose of performing a function under clause 50 so long as the proper performance of the function is not affected;
- e) to do anything that the corporation determines to be conducive or incidental to the performance of a function under clause 50 or this clause; or
- f) to do anything that it is authorised to do by any other written law.

**Clause 52      Restriction on area in which corporation may operate**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included within the *Electricity Corporations Bill 2003*.

This clause provides that performance of the Regional Power Corporation's electricity functions within Western Australia is limited to electricity systems that are not served by the South West interconnected system, with the exception of providing services to the Electricity Generation Corporation. The performance of functions relating to supplying gas or steam or providing telecommunication services are limited to the same area.

Subdivision 6 – Special function in respect of certain assets and liabilities

**Clause 53      Administration under delegated power**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*.

This clause allows powers or duties in respect of matters that are retained by the State (rather than allocated to a successor Western Power entity, such as a particular contract or property), to be delegated to a successor Western Power entity who must exercise them on behalf of the Minister.

Subclause (1) defines for the purpose of the clause those assets and liabilities that were not allocated to one or more successor Western Power entities pursuant to a transfer order made under this Bill and which are to be dealt with as the Minister directs pursuant to clause 167 (unallocated assets and liabilities to be dealt with by the Minister).

Subclause (2) empowers regulations to be made:

- declaring any, or a group of, specified unallocated assets or liabilities to be an asset or liability or group to which this clause applies (defined as "declared matters" for the purposes of this clause); and
- designating a successor Western Power entity to act in respect of those declared matters.

If such regulations are in force, then the Minister is empowered to delegate his or her powers and duties under clause 164 (order for replacement) to the relevant successor entity and that successor entity must perform the delegated powers and duties (on its own account or through an officer or agent). The performance of a delegated power or duty is deemed to be done in accordance with the delegation, unless the contrary is shown.

This clause further provides that regulations may prescribe provisions of this Bill that do not apply, or have modified application, to the declared matters or to the exercise of powers and duties under this clause.

Subdivision 7 – Provisions applying to functions of all corporations

**Clause 54      Corporations may act at their discretion**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included within the *Electricity Corporations Bill 2003*.

This clause gives a successor Western Power entity the discretion as to how and when it performs its functions, subject to the Bill and any direction given by the Minister under the Bill.

**Clause 55      Where corporation may operate**

This clause essentially replicates the existing section 28(3) of the *Electricity Corporation Act 1994*.

This clause prescribes the locations where a successor Western Power entity may operate. Successor entities are entitled to act outside the State and, except as provided in Division 1 of Part 3 of the Bill (which limits certain activities of certain of the successor Western Power entities to the South West interconnected system or to areas outside the South West interconnected system), in any area of the State.

**Clause 56      Corporation to act in accordance with policy instruments**

The clause replicates the existing section 29 of the *Electricity Corporation Act 1994*.

This clause provides that a successor Western Power entity must act in accordance with its strategic development plan and its statement of corporate intent.

**Clause 57 Powers**

This clause is equivalent to the existing section 30 in the *Electricity Corporation Act 1994*

This clause sets out the general powers of each of the successor entities to Western Power. A successor entity has all the powers it needs to perform its functions under the Bill or any other written law. Subclause (3) provides a non-exhaustive list of powers which may be exercised by a successor entity in the performance of its functions. These include the power to:

- acquire, develop, manage and dispose of real and personal property;
- enter into contracts;
- establish and operate systems for the recovery, processing and transport of fuel or energy;
- participate in business arrangements, including by holding shares;
- carry out exploration, investigation and research;
- exploit intellectual property; and
- promote and market the successor entity and its activities.

The successor entity is also empowered to make charitable gifts for the benefit of the community and ex gratia payments. A successor entity may also accept absolute gifts, or conditional gifts provided that the conditions attached to such gifts are within the functions of the successor entity.

The powers of the successor entity are subject to any limitations imposed by the *Energy Operators (Powers) Act 1979*.

**Clause 58 Certain works exempt from planning laws**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included within the *Electricity Corporations Bill 2003*.

This clause applies to works carried out by the Electricity Networks Corporation or the Regional Power Corporation to extend, expand or enhance an electricity transmission or distribution system.

This clause provides that the Electricity Networks Corporation and the Regional Power Corporation are not required to comply with an interim development order or a town planning scheme under the *Town Planning and Development Act 1928* in carrying out the works described above. However, the Electricity Networks Corporation and the Regional Power Corporation are required to carry out the works, so far as is reasonably practicable, consistently with the order or scheme and must consult with the responsible authority to ensure such consistency.

**Clause 59 Corporation to act on commercial principles**

This clause is similar to the existing section 31 of the *Electricity Corporation Act 1994*.

This clause provides that in performing its functions, a successor Western Power entity must act in accordance with prudent commercial principles and endeavour to make a profit.

Profit making endeavours must be consistent with maximising the long term value of the successor entity.

The performance of the functions set out in clause 41(c) (which relates to the wholesale electricity market) by the Electricity Networks Corporation is specifically excluded from the operation of this requirement. When performing those functions, the Electricity Networks Corporation must ensure that the reasonable costs of performing the function do not exceed its revenue from doing so.

The System Management business unit of the Electricity Networks Corporation will be required to carry out its functions in the interests of all market participants and effective market operation under the guidance of a set of market rules, endeavouring to ensure that revenue at least meets full operating costs.

**Clause 60 Segregation of functions of corporations**

This clause is equivalent to section 31A of the *Electricity Corporation Act 1994*.

This clause provides for the making of regulations which:

- prescribe segments into which functions or operations of a successor Western Power entity are to be divided; and
- provide for, and in relation to:
  - the segregation of any segment so prescribed from the other functions of a successor entity; or
  - the segregation from a successor entity of any subsidiary of the successor entity that has functions of a specified kind.

Any regulations which are made under this clause may provide for:

- the keeping of accounts and records;
- financial reporting;
- apportionment of income, expenditure and liabilities;
- protection of information;
- conduct of officers of a successor entity; and
- controls and procedures, and the conferral of functions on a specified person, which are necessary to ensure that the segregation is effective.

This clause is intended to allow sufficient flexibility in the Bill to enable the maintenance of separate accounting systems for a number of functions to be performed by the successor Western Power entities. It is envisaged that regulations will be made providing for accounting separation of the Electricity Networks Corporation's two business units, being Network Management and System Management, with auditable service agreements for services shared or delivered between the two business units.

It is also proposed that separate accounts will be kept in respect of the Electricity Retail Corporation's tariff customer activities and contract customer activities to minimise the potential for cross subsidisation between these activities. Regulations may also be made providing for accounting separation of the Regional Power Corporation's two business units, being activities in the North West interconnected system and the 29 isolated systems

#### **Clause 61                    Interruption or restriction of supply**

This clause essentially replicates the existing section 32 of the *Electricity Corporation Act 1994*.

Subclause (1) empowers a successor Western Power entity to interrupt, suspend or restrict the generation, transport or supply of electricity if it considers it necessary to do so because of an accident, emergency, danger or some other unavoidable cause. However, subclause (2) states that subclause (1) does not apply if section 31(1) of the *Electricity Industry Act 2004* (which permits a holder of a generation, transmission, distribution, retail or integrated regional licence to vary or interrupt the supply of electricity in specified circumstances) applies to the activity that is being interrupted, suspended or restricted.

The successor entity will only be liable for resultant loss or damage where an agreement to which the successor entity is a party provides for such liability.

The clause is expressed to operate in addition to and without limitation of section 48 (rights as to entry on lands, etc, in emergency), section 57 (supply system emergencies) and section 58 (energy operator may not be bound to supply) of the *Energy Operators (Powers) Act 1979* and regulations made under section 124 of the *Electricity Industry Act 2004*. Further, this clause is expressed to have effect despite Schedules 5 and 6 of the *Electricity Transmission and Distribution Systems (Access) Act 1994* (which impose obligations to provide access to electricity transmission and distribution capacity).

**Clause 62      Acquisition of subsidiary**

This clause is similar to the existing section 33(1) of the *Electricity Corporation Act 1994*, subject to one exception.

This clause provides that the approval of both the Minister and the Treasurer must be obtained before a successor Western Power entity forms or acquires a subsidiary. The term subsidiary is defined in clause 3 of the Bill. In broad terms it includes:

- a subsidiary for the purposes of the *Corporations Act 2001 (Cth)*; and
- a unit trust, joint venture or partnership in which the successor entity has a controlling interest.

**Clause 63      Control of subsidiary**

This clause is similar to the existing section 33(2)–(4) of the *Electricity Corporation Act 1994*.

Subclause (1) sets out the requirements which a successor Western Power entity must ensure are contained in the constitution of a subsidiary which is required under the *Corporations Act 2001 (Cth)* or any other written law to have a constitution. The requirements include those specified in Schedule 3 to the Bill.

Subclause (2) imposes a responsibility on a successor entity to ensure (to the maximum extent practicable) that a subsidiary complies with its constitution and the Bill. The Bill is to prevail in the event of any inconsistency between the two.

The provisions allowing for a director, chief executive officer or member of staff to become a member of the committee of a subsidiary incorporated association or a director of a subsidiary company are new to the Bill.

**Clause 64      Corporations Act, effect of section 63**

This is a new clause in that there is no equivalent or similar provision in the current *Electricity Corporation Act 1994*, but was included in the *Electricity Corporations Bill 2003*.

Subclause (1) provides that nothing in clause 63 (control of subsidiary) of the Bill is to be taken to make a successor Western Power entity or the Minister a director of a subsidiary for the purposes of the *Corporations Act 2001 (Cth)*.

Subclause (2) declares clause 63, 64(1) and Schedule 3 of the Bill to be "Corporations legislation displacement provisions" for the purpose of section 5G of the *Corporations Act 2001 (Cth)*, thereby allowing the constitution of a subsidiary to include the required provisions, even if the procedures and requirements of the *Corporations Act 2001 (Cth)* are not complied with in relation to those provisions.

**Clause 65 Disposals that require a Ministerial order**

This clause is a new clause in that there is no equivalent provision in the *Electricity Corporation Act 1994*.

The provision prevents the disposal of significant parts of a successor Western Power Corporation's assets without the effective approval of both Houses of Parliament.

Subclause (1) defines the terms "dispose of" and "significant asset" for the purposes of this clause. "Dispose of" is defined as entering into any arrangement (or series of arrangements) that results in a successor Western Power entity ceasing to have at least 75% of the beneficial interest in a significant asset. "Significant asset" is defined as property that has a value that is more than the greater of:

- 5% of the written down value of the relevant successor entity's consolidated fixed assets; and
- \$100 million.

This clause prohibits a successor Western Power entity from disposing of a significant asset except under a disposal order made by the Minister, which disposal order may be conditional or may prescribe a process to effect the disposal.

The clause provides for the application of sections 41, 42, 43 and 44 of the *Interpretation Act 1984* to a disposal order as if it were a regulation. This means that the disposal order:

- must be published in the Gazette and will come into effect on the day upon which it is so published;
- must be laid before Parliament within 6 sitting days following publications and is subject to disallowance; and
- can be amended or repealed.

**Clause 66            Other transactions that require Ministerial approval**

This clause essentially replicates the existing section 34 of the *Electricity Corporation Act 1994*.

This clause provides that a successor Western Power entity must obtain the approval of the Minister before it, or a subsidiary, enters into any transaction (except for disposals under clause 65 which require a Ministerial order, and transactions under clause 125 or 127 of the Bill, which relate to borrowing and hedging transactions) where the successor entity's liability (being the amount of consideration or the amount to be paid or received by the successor entity or a subsidiary) exceeds the prescribed amount. The clause sets the prescribed amount as being the greater of an amount equal to 1% of the written down value of the fixed assets and investments of the successor entity or the sum of \$20 million.

The term "transaction" is defined in the clause to include any contract or arrangement.

**Clause 67            Exemptions from section 66**

The clause essentially replicates the existing section 35 of the *Electricity Corporation Act 1994*.

This clause provides for the making of orders by the Minister to exempt a particular transaction or class of transaction from the operation of the Ministerial approval requirement contained in clause 66 (other transactions that require Ministerial approval).

Any exemption granted under this clause must be laid before each House of Parliament or dealt with in accordance with clause 132 (supplementary provision for laying document before Parliament).

**Clause 68            Minister to be consulted on major initiatives**

The clause essentially replicates the existing section 36 of the *Electricity Corporation Act 1994*.

This clause requires a successor Western Power entity to consult with the Minister before it commences a major initiative or a course of action that is likely to be of significant public interest. The requirement to consult on matters of significant public interest is not limited to a transaction falling within clause 66 (other transactions that require Ministerial approval).

**Clause 69            Delegation**

This clause essentially replicates the existing section 37 of the *Electricity Corporation Act 1994*.

This clause sets out a successor Western Power entity's power of delegation and provides that a successor entity may delegate any power or duty of the successor entity under the Bill or any other written law to a director, the chief executive officer, a staff member, a committee established under clause 13 (committees) or any other person. The clause also sets out the formalities for the instrument of delegation, and specifically preserves the successor entity's ability to perform functions through officers and agents.

## **Division 2 - Role of Economic Regulation Authority**

This Division is a new Division in that there is no equivalent Division in the *Electricity Corporation Act 1994*.

### **Clause 70      Advisory function**

This clause provides that it is a function of the Economic Regulation Authority to give advice to the Minister under clauses 39(3)<sup>3</sup> and 48(3)<sup>4</sup> as to the effect that these generation and sale limitations have had or are likely to have on the encouragement of competition in the generation, retail and wholesale electricity markets.

### **Clause 71      Public consultation**

This clause requires the Authority to seek public comment before giving advice on a matter under clause 70 (i.e. electricity generation and sale limitations). The Authority must publish a notice in a State newspaper seeking public submissions on the matter. The Authority must have regard to the public submissions received in accordance with the notice.

### **Clause 72      Advice to be published**

This clause requires the Authority to publish any advice given under clause 70 (advisory function) in a State newspaper or on its website.

## **Division 3 - Arrangements authorised or approved by Governor**

### **Clause 73      Governor may make certain regulations**

This clause essentially replicates the existing section 38 of the *Electricity Corporation Act 1994*.

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<sup>3</sup> Advising the Minister on the operation of the temporary restriction on the Electricity Generation Corporation from selling electricity to consumers.

<sup>4</sup> Advising the Minister on the operation of the temporary restriction on the Electricity Retail Corporation from generating electricity.

This clause provides for the making of regulations which authorise or approve any arrangement, act, matter or thing in relation to a successor Western Power entity for the purposes of the *Trade Practices Act 1974 (Cth)* and the Competition Code. The regulations may authorise or approve:

- any arrangement relating to a successor Western Power entity or a subsidiary or the performance of the functions of a successor Western Power entity or a subsidiary;
- any act or thing proposed to be done (or omitted to be done) in the State by a successor Western Power entity or a subsidiary in the performance of its functions; or
- any other matter or thing necessary or convenient to give effect to the authorisation or approval.

The term “arrangement” is defined in the clause to include any contract, arrangement or understanding or any market practice or market or customer restriction, division, allocation or segregation of any kind or a course of conduct or dealing.

This clause is intended to ensure that the specified arrangements, acts, matters or things in relation to the successor entities constitute an exemption to the restrictive trade practices provisions of the *Trade Practices Act* in accordance with section 51 of the *Trade Practices Act*.

#### **Division 4 - Protection of persons dealing with a corporation**

##### **Clause 74      Person dealing with corporation may make assumptions**

This clause essentially replicates the existing section 39 of the *Electricity Corporation Act 1994*.

This clause sets out the assumptions which a person dealing with a successor Western Power entity is entitled to make. The assumptions are set out in clause 76 (assumptions that may be made). The clause also provides that in any proceedings in relation to the dealings, the successor entities cannot assert that the matters which the person was entitled to assume are incorrect.

##### **Clause 75      Third party may make assumptions**

This clause replicates the existing section 40 of the *Electricity Corporation Act 1994*.

This clause provides that a third party having dealings with a person who has, or purports to have, acquired title to property from a successor Western Power entity is entitled to make the assumptions set out in clause 76 (assumptions that may be made).

In any proceedings in relation to those dealings, the successor entity concerned or the second party concerned is not entitled to assert that the matters which the third party was entitled to assume are incorrect.

**Clause 76 Assumptions that may be made**

This clause replicates the existing section 41 of the *Electricity Corporation Act 1994*.

This clause sets out the assumptions that a person referred to in clauses 74 (person dealing with corporation may make assumptions) or 75 (third party may make assumptions) is entitled to make. Persons are entitled to assume that:

- the Bill has been complied with at all relevant times;
- that a person held out to be a director, CEO, member of staff or agent has been properly appointed and has authority to perform the function;
- that a document properly issued is a genuine document; and
- that the directors, CEO, staff and agents have properly performed their duties to the successor Western Power entity.

The clause also sets out the assumptions which may be made with respect to the execution of documents by the successor entity.

These assumptions are similar to those provided for in the *Corporations Act 2001 (Cth)* for the benefit of a person having dealings with a company incorporated in law.

**Clause 77 Exception to sections 74 and 75**

This clause essentially replicates the existing section 42 of the *Electricity Corporation Act 1994*.

This clause provides that a person is not entitled to make any of the assumptions set out in clause 76 (assumptions that may be made) if the person has actual knowledge or ought to have known that the matters referred to in clause 76 would be incorrect.

The exemption is also similar to the exemption contained in the *Corporations Act 2001 (Cth)* for persons who have dealings with companies.

## **Part 4 - Operations of corporations, imposition of requirements**

This Part is new in that there are generally no equivalent provisions in the current *Electricity Corporation Act 1994*.

It is intended that at the time of restructure various essential contractual relations will come into force between the successor Western Power entities. For example a vesting contract (to commit electricity for supply to tariff customers) and an initial contract (to provide for electricity supply to tariff customers) will be established between the Electricity Generation Corporation and the Electricity Retail Corporation.

The purpose of these initial arrangements is to manage the Electricity Generation Corporation's ability to exercise market power over a substantial proportion of its generation output. The vesting contract is also intended to ensure that the Electricity Retail Corporation has access to a stable contracted generation supply to support customers on uniform tariffs that cannot or chose not to switch electricity suppliers. It is intended that the Minister for Energy will approve the terms and conditions of the vesting contract and the initial contract pursuant to orders made under this Part of the Bill.

This Part also gives effect to the intention that the Electricity Generation Corporation's obligations under the vesting contract are to end when the Minister for Energy determines that the Western Australian electricity market is sufficiently competitive, based upon advice from the Economic Regulation Authority.

Other such contracts will deal with, for example, access by the other corporations to Electricity Networks Corporation's electricity transmission and distributions networks, and the supply of gas by Electricity Generation Corporation to Electricity Retail Corporation.

### **Clause 78      Meaning of terms used in this Part**

This clause defines the terms "corporation", "prescribed contract" and "specified" for the purposes of this Part of the Bill.

### **Clause 79      Object of this Part**

This clause specifies that the purpose of the Part is to confer on the Minister power to determine arrangements between the successor Western Power entities in order to:

- encourage competition in the generation, wholesaling and retailing of electricity; and
- establish the terms and conditions of the initial arrangements between the successor entities.

**Clause 80**      **Minister may prescribe contracts**

This clause empowers the Minister to make orders which prescribe provisions that are to have effect as a contract (defined as a "prescribed contract" for the purposes of the Part) between all or some of the successor Western Power entities. The Minister must serve a copy of an order on each relevant successor Western Power entity.

This is the clause under which the vesting contract, the initial contract and the other contracts necessary to establish the initial arrangements between successor entities, will be prescribed.

**Clause 81**      **Matters that may be provided for**

This clause describes the matters that may be provided for in a prescribed contract (as defined in clause 78). These matters may include:

- any matters that the Minister believes are necessary or expedient to achieve the object of this Part as specified in clause 79 of the Bill;
- a specified amount of electricity to be supplied by one successor Western Power entity to another successor Western Power entity for a specified purpose and the prices or price limits for that supply;
- rights, obligations of, and arrangements between, the successor Western Power entities; and
- any incidental or supplementary provision that the Minister considers necessary or expedient to include.

**Clause 82**      **Amendment and cancellation**

This clause empowers the Minister to vary, add to, cancel and replace a prescribed contract (as defined in clause 78). The clause requires the Minister to cancel contracts which are created to encourage the development of competition in the generation, wholesaling and retailing of electricity when he or she considers that the State electricity market is operating in an open and competitive manner. The Minister must serve a copy of each amendment and cancellation order on each relevant successor Western Power entity.

**Clause 83**      **Enforcement**

This clause provides that a prescribed contract is taken to have been entered into between the relevant successor Western Power entities and the rights and obligations under the prescribed contracts are enforceable accordingly. Therefore, one successor entity can sue another successor entity for breach of contract.

**Clause 84      Advice of Economic Regulation Authority to be obtained**

This clause requires the Minister to obtain, and take into account, the views of the Economic Regulation Authority before canceling a prescribed contract under clause 82(2) (amendment and cancellation).

The Authority is to provide advice to the Minister on the effect that the cancellation would have on the encouragement of competition in the generation, wholesaling and retailing of electricity. This role is similar to the Authority's role under clauses 39(3) and 48(3).

**Clause 85      Trade practices exemption**

This clause provides that the making of an order under clauses 80(1) (Minister may prescribe contracts) or 82 (amendment and cancellation), each prescribed contract and conduct authorised or required by a prescribed contract is specifically authorised to the extent that it would otherwise contravene the *Trade Practices Act 1974 (Cth)* or the Competition Code.

This clause is intended to ensure that the initial contracts, and conduct undertaken in accordance with those contracts, constitute exemptions to the restrictive trade practices provisions of the *Trade Practices Act* in accordance with section 51 of the *Trade Practices Act*.

## **Part 5 - Provisions about accountability**

### **Division 1 - Strategic development plans**

#### **Clause 86 Draft strategic development plan to be submitted to Minister**

The clause is similar in content to the existing section 43 of the *Electricity Corporation Act 1994*.

This clause requires a successor Western Power entity to prepare and submit to the Minister a draft strategic development plan for the successor entity and any subsidiary.

However, this clause introduces a new provision allowing for the Minister, with the concurrence of the Treasurer, to issue a notice to the successor entity fixing a day for the submission of a draft strategic development plan to ensure the timely submission of the plan. If no such notice is issued, the plan must be submitted not later than 2 months prior to the start of the next financial year. This is an equivalent period to that currently provided in section 43 of the *Electricity Corporation Act 1994*.

#### **Clause 87 Transitional provision**

This clause replicates the existing section 44 of the *Electricity Corporation Act 1994*.

This clause sets out the time period which is to be covered by the first strategic development plan.

#### **Clause 88 Matters to be included in strategic development plan**

This clause is similar to the existing section 45 of the *Electricity Corporation Act 1994*. A new subclause has however also been included.

The strategic development plan must set out the successor Western Power entity's economic and financial objectives and operational targets and how these will be achieved. It must cover a forecast period of 5 years, or such lesser period as consented to by the Minister.

The clause prescribes the matters to which regard must be had in the preparation of the plan. These include competitive strategies (where appropriate), product pricing, productivity levels, financial and personnel requirements and capital expenditure.

A new subclause (4) provides for the making of regulations dealing with the form and content of the plan. Any regulations must be consistent with the requirements described above. Subclause (5) empowers the regulations to make special provisions for the content of strategic development plans so far as they apply to the System Management function within the Electricity Networks Corporation. These regulations provide for greater clarity as to the content of the plans.

**Clause 89 Strategic development plan to be agreed if possible**

This clause differs from the equivalent provision in section 46 of the *Electricity Corporation Act 1994*.

This clause requires the board of a successor Western Power entity and the Minister is to endeavour to reach agreement on a draft strategic development plan as soon as possible and in any event no later than the start of the following financial year. The clause also requires the board and the Minister to endeavour to reach agreement on the draft plan at the same time as they reach agreement on the draft statement of corporate intent under clause 98.

As indicated above, this clause differs from the equivalent provision in section 46 of the *Electricity Corporation Act 1994*. That section required the plan to be submitted at least one month prior to the end of the financial year and did not make reference to the statement of corporate intent.

**Clause 90 Minister's powers in relation to draft strategic development plan**

This clause essentially replicates the current section 47 of the *Electricity Corporation Act 1994*.

This clause sets out the powers of the Minister in respect of strategic development plans. The Minister is entitled to return a plan to the board and request it to:

- consider a particular issue and deal with that issue in the plan;  
or
- revise the plan in light of its further consideration,

and the board must comply with this request as soon as practicable.

The Minister is empowered to direct the board to take specified steps in respect of the draft plan or to make specified modifications to the draft plan if the board and the Minister have not reached agreement on the draft plan by one month before the start of the next financial year. Any direction given by the Minister must be tabled before both Houses of Parliament in accordance with clause 132 (supplementary provision for laying document before Parliament).

**Clause 91 Strategic development plan pending agreement**

This clause essentially replicates the existing section 48 of the *Electricity Corporation Act 1994*.

This clause provides for the latest draft of the strategic development plan to be the strategic development plan of the successor Western Power entity and any subsidiary for the time being where the board and the Minister have not been able to agree a strategic development plan prior to the start of the financial year. This draft plan will continue to take effect as the plan until such time as a draft strategic development plan is agreed under clause 92 (Minister's agreement to draft strategic development plan). The term "latest draft plan" is defined in the clause.

**Clause 92 Minister's agreement to draft strategic development plan**

This clause replicates the existing section 49 of the *Electricity Corporation Act 1994*.

A draft plan becomes the strategic development plan for the successor Western Power entity and any subsidiary for the relevant financial year or remainder of the year (as the case may be), when the board and the Minister reach agreement on it.

**Clause 93 Modifications of strategic development plan**

This clause replicates the existing section 50 of the *Electricity Corporation Act 1994*.

This clause provides for the modification of a strategic development plan by the board with the agreement of the Minister or by the direction of the Minister. Before the Minister exercises the power to direct the board to modify a strategic development plan, the Minister is required to consult with the board and take its views into account. Any direction given by the Minister must then be tabled before both Houses of Parliament within 14 days of being given or dealt with in accordance with clause 132 (supplementary provision for laying document before Parliament).

**Clause 94 Concurrence of Treasurer**

This clause replicates the existing section 51 of the *Electricity Corporation Act 1994*.

The Minister's powers under clauses 92 (Minister's agreement to draft strategic development plan) and 93 (modifications of strategic development plan) with respect to agreement and modification of a strategic development plan are subject to the concurrence of the Treasurer.

## **Division 2 - Statement of corporate intent**

### **Clause 95      Draft statement of corporate intent to be submitted to Minister**

The clause is similar in content to the existing section 52 of the *Electricity Corporation Act 1994*.

This clause requires the board of a successor Western Power entity to prepare and submit to the Minister a draft statement of corporate intent for the successor entity and any subsidiary.

However, this clause introduces a new provision allowing for the Minister, with the concurrence of the Treasurer, to issue a notice to the successor entity fixing a day for the submission of a draft statement of corporate intent. If no such notice is issued, the plan must be submitted not later than 2 months prior to the start of the next financial year. This is an equivalent period to that currently provided in section 52 of the *Electricity Corporation Act 1994*.

### **Clause 96      Transitional provision**

This clause replicates the existing section 53 of the *Electricity Corporation Act 1994*.

This clause sets out the time period which is to be covered by the first statement of corporate intent. The statement must be in respect of the first full financial year after the commencement of this Part of the Bill.

### **Clause 97      Matters to be included in statement of corporate intent**

This clause is similar in its content to the existing section 54 of the *Electricity Corporation Act 1994*, but contains an additional subclause.

This clause specifies the matters which must be specified in the statement of corporate intent. Broadly, these matters include:

- performance targets;
- objectives;
- the nature and scope of functions to be performed during the relevant year;
- the main undertakings during the relevant financial year;

- financial and accounting policies; and
- community service obligations.

The Minister is empowered to exempt a successor Western Power entity from including any of the specified matters in its statement.

New subclause (5) provides that the regulations may make provision for the form and content of statements of corporate intent. Again, provision is made for the regulations to make special provisions for the content of statements of corporate intent in relation to the System Management function within the Electricity Networks Corporation.

**Clause 98                    Statement of corporate intent to be agreed if possible**

This clause in part replicates the existing section 55 of the *Electricity Corporation Act 1994*.

This clause requires the board of a successor Western Power entity and the Minister to reach agreement on a draft statement of corporate intent as soon as possible and in any event no later than the start of the next financial year. The clause also requires the board and the Minister to endeavour to reach such agreement in accordance with clause 89(b) (that is, at the same time as they reach agreement on the draft strategic development plan).

As indicated above, this clause in part replicates the existing section 55 of the *Electricity Corporation Act 1994*, but adds the additional requirement that the board and the Minister reach agreement on the strategic development plan in accordance with clause 89(b).

**Clause 99                    Minister's powers in relation to draft statement of corporate intent**

This clause essentially replicates the existing section 56 of the *Electricity Corporation Act 1994*.

This clause sets out the powers of the Minister in respect of statements of corporate intent. The Minister is entitled to return a statement to the board and request it to:

- consider a particular issue and deal with that issue in the statement; and
- revise the statement in light of its further consideration.

The board must comply with this request as soon as practicable.

The Minister is empowered to direct the board to take specified steps in respect of the draft statement or to make specified modifications to the draft statement if the board and the Minister have not reached agreement on the draft statement by one month before the start of the next financial year. Any direction given by the Minister must be tabled before both Houses of Parliament or dealt with under clause 132 (supplementary provision for laying document before Parliament).

**Clause 100      Statement of corporate intent pending agreement**

This clause essentially replicates the existing section 57 of the *Electricity Corporation Act 1994*.

This clause provides for the latest draft of the statement of corporate intent to be the statement of corporate intent of the successor Western Power entity and any subsidiary for the time being where the board and the Minister have not been able to agree a statement of corporate intent prior to the start of the financial year. This draft statement will continue to take effect as the statement until such time as a draft statement of corporate intent is agreed under clause 101 (Minister's agreement to draft statement of corporate intent). The term "latest draft statement" is defined in the clause.

**Clause 101      Minister's agreement to draft statement of corporate intent**

This clause is similar in its terms to the existing section 58 of the *Electricity Corporation Act 1994*.

A draft statement becomes the statement of corporate intent for the successor Western Power entity and any subsidiary for the relevant financial year or remainder of the year (as the case may be), when the board and the Minister reach agreement on it.

Within 14 days of agreement being reached, the statement must be tabled before each House of Parliament or dealt with in accordance with clause 132 (supplementary provision for laying document before Parliament). The board may request that the Minister delete any commercially sensitive information from the statement, and the Minister may do so. Where information is deleted, the copy of the statement from which it has been deleted must contain a statement at the place where the information has been deleted explaining the reasons for the deletion, and be accompanied by a statement from the Auditor-General stating whether or not the information deleted is commercially sensitive.

The requirement to explain the reasons for the deletion of information and to obtain the advice of the Auditor General is an additional requirement which does not appear in the existing section 58 and has been included to provide for greater transparency.

**Clause 102      Modifications of statement of corporate intent**

This clause replicates the existing section 59 of the *Electricity Corporation Act 1994*.

This clause provides for the modification of a statement of corporate intent by the board with the agreement of the Minister or by the direction of the Minister. Before the Minister exercises the power to direct the board to modify a statement of corporate intent, the Minister is required to consult with the board and take its views into account. Any direction given by the Minister must then be tabled before both Houses of Parliament within 14 days of being given or dealt with in accordance with clause 132 (supplementary provision for laying document before Parliament).

**Clause 103      Concurrence of Treasurer**

This clause replicates the existing section 60 of the *Electricity Corporation Act 1994*.

The Minister's powers under clauses 101 (Minister's agreement to draft statement of corporate intent) and 102 (modifications of statement of corporate intent) are not to be exercised without the concurrence of the Treasurer.

**Division 3 - Quarterly and annual reports**

**Clause 104      Quarterly reports**

This clause essentially replicates the existing section 61 of the *Electricity Corporation Act 1994*.

This clause requires each of the successor Western Power entities to provide the Minister with a separate report (prepared on a consolidated basis) on the operations of each successor entity and of each subsidiary for each of the first three quarters of a financial year. The successor entity is also required to give a copy of each of these quarterly reports to the Treasurer. A quarterly report must be given to the Minister within one month after the end of the quarter or as otherwise agreed between the Minister and the board concerned.

The clause requires that a quarterly report is to be prepared for any segment of the successor entity specified by regulations made for the purposes of clause 60 (segregation of functions of corporations) which provide for accounting separation for the district business units within the successor Western Power entities.

The clause also provides that a quarterly report must include the information required to be given in the report by the successor entity's statement of corporate intent, and must comply with regulations made for the purposes of clause 60. After consultation with the board of the successor entity concerned, the Minister is required to make a quarterly report available to the public. This is, however, subject to clause 107 which makes provision for the deletion of commercially sensitive information from a quarterly report.

**Clause 105      Annual reports**

This clause essentially replicates the existing section 62 of the *Electricity Corporation Act 1994*.

This clause requires each of the successor Western Power entities to provide the Minister each year with separate annual reports on the operations of each successor entity and of each subsidiary. The annual report of the successor entity is to be prepared on a consolidated basis and in accordance with clauses 32 (deadline for reporting to the Minister) and 33 (annual financial reporting to the Minister) of Schedule 4, as well as for any segment of the successor entity prescribed by regulations for the purposes of clause 60 (segregation of functions of the corporation). The annual reports for any subsidiary must also be prepared in accordance with clauses 32 and 33 of Schedule 4.

The annual report of a successor entity must be tabled in Parliament or otherwise dealt with according to clause 132 (supplementary provision for laying document before Parliament) within 21 days of the Minister receiving it. There is no such requirement for the annual report of a subsidiary.

**Clause 106      Contents of annual reports**

This clause essentially replicates the existing section 63 of the *Electricity Corporation Act 1994*.

This clause describes the matters which must be included in an annual report of a successor Western Power entity or a subsidiary. Broadly, these include:

- sufficient information to enable the Minister to make an informed assessment of the operations of the successor entity or a subsidiary;
- a comparison of the performance of a successor entity or subsidiary with its statement of corporate intent;
- particulars of all directions given during the financial year (or which were materially relevant during the year) by the Minister in respect of the successor entity or subsidiary; and

- particulars of the impact upon the financial position, profits, losses and prospects of a successor entity or a subsidiary of any modifications to the statement of corporate intent or directions given by the Minister under clause 109(1) (being directions given by the Minister to a successor entity with respect to the performance of its functions) given during the relevant financial year.

The annual report must also include a summary of the report which is required to be given under clause 33 (being a report in relation to the compliance with a code of conduct by the staff of the successor entity).

The requirements imposed by this clause with respect to annual reports are equivalent to those currently imposed by section 63 of the *Electricity Corporation Act 1994*.

**Clause 107      Deletion of commercially sensitive matters from reports**

This clause essentially replicates the existing section 64 of the *Electricity Corporation Act 1994*.

The clause makes provision for the board to request that the Minister delete any commercially sensitive information from a quarterly or annual report, and the Minister may comply with such a request. Where information is deleted, the copy of the report from which it has been deleted must contain a statement that information has been deleted pursuant to this clause. The intent of this clause is to ensure that a successor Western Power entity is not detrimentally affected in its ability to compete in a competitive commercial environment by the release of its commercial information relative to its competitors.

**Division 4 - Ministerial directions**

**Clause 108      Directions to corporation**

This clause replicates the existing section 65 of the *Electricity Corporation Act 1994*.

This clause provides that a successor Western Power entity is not required to comply with any administrative request or direction given by or on behalf of Government except as set out in the Bill or as required under any written law. This clause is consistent with the fact that the successor Western Power entities are not agents of the State and that each entity is to act at its own discretion in accordance with prudent commercial principles.

The clause also protects a successor entity from being unduly burdened by unnecessary or excessive directions and requests for information from other Government agencies.

**Clause 109      Directions generally**

This clause is generally consistent with the power of direction contained within sections 28 and 66 of the *Electricity Corporation Act 1994*.

The clause empowers the Minister to give directions to a successor Western Power entity with respect to the performance of its functions generally or on a particular matter. Subclause (2) provides that the direction may also require the corporation not to perform a specified function.

The successor entity is required to comply with a direction, subject to clause 110 (when the board determines that compliance with that direction would be contrary to its commercial interest). Where the Minister gives a direction under this clause, the direction must be tabled before each House of Parliament or otherwise dealt with in accordance with clause 132 (supplementary provision for laying document before Parliament).

The Minister cannot give a direction to the System Management division of the Electricity Networks Corporation in relation to its functions concerning the wholesale electricity market.

**Clause 110      Directions contrary to commercial interest**

This clause replicates the existing section 67 of the *Electricity Corporation Act 1994*.

This clause makes provision for the situation where the board of a successor Western Power entity forms the view that a direction given by the Minister to the successor entity under clause 109 (directions generally) is contrary to the successor entity's commercial interests. The clause provides that where the board of a successor entity determines that it would be inconsistent with clause 59(1) of the Bill (which requires the successor entity to act on commercial principles) to comply with the direction or that there is some other reason why it should not comply with it, the board must notify the Minister of its determination within 7 days of the direction being given. Upon receiving such notice, the Minister must consult with the Treasurer and either cancel or confirm the direction. The successor entity is not required to comply with the direction until such time as it is confirmed by the Minister.

**Clause 111      When directions take effect**

This clause replicates the existing section 68 of the *Electricity Corporation Act 1994*.

This clause provides that a Ministerial direction under clause 109 (directions generally) becomes effective 7 days after it has been given (or such other longer period determined by the Minister), or, where it is the subject of a notice under clause 110 (directions

contrary to commercial interest), upon being confirmed by the Minister. The clause makes provision for the period of 7 days to be extended by the Minister upon the request of the board. Where the board makes a request for an extension, the Minister must consider the board's request before the expiration of the 7 day period.

**Clause 112      Directions relating to the supply of gas**

This clause is similar to section 38A of the *Electricity Corporation Act 1994*.

This clause empowers the Minister to direct the Electricity Generation Corporation or the Regional Power Corporation not to sell or supply gas.

The Bill removes this power from the Governor and assigns it to the Minister, consistent with the powers of direction under clause 109 (directions generally).

Where the Minister gives a direction under this clause, the direction must be tabled before each House of Parliament or otherwise dealt with in accordance with clause 132 (supplementary provision for laying document before Parliament).

**Division 5 - Consultation and provision of information**

**Clause 113      Consultation**

This clause replicates the existing section 69 of the *Electricity Corporation Act 1994*.

This clause provides that the board of a successor Western Power entity and the Minister (or their representatives) must consult at the request of either of them in respect of any aspect of the successor entity's operations.

**Clause 114      Minister to have access to information**

This clause essentially replicates the existing section 70 of the *Electricity Corporation Act 1994*.

This clause provides that the Minister is entitled to have access to, and to make and retain copies of, information in the possession of a successor Western Power entity and any subsidiary. The Minister is entitled to request the CEO or the board of the successor entity to provide or give access to information within a specified time frame, and may make use of the staff of the successor entity or a subsidiary for the purposes of obtaining the required information.

The CEO or the board is required to comply with such a request, and must at the time the information is provided to the Minister or the Minister is given access to the information, advise the Minister whether (in the opinion of the CEO or the board) the public disclosure of the information would adversely affect the commercial interests of the successor entity or any subsidiary.

The terms "document" and "information" are defined for the purposes of the clause.

**Clause 115 Provision of information in compiled form**

There is no equivalent provision to this clause in the *Electricity Corporation Act 1994*, but was contained within the *Electricity Corporations Bill 2003*.

This clause empowers the Minister to require the CEO or the board of a successor Western Power entity to create a new document which contains information:

- of a specified description;
- presented in a specified way;
- relating to a specified period; or
- having some other specified characteristic,

where the Minister wishes to obtain information that is not itself in the possession of the successor entity or a subsidiary, but which is capable of being assembled or compiled from information in the possession of the successor entity or subsidiary.

The CEO or board of a successor Western Power entity must comply with a request, and take whatever steps are necessary to enable the request to be complied with. The Minister is entitled to make copies of the document prepared. At the time the document is provided to the Minister the CEO or board must advise the Minister whether (in the opinion of the CEO or the board) the public disclosure of the information would adversely affect the commercial interests of the successor entity or any subsidiary.

This clause is intended to improve governance arrangements by ensuring that the Minister is able to obtain the information necessary for the Minister to be fully appraised of the activities of the successor Western Power entities.

**Clause 116 Minister to be kept informed**

This clause replicates the existing section 71 of the *Electricity Corporation Act 1994*.

This clause requires a successor Western Power entity to keep the Minister reasonably informed of the operations, financial performance and financial position of the successor Western Power entity and its subsidiaries, and must provide the Minister with the reports and information which the Minister requires to make informed assessments regarding those matters.

The clause also imposes an obligation upon the board of a successor Western Power entity to promptly inform the Minister if the board becomes aware of matters which are likely to affect the achievement of the successor entity's objectives outlined in its statement of corporate intent or its targets set out in its strategic development plan.

**Clause 117      Notice of financial difficulty**

This clause replicates the existing section 72 of the *Electricity Corporation Act 1994*.

This clause provides that the board of a successor Western Power entity must notify the Minister if the board forms the view that the successor entity or a subsidiary is or may be unable to satisfy any financial obligation of the successor entity or subsidiary (as the case may be) from the financial resources available or likely to be available to the successor entity or the subsidiary at the time the obligation is due. The notice must be in writing, setting out the basis of the board's view and any other information which may be relevant.

The Minister must, within 7 days of being given the notice, confer with the Treasurer and the board to determine what action is necessary to enable the financial obligation to be satisfied and initiate such action to ensure that the financial obligation is in fact met when due. The clause empowers the Minister to give a direction to the successor entity for the purpose of ensuring that the financial obligation can be met, including a direction to cease performing certain of its functions. The board must give effect to, and ensure compliance by a subsidiary with, any direction given.

A direction given by the Minister under this clause must be tabled in each House of Parliament or be dealt with according to clause 132 (supplementary provision for laying document before Parliament).

**Division 6 - Protection from liability**

**Clause 118      No liability for certain acts or omissions**

This clause essentially replicates the existing section 73 of the *Electricity Corporation Act 1994*.

This clause provides an exclusion of liability for a successor Western Power entity, a subsidiary of a successor entity, or a person performing functions under the Bill. The clause provides that a successor entity, a subsidiary of a successor entity or a person performing functions under the Bill is not liable:

- in respect of claims arising as a consequence of the disclosure of information or documents under:
  - clause 104 (quarterly reports), 105 (annual reports), 113 (consultation), 114 (Minister to have access to information), 115 (provision of information in compiled form), 116 (Minister to be kept informed) or 117 (notice of financial difficulty); or
  - the *Electricity Transmission and Distribution Systems (Access) Act 1994* Schedule 5 clause 4 or 6 or Schedule 6 clause 4 or 6; or
- for having done or omitted to do anything required to be done by a direction given under clause 90(3) (Minister's powers in relation to draft strategic development plan), 93(2) (modifications of strategic development plan), 99(3) (Minister's powers in relation to draft statement of corporate intent), 102(2) (modifications of statement of corporate intent), 109(1) (directions generally), 117(4) (notice of financial difficulty) or 124(3) (dividend).

## Part 6 - Financial provisions

### Division 1 - General

**Clause 119**      **Bank account**

This clause essentially replicates the existing section 75 of the *Electricity Corporation Act 1994*, although the term "bank" is now defined by reference to the definition of that term in the *Financial Administration and Audit Act 1985*.

This clause provides that a successor Western Power entity may have an account or accounts at any bank or banks, and for money received, and expenditure made, by the successor entity to be paid to or from the account.

**Clause 120**      **Investment**

This clause essentially replicates the existing section 76 of the *Electricity Corporation Act 1994*.

This clause empowers the board of a successor Western Power entity to invest funds of that successor entity which are not being used for the performance of the successor entity's functions.

**Clause 121**      **Exemption from rates**

This clause is equivalent in effect to section 77 of the *Electricity Corporation Act 1994*.

This clause provides that land vested in or under the control and management of a successor Western Power entity and which is used or reserved exclusively for the purposes of providing works, facilities and undertakings necessary for the performance of the successor entity's functions is not rateable land for the purposes of the *Local Government Act 1995*. The effect of this provision is that a successor entity will be exempt from local government rates for this land.

### Division 2 - Payments to State

**Clause 122**      **Payment of amount in lieu of rates**

This clause replicates the existing section 78 of the *Electricity Corporation Act 1994*.

This clause provides that a successor Western Power entity must pay to the Treasurer an amount equivalent to any local government rate or charge which the successor entity would have been liable to

pay but for clause 121 (exemption from rates), and section 6.26(2)(a)(i) of the *Local Government Act 1995* (i.e. land which is the property of the State and is being used or held for a public purpose).

**Clause 123      Determination of amounts under section 122**

This clause replicates the existing section 80 of the *Electricity Corporation Act 1994*.

This clause provides for the Treasurer to direct the principles according to which amounts payable under clause 122 (payment of amount in lieu of rates) are determined and the timing of payment.

**Clause 124      Dividend**

This clause replicates the existing section 81 of the *Electricity Corporation Act 1994*.

This clause sets out the circumstances in which dividends are payable by a successor Western Power entity for a financial year and the manner of calculation of dividends.

As soon as practicable following the end of each financial year, the board of a successor entity is required to make a recommendation to the Minister as to the amount of the dividend (if any) which the board considers appropriate for the successor entity to pay in respect of a financial year. The dividend is to be calculated with respect to the net profits of the successor entity for a financial year after taking into account any amounts payable by the successor entity to the Treasurer under clause 122 (payment of amount in lieu of rates) and the *State Enterprises (Commonwealth Tax Equivalents Act) 1996*.

The Minister, with the concurrence of the Treasurer, may then either accept the recommendation or, after consultation with the board, direct that some other amount is to be paid. The successor entity must then pay the dividend as soon as practicable after the amount has been fixed, and in any event not later than 6 months after the end of the relevant financial year (or such other time agreed by the Treasurer and the board).

Where the Minister has not accepted the recommendation of the board and has instead directed the payment of some other amount, the Minister's direction must be laid before each House of Parliament or otherwise dealt with according to clause 132 (supplementary provision for laying document before Parliament).

### **Division 3 - Borrowing**

#### **Clause 125      Borrowing**

This clause replicates the existing section 82 of the *Electricity Corporation Act 1994*.

This clause sets out the powers that each of the successor Western Power entities have with respect to the borrowing of money. A successor entity has the power to borrow or re-borrow, obtain credit, issue, acquire, hold or dispose of debt paper (as defined in the clause), create and issue capital instruments or otherwise arrange for financial accommodation to be extended to the successor entity. Capital instruments may be created and issued on terms determined by the successor entity and approved by the Minister.

#### **Clause 126      Borrowing limits**

This clause replicates the existing section 83 of the *Electricity Corporation Act 1994*.

This clause provides for the Treasurer to impose limits on the borrowing of a successor Western Power entity for each financial year. The limit contemplated by this clause is a monetary limit and can be varied. Whilst the successor entity is required to comply with the limit imposed, a person dealing with the successor entity is not required to enquire whether the successor entity has complied or is complying with the limit, and a transaction will not be unenforceable merely by virtue of the fact that it has been entered into in contravention of the limit imposed.

#### **Clause 127      Hedging transactions**

This clause replicates the existing section 84 of the *Electricity Corporation Act 1994*.

This clause empowers a successor Western Power entity to enter into a broad variety of hedging transactions in connection with the exercise of any its borrowing powers conferred by clause 125 (borrowing). The types of hedging transactions which the successor entity may enter into include:

- foreign exchange transactions;
- currency swaps;
- foreign currency cap, collar or floor;

- forward interest rate agreement or an interest rate swap;
- interest rate cap, collar or floor; and
- futures contract or option.

The successor entity can enter into any other class of hedging transaction with the approval of the Treasurer. The successor entity can also enter into an arrangement to effect a transaction which is a combination of two or more of the permitted hedging transactions or one or more of the permitted hedging transactions in combination with one or more transactions permitted under clause 125.

#### **Division 4 - Guarantees**

##### **Clause 128 Guarantees**

This clause essentially replicates the existing section 85 of the *Electricity Corporation Act 1994*.

The clause provides that the Treasurer may, with the concurrence of the Minister, guarantee any financial obligation of a successor Western Power entity arising as a result of the exercise of the borrowing power contained in clause 125 (borrowing) of the Bill or to which it becomes subject under Part 9 (that is, Western Power guarantees transferred to a successor Western Power entity pursuant to a transfer order made under that Part). The payment of any money under a guarantee is to be made by the Treasurer from the Consolidated Fund, and any amounts recovered from the successor entity in respect of payment under a guarantee must be credited to the Consolidated Fund.

##### **Clause 129 Charges for guarantee**

This clause replicates the existing section 86 of the *Electricity Corporation Act 1994*.

This clause provides for the Treasurer to fix a charge to be paid by a successor Western Power entity to the Consolidated Fund for the provision of a guarantee under clause 128 (guarantees). The Treasurer can also fix the time and manner of payment of the charge.

## Division 5 - Financial administration and audit

### Clause 130      **Limited application of *Financial Administration and Audit Act 1985***

This clause replicates the existing section 87 of the *Electricity Corporation Act 1994*.

This clause excludes the application of the *Financial Administration and Audit Act 1985* (other than sections 78-80, 82-92 and 95 of that Act) to a successor Western Power entity or any person performing any functions under the Bill. The clause preserves the operation of certain sections of the *Financial Administration and Audit Act 1985* which make the Auditor General responsible for the audit of a successor entity's accounts.

### Clause 131      **Financial administration and audit**

The clause essentially replicates the existing section 88 of the *Electricity Corporation Act 1994*.

This clause provides for Schedule 4 (financial administration and audit) to have effect in relation to the financial administration and audit of the successor Western Power entities. Schedule 4 is modelled on the provisions of the *Corporations Act 2001 (Cth)* with respect to financial administration and audit.

The clause provides for the amendment of Schedule 4 by regulations made by the Governor (with the concurrence of the Treasurer) in accordance with subclauses (3) and (4). Subclause (3) provides that where:

- a provision of Schedule 4 that sets out the substance of a provision of the *Corporations Act 2001 (Cth)* does not accurately reflect the corresponding provision of the *Corporations Act 2001 (Cth)* as in force for the time being; or
- the *Corporations Act 2001 (Cth)* does not contain an equivalent provision to a provision of Schedule 4; or
- the *Corporations Act 2001 (Cth)* contains a provision relating to a matter provided for by Schedule 4 and Schedule 4 does not contain an equivalent provision,

the Minister may recommend that the Governor make regulations to amend the Schedule accordingly.

These requirements are intended to facilitate the maintenance of consistency between the financial administration and audit requirements applicable to successor Western Power entities under the Bill and the financial administration and audit provisions generally applying under the *Corporations Act 2001 (Cth)*.

Subclause (4) furthers this objective, by providing that any amending regulations must operate to ensure that Schedule 4 is substantially the same as the corresponding provisions of the *Corporations Act 2001 (Cth)*, subject to any modifications consistent with the policy of the Bill.

## Part 7 - Miscellaneous

### Clause 132      **Supplementary provision for laying document before Parliament**

This clause replicates the existing section 96 of the *Electricity Corporation Act 1994*.

This clause provides that if, during a period when a document must be laid before a House of Parliament, the House is not sitting, the Minister must instead transmit a copy of the document to be laid to the Clerk of the House. The copy transmitted to the Clerk of the House is taken to have been laid before the House for the purposes of the Bill, and to be a document published by order or under the authority of that House. The laying of the copy of the document is to be recorded in the Minutes, or Votes and Proceedings, of the House on the first sitting day after it was provided to the Clerk of the House.

### Clause 133      **Execution of documents**

This clause replicates the existing section 97 of the *Electricity Corporation Act 1994*.

This clause sets out the manner of execution of documents by a successor Western Power entity. A document is taken to be duly executed by a successor entity if the common seal of the successor entity is affixed in the presence of two directors or a director and the chief executive officer or a director and an executive officer, or is signed on behalf of the successor entity by a person authorised to execute documents on behalf of the successor entity.

Subclause (4) enables the successor entity, by writing under its common seal, to authorise a director, the chief executive officer, member of staff or other agent of the successor entity to execute documents on its behalf. Subclause (5) provides for an authorisation given under subclause (4) to be given generally or in respect of limited matters and so as to authorise 2 or more persons to execute documents jointly. Subclause (5) also provides that an authority may be presumed by a person dealing with a successor entity to continue during any period for which it is conferred or (if no duration has been imposed) until notice of termination of the authority is given to the person dealing with the successor entity.

### Clause 134      **Contract formalities**

This clause replicates the existing section 98 of the *Electricity Corporation Act 1994*.

This clause provides that a person with the authority of a successor Western Power entity may make, vary or discharge a contract for and on behalf of that successor entity and in the name of that successor entity.

**Clause 135      Delegation by Treasurer**

This clause essentially replicates the existing section 99 of the *Electricity Corporation Act 1994*.

This clause provides for the Treasurer to delegate, by instrument in writing, any of his powers or duties under the Bill to a Treasury officer (being an officer of the Department that principally assists the Minister administering the *Financial Administration and Audit Act 1985* in administering that Act). This power can not be sub-delegated.

**Clause 136      Regulations**

This clause replicates the existing section 100 of the *Electricity Corporation Act 1994*.

This clause provides for the making of regulations by the Governor prescribing all matters necessary or convenient to be prescribed for the purposes of the Bill. Regulations made under the provisions of the *Electricity Act 1945* are to prevail over regulations made under the Bill in the event of any inconsistency.

## **Part 8 - Amendments to other written laws**

### **Clause 137      Amendments to other Acts**

This clause specifies that the Acts mentioned in are amended in accordance with Schedule 5.

### **Clause 138      Power to amend subsidiary legislation**

Subsidiary legislation made under any Act may furthermore be amended by the Governor by way of regulations.

Amendment of subsidiary legislation by the Governor may only occur upon recommendation by the Minister.

The Minister may only make such a recommendation if the Minister considers that each proposed amendment is necessary or desirable as a result of the enactment of this Bill.

This clause does not preclude the amendment of subsidiary legislation in accordance with the Act under which the subsidiary legislation was made.

## **Part 9 - Transitional provisions for succession from Western Power Corporation to new corporations**

### **Division 1- Preliminary**

This Part provides for transitional provisions for the succession from Western Power Corporation to four new corporations.

This Part provides for the making of a Transfer Order, by the Minister for Energy, specifying how the assets, rights and liabilities of Western Power are to be allocated to the four new corporations. The Transfer Order will give effect to the legal establishment of the new entities. Part 9 also includes provision for unallocated assets or liabilities.

The matters provided for under Part 9 were previously contained within the *Electricity Legislation (Amendments and Transitional Provisions) Bill 2003*.

As with that Bill, Part 9 has been generally modeled on the mechanism contained within the *Energy Corporations (Transitional and Consequential Provisions) Act 1994* which was successfully used to restructure the State Energy Commission of Western Australia into Western Power and AlintaGas in 1994.

#### **Clause 139 Purpose of this Part**

This clause states that the purpose of this Part is to provide for the four new successor entities to be the successors to Western Power.

#### **Clause 140 Terms used in this Part**

This clause provides for definitions of "asset", "commencement day", "liability", "new corporation", "principal Act", "records", "right", "the 1994 Act", "transfer order" and "Western Power Corporation".

#### **Clause 141 Saving**

This clause 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 resulting from a 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 standard 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 - Certain powers conferred on Minister**

### **Clause 142 Power for certain agreements to be made before commencement day**

This clause enables the Minister, on behalf of the successor Western Power entities, and Western Power to agree in writing before the commencement day that the transfer of assets, rights and liabilities from Western Power to the successor Western Power entities under this Division of the Bill is the supply of a going concern. This agreement in writing will satisfy one of the requirements of section 38-325 of the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*. Consequently, no GST will be payable on that supply. If the other requirements of that section are satisfied the supply will be within the exemption from GST provided for in the section.

As the agreement contemplated by this clause must be made before the commencement day, subclause (4) establishes the successor Western Power entities to the limited extent necessary to achieve the purposes of this clause.

It should be noted that the vesting of the assets, rights and liabilities of Western Power in the successor entities is not regarded as being a supply for consideration for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999* in the first instance so no GST should be attracted as a result of the statutory vesting. This section enables the supply to be brought within a specific exemption to the imposition of GST in the event the Australian Taxation Office formed an adverse view on this threshold question.

### **Clause 143 Minister may give directions**

This clause empowers the Minister to give directions in writing to Western Power requiring it to take any step (or refraining from taking any step) that the Minister considers necessary or convenient for achieving the purpose of Part 9 of the Bill, being the succession from Western Power to the successor Western Power entities.

The clause states that a direction can be given which requires Western Power to allow its functions to be performed by a committee appointed by the Minister, and to follow instructions of that committee. Although not designated by the legislation this Committee is the Electricity Reform Implementation Steering Committee. The clause further states that Western Power must comply with such directions even where there is any conflict or inconsistency between compliance with the direction and a provision of the *Electricity Corporation Act 1994*.

A similar provision was contained in the *Gas Corporation (Business Disposal) Act 1999*.

**Clause 144      Directions to be laid before Parliament**

This clause requires the Minister to cause the text of any direction made under clause 143 (Minister may give directions) to be laid before each House of Parliament in accordance with clause 132 (supplementary provision for laying document before Parliament).

**Division 3- Passing of Western Power Corporation's assets and liabilities to new corporations or the State**

Subdivision 1 - Making of transfer orders

**Clause 145      Minister to make order for allocation of assets and liabilities**

This clause provides that, as soon as practicable after this clause comes into force, the Minister may make and publish in the *Gazette* a transfer order or orders to give effect to the allocation of assets, rights, liabilities and legal proceedings from Western Power to the successor Western Power entities. A transfer order is to specify the assets, rights, liabilities and legal proceedings which are to be assigned.

This is the provision pursuant to which the assets and liabilities of Western Power will be transferred to one or more of the successor Western Power entities (and where applicable, whether as joint tenants or tenants in common).

This clause also describes other matters that may be specified in a transfer order, including that a transfer order may:

- allocate values to assets and liabilities;
- provide for the allocation of income in respect of an asset;
- allocate a specified share of a particular liability to one or more of the successor Western Power entities;

- provide for the dealing with accounts, funds, profits and liability for levies; and
- such incidental or supplementary provisions as the Minister thinks fit.

This clause prohibits a transfer order from being made after the commencement day, except under clause 149 (which enables subsequent transfer orders to be made within six months of the commencement day).

**Clause 146 Order may provide for transfer to subsidiary**

This clause provides that an asset, right or liability may be allocated in a transfer order to a subsidiary of a successor Western Power entities. The Minister then makes an order under clause 153, which allows time for the subsidiary to be created, and the asset, right or liability vests in, or is assumed by, the subsidiary.

**Clause 147 Transfer order schedules**

This clause provides that a transfer order may allocate assets, rights or liabilities by reference to schedules (which need not be published in the *Gazette* but must be available for public inspection).

**Clause 148 Treatment of certain internal arrangements of Western Power Corporation**

This clause provides that arrangements between internal divisions of Western Power may be specified in a transfer order as if the arrangements created contractual rights and liabilities between different legal entities. This is intended to give legal status to what has previously been important to internal arrangements, such as the understanding as to the basis upon which Western Power's retail business had access to the electricity distribution system operated by the Western Power networks business which as between separate legal entities should have the status and certainty of contracts.

**Clause 149 Power to make subsequent order**

This clause provides that if it is impracticable to allocate any asset, right or liability under clause 145 (Minister to make order for allocation of assets and liabilities) before the commencement day, then the decision as to allocation can be deferred as follows:

- the transfer order made under clause 145 is to specify that the relevant asset, right or liability is to be allocated under this clause; and
- the Minister may make a further transfer order under clause 145 in respect of that asset, right or liability within six months of the commencement day.

Any such subsequent transfer order is to have effect from the commencement day and Western Power is taken to hold the relevant asset, right, or liability until the subsequent transfer order is made, and is expressly continued in existence for this purpose.

**Clause 150      References in Government agreements**

This clause requires a transfer order to specify that where there is a reference to Western Power in a Government agreement (such as a State Agreement Act), then that reference is to be read as a reference to one or more particular successor entities (and where applicable, whether as joint tenants or tenants in common).

**Clause 151      Amendment of transfer orders**

This clause provides that the Minister may:

- before the commencement day, make a further order to amend a transfer order; and
- after the commencement day, make a further order to rectify any unintentional omission from a transfer order or to amend a provision of a transfer order described in clause 145(3)(e) or (f) (the allocation of values to assets and liabilities) or clause 150 (changes references to Western Power in Government agreements to references to the successor Western Power entities).

These further orders must be published in the *Gazette*.

This clause further provides that, in relation to further orders made after the commencement day:

- such orders can be made so as to take effect from the commencement day; and
- if a provision of such an order has effect before it is published in the *Gazette*, the provision does not operate so as to prejudicially affect, or impose liabilities on, a person in respect of anything done or not done before the day of publication.

Subdivision 2 - Operation of transfer orders

**Clause 152 Allocation to one new corporation**

This clause describes the consequences of a transfer order where assets, rights, liabilities and legal proceedings of Western Power are transferred to one of the successor Western Power entities. On and from the commencement day, these assets, rights, liabilities and legal proceedings vest in, or are assumed by, the relevant successor Western Power entity. This clause also describes that references to Western Power in such things as contracts are substituted with references to the relevant successor Western Power entity, except to the extent that any provision of a transfer order, clause 157 of the Bill (regarding Government agreements) or the relevant context otherwise requires.

This clause further provides that any legal proceedings, remedies, acts or things that may have been commenced or done by Western Power before the commencement day may be commenced or done by the relevant successor Western Power entity after the commencement day.

**Clause 153 Order for transfer to subsidiary**

This clause provides for the Minister, where a transfer order makes a provision under clause 146 (order may provide for transfer to subsidiary), to declare that the asset, right or liability is vested in, or assumed by, a specified subsidiary of a successor Western Power entity.

**Clause 154 Allocation to more than one new corporation**

This clause describes the consequences of a transfer order where assets, rights, liabilities and legal proceedings of Western Power are transferred to two or more successor Western Power entities. On and from the commencement day, these assets, rights, liabilities and legal proceedings vest in, or are assumed by, the relevant successor Western Power entities. This clause also describes that references to Western Power in such things as contracts are substituted with references to the relevant successor Western Power entities, except to the extent that any provision of a transfer order, clause 157 of the Bill (regarding Government agreements) or the relevant context otherwise requires.

This clause further provides that any legal proceedings, remedies, acts or things that may have been commenced or done by Western Power before the commencement day may be commenced or done by the relevant successor Western Power entities after the commencement day.

**Clause 155 Replacement of Western Power Corporation in proceedings**

This clause provides for the consequences of a successor Western Power entity (or two or more successor entities jointly) being included as the party replacing Western Power as a party in any proceedings. On and after the commencement day the successor entity or entities becomes a party to the proceedings in place of Western Power.

**Clause 156 Handing over of records**

This clause provides that as soon as practicable after the commencement day, Western Power must deliver to the relevant successor Western Power entity or entities all records relating to the assets, rights, liabilities and legal proceedings transferred to that entity or those entities under the transfer order.

**Clause 157 Changes to Government agreements**

This clause provides that on and after the commencement day, a reference to Western Power in a Government agreement that is to be read as a reference to one or more successor Western Power entities (pursuant to a provision of the transfer order made under clause 150) has effect as provided in the transfer order.

Subdivision 3 - Re-allocation of assets, rights and liabilities

**Clause 158 Order for re-allocation**

This clause empowers the Minister to make re-allocation orders under which any assets, rights or liabilities that were vested in one or more successor Western Power entities pursuant to a transfer order are reallocated and vest (or vest differently) in another successor Western Power entity or entities on and from the day specified in that re-allocation order.

Orders under this clause can only be made within 6 months of the commencement day and must be published in the *Gazette*.

**Clause 159 Re-allocation to have effect from commencement day**

This clause describes the effect of re-allocation orders made under clause 158 (order for re-allocation) of the Bill, being essentially that such orders have effect according to their tenor. On and from the commencement day specified in the re-allocation order, the re-allocated assets, rights and liabilities vest in, or are assumed by, the successor Western Power entity or entities specified in the re-allocation order.

A corporation previously concerned is not required to account for any benefit nor is it entitled to be reimbursed for any liability discharged in the period between the vesting and the reallocation.

A reallocation order may make any necessary or expedient savings or transitional provision.

References to the initial successor Western Power entity or entities in such things as contracts before the re-allocation are substituted with references to the successor Western Power entity or entities specified in the re-allocation order.

Any legal proceedings, remedies, acts or things that may have been commenced or done by the initial successor Western Power entity or entities before the re-allocation may be commenced or done by the successor Western Power entity or entities specified in the re-allocation order.

**Clause 160      Handing over of records**

This clause provides that as soon as practicable after the day specified in the re-allocation order, the initial successor Western Power entity or entities must deliver to the relevant successor Western Power entity or entities specified in the re-allocation order all records relating to the assets, rights, liabilities or legal proceedings transferred to that entity or those entities under the re-allocation order.

Subdivision 4 - Order that allocated assets or liabilities pass instead to the State

**Clause 161      Minister may order that section 167 is to apply**

This clause provides that an asset, right or liability that vested in, or was assumed by, a successor Western Power entity is instead to be dealt with under clause 167, which section deals with assets, rights and liabilities which are unallocated in the transfer order.

**Clause 162      Effect of order**

This clause provides that an order made under clause 161 (Minister may order that section 167 is to apply) has effect in accordance with its tenor. The State is substituted in any agreement or instrument instead of the successor Western Power Corporation or subsidiary previously entitled or liable.

**Clause 163      Handing over of records**

This clause provides that the successor Western Power entity or entities previously concerned must deliver to the Minister all records relating to the assets, rights and liabilities referred to in clause 162 (effect of order).

Subdivision 5 - Replacement of party in proceedings

**Clause 164      Order for replacement**

This clause provides that the Minister may declare that on or after a day specified in the order a successor Western Power entity or two or more successor entities that became a party or parties to proceedings under clause 155 (replacement of Western Power Corporation in proceedings) are to be replaced by another successor entity or entities. This enables proceedings which may have been inadvertently allocated to a successor entity to be retained by the State. An order cannot be made later than 6 months after the commencement date.

**Clause 165      Effect of order**

This clause provides that an order under clause 164 (order for replacement) has effect according to its tenor.

**Clause 166      Handing over of records**

This clause provides that the successor Western Power entity or entities that have been replaced as a party to proceedings must deliver to the relevant successor entity or entities all records relating to the proceedings.

Subdivision 6 – Assets, liabilities and proceedings not otherwise provided for

**Clause 167      Unallocated assets and liabilities to be dealt with by Minister**

This clause provides that all assets, rights, obligations and liabilities of Western Power which were not transferred to one or more of the successor Western Power entities by the transfer order will be dealt with after the commencement day as follows:

- assets and rights are to be dealt with as the Minister directs; and
- liabilities are to be discharged as the Minister, with the approval of the Treasurer, directs.

The dealings described above are subject to deferred allocation orders (clause 149), rectification orders (clause 151) and rectification regulations (clause 187(1) and (2)).

The State as the sovereign entity will have all appropriate powers to assume the assets, rights and liabilities and to continue claims and legal proceedings assumed pursuant to this clause.

**Clause 168 Provisions incidental to section 167**

This clause provides for the incidental consequences of matters not being allocated to a successor Western Power entity as follows:

- references to Western Power in agreements are to be substituted by references to the State (except to the extent that clause 157 of the Bill (in relation to Government agreements) or the relevant context otherwise requires);
- any legal proceedings that might have been commenced by Western Power may be commenced by the State; and
- any act, matter or thing done or omitted to be done by Western Power is taken to have been done or omitted to be done by the State.

**Clause 169 State to be party to proceedings if no provision made**

This clause provides that if no provision is made in a transfer order for Western Power to be replaced as a party to any proceedings to which it is a party, then the State is, on and from the commencement date, a party to those proceedings in place of Western Power.

**Clause 170 Handing over of records**

This clause provides that Western Power is to deliver to the Minister all records relating to unallocated assets, rights and liabilities.

Subdivision 7 – Other matters relating to passing of assets and liabilities

**Clause 171 Continuation of guarantees in respect of Western Power Corporation**

This clause provides that:

- guarantees given by the Treasurer under section 85 of the *Electricity Corporation Act 1994* to guarantee Western Power's repayment of debt; and
- guarantees continued in force by section 51 of the *Energy Corporations (Transitional and Consequential Provisions) Act 1994* (being those guarantees given by in respect of SECWA, the liability for which was transferred to Western Power upon the disaggregation of SECWA),

are not affected by the Bill or by any transfer of Western Power's liabilities to one or more successor Western Power entities and are to continue in force as if the guarantee was given by the assignee successor Western Power entity or entities.

Section 85(3) of the *Electricity Corporation Act 1994* (which provides that monies payable by the Treasurer under a guarantee is guaranteed by the State and is to be made by the Treasurer and charged to the consolidated fund) is to be taken to continue to apply for the purposes of this clause despite its repeal under Schedule 5.

This clause also empowers the Treasurer to enter into any instrument confirming the continued liability of the State under a guarantee (eg. to a third party lender which regards itself as unfairly prejudiced by the transfer of the guarantee to a successor Western Power entity). This clause further provides that any sum paid by the Treasurer under a guarantee in respect of a successor Western Power entity constitutes a charge on the assets of that entity.

**Clause 172      Guarantees to which section 171 does not apply**

This clause provides that for those guarantees that cannot be preserved under clause 171 (continuation of guarantees in respect of Western Power Corporation) of the Bill, for example, because the guarantee is not governed by Western Australian law.

Part 6 Division 4 of this Bill (which mirrors the existing provisions dealing with guarantees in the *Electricity Corporation Act 1994*) applies to the successor Western Power entity to which that guarantee has been assigned; and if the lender requests the Treasurer to give a guarantee in the same terms as the original guarantee, then the Treasurer is to comply with that request.

**Clause 173      Certain joint tenancies preserved**

This clause provides that the vesting of property which is jointly held by Western Power Corporation and an assignee from the former Gas Corporation in a successor Western Power entity does not sever the joint tenancy. This means that a statutory transfer of an interest held as a joint tenant by Western Power in an asset with a Gas Corporation assignee will continue as a joint tenancy between the successor Western Power entity and the Gas Corporation assignee.

**Clause 174      Western Power Corporation to complete necessary transactions**

This clause provides that if an asset, right or liability cannot be properly vested in one or more of the successor Western Power entities, then Western Power is taken to continue to hold and be liable for that asset, right or liability until the vesting is effected and is to take all practicable steps to ensure that such vesting occurs.

This clause also provides that any vesting that cannot be properly effected does not affect the duty of the successor Western Power entity or entities to account for, and report on, the asset, right or liability under the Bill.

**Clause 175      Exemption from State taxation**

This clause provides that State tax (including stamp duty and other taxes) is not payable in relation to anything that occurs or is done under Part 9 of the Bill. This clause further provides that a successor Western Power entity can request the Treasurer to certify in writing that a thing occurred or was done under that Part, and such a certificate is conclusive evidence of that fact.

**Clause 176      Registration of documents**

This clause provides that the "relevant officials" (who are persons charged under various statutes with registering relevant documents) are to record and register the documents necessary to show the effect of the transfer or other orders made under Part 9 and any regulations made under Division 7 of this Part. This clause further provides that if one or more of the successor Western Power entities states in an instrument that any estate or interest in land has become vested in it, then the statement is evidence of that fact.

#### **Division 4 - Staff**

**Clause 177      Transition of employment**

This clause provides for the transfer of employees from Western Power to the successor Western Power entities by deeming employment contracts made between Western Power and its employees before the transfer to continue as if they were made by the board of the relevant successor Western Power entity. Western Power is to determine which successor Western Power entity is to be the employer of each person who is a member of staff of Western Power, and notify each person in writing of the determination, before the commencement day. Such notice is to have effect as if it were an agreement made between the person and the board of the successor Western Power entity for the employment of that person as a member of the staff of the successor entity.

**Clause 178      Employees' rights preserved**

This clause maintains current levels of employee remuneration and other terms and conditions as well as providing for the retention and transfer of employee entitlements to the successor Western Power entities.

#### **Division 5 – Contracts with tariff customers**

**Clause 179      Minister to prescribe contracts**

This clause provides for the Minister to prescribe a form of contract. The clause provides for any person who was a tariff customer of Western Power to be taken to have entered into a contract with either the Electricity Retail Corporation or the Regional Power Corporation for the supply of electricity in the form of the contract prescribed by the Minister.

This clause is necessary to implement the transition of tariff customers to contract customers, consistent with the requirements of the *Electricity Industry Act 2004* that licensees supplying electricity to customers must do so under approved contracts. This is a transitional provision to achieve that outcome for existing tariff customers.

A similar provision is included in section 55 of the *Electricity Industry Act 2004*. Section 55 however provides that the Minister may prescribe a form of contract for the Western Power Corporation, as opposed to the Electricity Retail Corporation and the Regional Power Corporation.

## **Division 6 - Other transitional provisions**

### **Clause 180      Annual report**

This clause provides that Western Power is to prepare an annual report under section 62 of the *Electricity Corporation Act 1994* for the period from the preceding 1 July to the commencement day as if that period were a full financial year.

This clause also provides for Western Power to finalise any annual report that had not been sent to the Minister before the commencement day.

### **Clause 181      Continuation of certain directions given to Western Power Corporation**

This clause ensures that the current directions which preclude Western Power from:

- supplying gas to small use customers within specified areas (subclause (1)); and
- establishing new or additional generation capacity if this would result in Western Power owning more than 3000 MW of generation capacity in the SWIS (subclause (2)),

continue to be in force on and after the day of Western Power's restructure.

### **Clause 182      Completion of things commenced**

This clause provides that anything commenced by Western Power under the *Electricity Corporation Act 1994* before the commencement day may be continued by a successor Western Power entity provided that the doing of that thing is within the functions of, and is relevant to, the successor Western Power entity.

### **Clause 183      Continuing effect of things done**

Anything done or omitted to be done by Western Power:

- before the commencement day; and

- to the extent that the thing has any force and is not governed by clauses 152(6) (allocation to one new corporation), 154(7) (allocation to more than one corporation), 155(2) (replacement of Western Power in proceedings), 162(4) (effect of order), 168(4) (provisions incidental to section 167), 169(2) (State to be party to proceedings if no provision is made) or 181(1) or (2) (continuation of certain directions given to Western Power Corporation) collectively which deal with the consequences of an allocation under a transfer under or a re-allocation order,

is to be taken to have been done by a successor Western Power entity so far as the thing is relevant to that entity.

**Clause 184 Immunity to continue**

This clause continues the benefit of any immunity protecting Western Power before the commencement day for the benefit of a successor Western Power entity so far as the thing is relevant to that entity.

**Clause 185 Agreements and instruments generally**

This clause provides that an agreement or instrument which:

- had Western Power as a party; and
- does not come within clauses 152(4) (allocation to one new corporation), 154(5) (allocation to more than one new corporation), 157 (changes to Government agreements), 168(2) (provisions incidental to section 167) or 181(1) or (2) (continuation of certain directions given to Western Power Corporation);

has effect after the commencement day as if any relevant successor Western Power entity was substituted as the party to the agreement and references in the agreement to Western Power were references to any relevant successor Western Power entity.

**Clause 186 Western Power to perform necessary transitional functions**

This clause provides that, despite the repeal of section 4 of the *Electricity Corporation Act 1994* by clause 11 of Schedule 5 of the Bill, Western Power continues in existence for the purposes of fulfilling various reporting and other functions required by the Bill. This clause further provides that Western Power, for those purposes, is to be constituted by a person appointed by the Minister (on such terms and conditions as the Minister determines) and is to perform the functions through that person. Western Power, constituted by that person, has all powers that are necessary or convenient for the specified purposes.

The clause also provides that a successor Western Power entity is to provide such clerical or other assistance as Western Power (constituted by the relevant person) may reasonably request.

**Division 7 - Making of further provision by regulation**

**Clause 187 Powers of rectification and similar matters**

This clause empowers the Governor to make regulations if the Minister believes that:

- there is an error in a transfer order which cannot be rectified by making a reallocation order under clause 158(1) or (2) (order for re-allocation); or
- there has been an omission from a transfer order which cannot be rectified under clause 151(2) (amendment of transfer orders).

Such regulations may make any provision to correct and deal with the consequences of that error or omission. This clause also empowers the Governor to make regulations if the Minister believes that it is necessary to make an order under clause 149(1)(b) (power to make subsequent order) or a declaration described in clause 158 (1) and (2) (re-allocation order), but the six month period in which such orders and declarations can be made has expired.

Such regulations may make such provision as could have been made under clause 149(1)(b), 153(1), 158(1) or (2), 161(1) or 164(1) (as applicable) within the six month period.

**Clause 188 Further provision may be made by regulation**

This clause empowers the Governor to make:

- provision in regulations for any matter or thing necessary or convenient to achieve the purpose described in clause 139 (transitional matters in relation to the establishment of the four new successor entities to Western Power) of the Bill if there is no sufficient provision in Part 9 of the Bill; and
- regulations which rectify an anomaly which the Minister believes arises in the carrying out of any provision of Part 9 of the Bill.

Pursuant to clause 189 (regulations may operate from the commencement day), such regulations may have effect from the commencement day.

**Clause 189 Regulations may operate from the commencement day**

This clause provides that regulations made under Division 7 may have effect from the commencement day. This clause further provides that if a provision of such regulations has effect before it is published in the *Gazette*, the provision does not operate so as to prejudicially affect, or impose liabilities on, a person in respect of anything done or not done before the day of publication.

**Division 8 – Indemnities and guarantees**

**Clause 190 Treasurer may give indemnity and guarantee**

This clause provides for the Treasurer to be able to give an indemnity or guarantee of a payment to a person who is or has been a director or officer of Western Power or of a subsidiary of Western Power or a member or alternate member of the Electricity Reform Implementation Steering Committee.

An equivalent provision was included in the *Gas Corporation (Business Disposal) Act 1999*, and provides for the Government to indemnify non-executive directors of Western Power and non-public service members of the Electricity Reform Implementation Steering Committee against any liability they may incur in discharging their duties in the reform process.

## **Schedule 1 - Provisions about the constitution and proceedings of boards**

This Schedule essentially replicates the existing Schedule 1 to the *Electricity Corporation Act 1994*.

This Schedule contains provisions relating to the board of a successor Western Power entity. The terms of the Schedule are similar to the Schedules which appear in Acts establishing and governing other statutory corporations, such as the Water Corporation. The Schedule contains the following provisions:

### **Clause 1      Meaning of “director”**

This clause provides that in clauses 2 (term of office), 3 (resignation and removal), 4 (chairperson and deputy chair person) and 5(1) (alternate directors) of Schedule 1, a reference to the term director does not, if the chief executive officer is also a director, include a reference to him or her in that capacity.

### **Clause 2      Term of office**

This clause provides that subject to removal or resignation, a director of a successor Western Power entity holds office for up to 3 years and is eligible for reappointment at the end of that term. The periods of appointment are to be fixed so that approximately one third of the directors retire each year. Director's duties are not required to be performed on a full time basis, and subject to resignation or removal, a director is to continue in office until a successor is appointed, notwithstanding that the period for which the director was appointed has expired.

### **Clause 3      Resignation and removal**

This clause provides for the resignation of office by a director and the removal of a director by the Governor. The Governor may remove a director at any time and is not required to give reasons for doing so.

### **Clause 4      Chairperson and deputy chairperson**

This clause requires the Governor to appoint a director as chairperson and deputy chairperson on the nomination of the Minister. If the chief executive officer is also a director, he or she is not eligible to be appointed as chairperson or deputy chairperson.

The deputy chairperson is required to act in the place of the chairperson where the chairperson is unable to act for whatever reason.

**Clause 5            Alternate directors**

This clause provides for the appointment of alternate directors if a director is unable to act, and sets out the alternate director's entitlement to remuneration. Acts or omissions of an alternative director can not be questioned on the basis that the occasion for the appointment as alternate director has not arisen or has ceased.

**Clause 6            Meetings**

This clause sets out the manner in which meetings of the board are to be convened and conducted. The clause provides for the first meeting of the board to be convened by the chairperson and for subsequent meetings to be held at such times and places as the board determines. Any three directors constitute a quorum for a meeting of directors. In the case of equality of voting, the person presiding at the meeting has a casting vote in addition to his or her deliberative vote.

**Clause 7            Telephone and video meetings**

This clause provides that directors' meetings may be constituted by telephone or audio visual means but only if each participating director is capable of communicating with every other participating director at all times during those proceedings.

**Clause 8            Resolution may be passed without meeting**

This clause provides that if a document stating that an act, matter or thing has been done or that a resolution has been passed is sent to all directors and is assented to by not less than three of those directors, then that act or matter or thing or resolution is deemed to have been done at or passed at a meeting of the board of a successor Western Power entity. The meeting is taken to have been held on the day and at the time the document was last assented to by a director. A director may signify his or her assent to a document by signing it or by otherwise notifying the successor entity of his or her assent (whether in person or some other form of written, electronic, audio or audiovisual communication).

**Clause 9            Minutes and records**

This clause requires the board to keep accurate records of the proceedings of each board meeting and each resolution passed.

**Clause 10           Leave of absence**

This clause empowers the board to grant to a director a leave of absence from a meeting.

**Clause 11      Board to determine own procedures**

This clause provides that the board of a successor Western Power entity is to determine its own procedures, subject to any requirements of the Bill.

## **Schedule 2 – Provisions about the duties of directors and related provisions**

This Schedule essentially replicates the existing Schedule 2 of the *Electricity Corporation Act 1994*.

This Schedule contains a number of provisions imposing duties upon directors in the performance of their functions under the Bill, and provisions relating to liability. The duties imposed upon directors are based upon, but are not identical to, those imposed upon directors by the *Corporations Act 2001 (Cth)*, which now creates an important distinction between those duties which have civil consequences and those which have criminal consequences, when breached.

### **Division 1 - Preliminary**

#### **Clause 1 Attempts to commit offences**

This clause provides that a person who attempts (within the meaning of section 4 of the *Criminal Code*) to commit an offence against a provision of the Schedule is guilty of that offence.

### **Division 2 - Certain duties stated**

#### **Clause 2 Duty to act honestly**

This clause imposes a duty upon a director of a successor Western Power entity to act honestly at all times in the performance of the functions of his or her office. Alternative penalties are provided for a breach of the duty, depending upon whether the director acted with fraudulent intent. A breach of the duty with intent to deceive or defraud the successor entity or its creditors or for some other fraudulent purpose constitutes a crime, and as such can render a person liable to imprisonment. No equivalent duty is imposed upon directors by the *Corporations Act 2001 (Cth)*.

#### **Clause 3 Duty to exercise reasonable care and diligence**

This clause imposes an obligation on a director of a successor Western Power entity to exercise reasonable care and diligence in the performance of his or her duties. The degree of care and diligence which is required is that which a reasonable person in the same position would be expected to exercise. An equivalent duty is imposed upon directors by the *Corporations Act 2001 (Cth)*.

**Clause 4      Duty not to make improper use of information**

This clause provides that a director must not make improper use of information acquired by virtue of their position as director for the purposes of personal gain or to gain an advantage for some other person, or to the detriment of the successor Western Power entity. A contravention of the duty constitutes a crime. The clause imposes a penalty for breach of the duty, which can include a fine and a period of imprisonment (or both). An equivalent duty is imposed upon directors by the *Corporations Act 2001 (Cth)*.

**Clause 5      Duty not to make improper use of position**

This clause imposes a duty upon a director not to make improper use of their position for their personal gain or to gain an advantage for some other person or to the detriment of the successor Western Power entity. A breach of the duty constitutes a crime for which a penalty of a fine and/or a period of imprisonment can be imposed. An equivalent duty is imposed upon directors by the *Corporations Act 2001 (Cth)*.

**Clause 6      Fiduciary duty**

This clause provides that a director of a successor Western Power entity has the same fiduciary relationship with a successor entity and the same duties to the successor entity to act with loyalty and in good faith as a director of a company incorporated under the *Corporations Act 2001 (Cth)*. These duties are only enforceable by the Minister.

**Division 3 - Recovery from director**

**Clause 7      Payment of compensation may be ordered**

This clause provides that a person convicted of an offence in contravention of clauses 2 (attempts to commit offences), 3 (duty to exercise reasonable care and diligence), 4 (duty not to make improper use of information) or 5 (duty not to make improper use of information) of Schedule 2 may be required to pay compensation in addition to receiving a penalty if a court is satisfied that the successor Western Power entity has suffered loss or damage as a result of the commission of the offence.

An equivalent provision to this clause is contained in the *Corporations Act 2001 (Cth)*.

**Clause 8      Civil proceedings for recovery from director**

This provision provides that a successor Western Power entity may commence civil proceedings against a person who has contravened clauses 2 (attempts to commit offences), 3 (duty to exercise reasonable care and diligence), 4 (duty not to make improper use of information) or 5 (duty not to make improper use of information) of

Schedule 2 (irrespective of whether the person has been convicted of an offence against that clause) to recover from that person an amount equal to any profit which the person made as result of the contravention and an amount equivalent to any loss or damage suffered by the successor entity as a result of the contravention.

An equivalent provision to this clause is contained in the *Corporations Act 2001 (Cth)*.

#### **Division 4 - Relief from liability**

##### **Clause 9 Court may grant relief**

Without limiting clause 118 (no liability for certain acts or omissions), this clause sets out the circumstances in which a court may relieve a person from liability under clauses 6 (fiduciary duty), 7 (payment of compensation may be ordered) or 8 (civil proceedings for recovery from director). Where the court forms the view that a person who has breached one of the relevant clauses acted with honesty and ought fairly be excused from liability having regard to all the circumstances, the court may relieve the person either wholly or partly from any liability on such terms and conditions as it thinks fit.

##### **Clause 10 Application for relief**

This clause empowers a person who believes that an action may be brought against him or her under clauses 6 (fiduciary duty), 7 (payment of compensation may be ordered) or 8 (civil proceedings for recovery from director) to apply to the Supreme Court for relief from liability. The Supreme Court has the same power to deal with such an application as the court exercising appropriate jurisdiction has by virtue of clause 9 (court may grant relief).

##### **Clause 11 Case may be withdrawn from jury**

This clause provides that a judge has the power to withdraw a claim to which clause 9 (court may grant relief) applies and which is being tried by judge and jury from the jury where the judge is satisfied that the person is entitled to relief in whole or part from liability.

An equivalent provision to this clause is contained in the *Corporations Act 2001 (Cth)*.

## **Division 5 - Personal interests of directors, disclosure and voting**

### **Clause 12      Disclosure**

This clause imposes a duty upon a director who has a notifiable interest in a matter involving the successor Western Power entity to disclose the nature of the interest at a meeting of the board as soon as possible after the relevant facts have come to light. The disclosure must then be recorded in the minutes of the meeting. The term “notifiable interest” is defined in the clause to mean an interest in a matter that will (under clause 13(1) of Schedule 2) disqualify the director from voting on the matter at a meeting of the board unless allowed to do so by resolution under clause 13(3) or declaration under clause 13(6) (clause 13 deals with voting by interested directors).

A breach of the duty carries a financial penalty.

### **Clause 13      Voting by interested directors**

Subclause (1) of this clause provides that where a director has a material personal interest in a matter that is being considered by the board of the successor Western Power entity, the director must not vote on the matter or be present when the matter is considered.

Subclause (2) specifies that a director does not have a personal interest in a matter relating to a contract of insurance merely because the contract would insure that director against liability incurred in the performance of his or her functions as director.

Subclause (3) excludes the operation of subclause (1) where the board has passed a resolution that specifies the director, the interest and the matter and states that the directors voting for the resolution are satisfied that the interest should not disqualify the director from considering and voting on the matter.

Subclause (4) provides an exception to the rules relating to quorum set out in clause 6(5) of Schedule 1 (which deals with meetings) where a director has been disqualified under subclause (1). The clause provides that a quorum is present during consideration of a matter if at least 2 directors are present who are entitled to vote on any motion that may be moved at the meeting in relation to the matter. Subclause (5) then empowers the Minister to deal with a matter where a board is unable to do so because of subclause (4).

Subclause (6) empowers the Minister to declare that subclauses (1) and (4) do not apply in respect of a specified matter either generally or in voting on resolutions. By subclause (7), where the Minister makes such a declaration, the declaration must be laid before both Houses of Parliament, or otherwise dealt with according to clause 132 (supplementary provision for laying document before Parliament).

## **Division 6 - Other prohibited conduct**

### **Clause 14 Prohibition on loans to directors and related persons**

The clause prohibits the making of loans or giving of a guarantee or other security in connection with a loan to a director, a spouse or defacto of a director or a relative of a director or spouse or defacto of a director. A director who is knowingly involved in the contravention of this prohibition with intent to defraud commits a crime and is liable to a penalty of a fine and/or imprisonment. Any other breach of the prohibition carries a financial penalty only.

### **Clause 15 Directors and auditors not to be indemnified for certain matters**

This clause creates a general prohibition of the giving of indemnities or exemptions from liability by a successor Western Power entity or a subsidiary to a person who is or has been a director or auditor of the successor entity and who has incurred a liability in that capacity.

The clause then sets out a number of exceptions to this general prohibition. Subclause (3) provides that a person can be indemnified against a civil liability to a person other than a successor entity or subsidiary, provided that the liability did not arise out of conduct involving a lack of good faith. Subclause (4) provides that a person may be indemnified against a liability for costs and expenses incurred by the person in defending civil or criminal proceedings in which he or she is acquitted or judgment is given in his or her favour.

Subclause (5) provides that a successor entity or a subsidiary must not pay a premium in respect of a contract which insures a person who is or has been a director or auditor of the successor entity from liability incurred by the person in that capacity and arising out of conduct involving a willful breach of duty or a contravention of clause 4 (duty not to make improper use of information) or 5 (duty not to make improper use of position) of this Schedule. Any contract entered into for this purpose is deemed by subclause (7) to be void to the extent to which it contravenes subclause (5). This is subject to subclause (8), which provides that subclauses (5) and (7) do not apply to a liability for costs incurred by a person in defending civil or criminal proceedings, whatever their outcome.

**Clause 16**      **False or misleading information**

This clause imposes a duty on a director of a successor Western Power entity not to furnish information or permit the furnishing of information to the Treasurer, the Minister or a director, auditor, debenture holder or trustee for debenture holders of the successor entity which relates to the successor entity and which he or she knows to be false or misleading in a material particular or which has omitted from it a matter which renders the information misleading in a material respect. A breach of this duty renders a person liable to a penalty of a fine and/or imprisonment.

Subclause (2) has the effect of imposing a duty on a director to take reasonable steps to ensure that any information which he or she has provided to the Treasurer, the Minister or a director, auditor, debenture holder or trustee for debenture holders of the successor entity which relates to the successor entity is not false or misleading in a material particular and does not have omitted from it matter which makes it misleading in a material particular. A penalty of a fine and/or a term of imprisonment is provided for a breach of this obligation.

Where information is made available to the Treasurer, the Minister or a director, auditor, debenture holder or trustee for debenture holders of the successor entity in response to a question, the question and the information provided are to be considered together in determining whether the information was false or misleading.

### **Schedule 3 - Provisions to be included in constitution of subsidiary**

This Schedule replicates the existing Schedule 4 of the *Electricity Corporation Act 1994*.

This Schedule sets out the provisions which must be included in the constitution of a subsidiary of a successor Western Power entity.

**Clause 1            Disposal of shares**

This clause prohibits a successor Western Power entity from selling or disposing of shares in a subsidiary (as that term is defined in the Bill) without the approval of the Minister. Subclause (2) provides that the Minister is empowered to execute a transfer of any shares in a subsidiary held by the successor entity.

**Clause 2            Directors**

This clause provides that the directors of the subsidiary are to be appointed by the successor Western Power entity concerned, but only with the prior written approval of the Minister. Decisions relating to the subsidiary are to be made by the board of the subsidiary and in accordance with the statement of corporate intent of the relevant successor entity and the subsidiary. The board of a subsidiary is accountable to the Minister in the manner set out in Part 5 (provisions about accountability) of the Bill and in accordance with its constitution.

**Clause 3            Further shares**

This clause prohibits the issue or transfer of shares in a subsidiary without the prior written approval of the Minister.

**Clause 4            Subsidiaries of subsidiary**

This clause provides that a subsidiary must not form or acquire any subsidiary without the prior written approval of the Minister and the concurrence of the Treasurer. The subsidiary must ensure that the constitution of each of its subsidiaries complies with the Bill, and, to the maximum extent possible, that the subsidiary complies with its constitution and the Bill.

## **Schedule 4 - Financial administration and audit**

This Schedule replicates the existing Schedule 3 to the *Electricity Corporation Act 1994*.

This Schedule contains provisions in respect of the financial administration and audit obligations of each of the successor Western Power entities. It is intended to reflect the financial administration and audit obligations which are ordinarily imposed upon corporations by the *Corporations Act 2001 (Cth)*. The effect of this is that each of the successor entities will operate under financial administration and audit procedures essentially equivalent to those under which non-statutory corporations operate.

Each clause heading in Schedule 4 includes a reference to the comparable provision of the *Corporations Act 2001 (Cth)* which the clause is intended to implement. This parity with the *Corporations Act 2001 (Cth)* is recognised in clause 131 of the Bill, which facilitates the making of changes to Schedule 4 to mirror any changes which are made to the relevant provisions of the *Corporations Act 2001 (Cth)*. These changes may be effected by regulations made by the Governor on the recommendation of the Minister.

### **Division 1 - Preliminary**

#### **Clause 1            Meaning of terms used in this Schedule**

This clause contains the definitions necessary for the operation of the Schedule. The clause provides for the definitions of “accounting standard”, “company”, “financial records”, “financial year” and “regulations”.

### **Division 2 - Financial records**

#### **Clause 2            Obligation to keep financial records**

This clause imposes an obligation upon a successor Western Power entity to keep financial records and to retain these records for 7 years after the transaction covered by the record is complete.

This clause is equivalent to section 286 of the *Corporations Act 2001 (Cth)*.

#### **Clause 3            Physical format**

This clause describes the physical format which financial records must take.

This clause is equivalent to section 288 of the *Corporations Act 2001 (Cth)*.

**Clause 4 Place where records are kept**

This clause provides that the successor Western Power entity may decide where financial records are kept and must give the Treasurer written notice of the place where the records are kept. The records can be kept outside Australia but if so, sufficient information about those records must be kept in Australia to enable true and fair financial statements to be prepared. The Minister is empowered to direct a successor entity to produce any record which is kept outside Australia.

This clause is equivalent to section 289 of the *Corporations Act 2001 (Cth)*.

**Clause 5 Director access**

This clause confers upon a director of a successor Western Power entity rights of access to financial records.

This clause is equivalent to section 290 of the *Corporations Act 2001 (Cth)*.

**Division 3 - Financial reporting**

Subdivision 1 - Annual financial reports and directors' reports

**Clause 6 Preparation of annual financial reports and directors' reports**

This clause imposes an obligation to prepare annual financial reports and a directors' report for each financial year by a successor Western Power entity before 30 September.

This clause is equivalent to section 292 of the *Corporations Act 2001 (Cth)*.

**Clause 7 Contents of annual financial report**

This clause describes the matters which must be addressed in an annual financial report. These matters include financial statements (which are comprised of a profit and loss statement and a statement of cash flows for the year, a balance sheet as at the end of the year and consolidated profit and loss, balance sheet and cash flow statement if this is required by the accounting standards), notes to the financial statements and directors' declarations about the statements and notes. This clause also defines what is meant by both "notes to the financial statements" and "directors' declarations".

This clause is equivalent to section 295 of the *Corporations Act 2001 (Cth)*.

**Clause 8 Compliance with accounting standards and regulations**

This clause provides that a financial report must comply with accounting standards and regulations made under the *Corporations Act 2001 (Cth)*.

This clause is equivalent to section 296 of the *Corporations Act 2001 (Cth)*.

**Clause 9 True and fair view**

This clause states that financial statements and notes in respect of a financial year must give a true and fair view of the successor Western Power entity's financial position and performance.

This clause is equivalent to section 297 of the *Corporations Act 2001 (Cth)*.

**Clause 10 Annual directors' report**

This clause imposes an obligation on a successor Western Power entity to prepare directors' reports for each financial year. The report must contain the general and specific information required by clauses 11 (annual director's report – general information) and 12 (annual director's report – specific information) of the Schedule respectively and must:

- be made in accordance with a resolution of the directors;
- specify the date on which the report is made; and
- be signed by at least two directors.

This clause is equivalent to section 298 of the *Corporations Act 2001 (Cth)*.

**Clause 11 Annual directors' report – general information**

This clause describes the general information which must be included in a directors' report.

This clause is equivalent to section 299 of the *Corporations Act 2001 (Cth)*.

**Clause 12 Annual directors' report – specific information**

This clause describes the specific information which must be included in a directors' report.

This clause is equivalent to section 300 of the *Corporations Act 2001 (Cth)*.

**Clause 13      Annual directors' report – other specific information**

This clause describes some further specific information which is not dealt with in clause 12 (annual director's report – specific information) which must be included in the directors' report. This information is information relating to board policy for determining the nature and amount of emoluments of board members and senior executives and the relationship between this policy and the performance of the successor Western Power entity. The successor entity is also required to disclose details of the nature and amount of emoluments of each director and the 5 highest paid senior executives.

This clause is equivalent to section 300A of the *Corporations Act 2001 (Cth)*.

**Clause 14      Audit of annual financial report**

This clause imposes an obligation on a successor Western Power entity to have its annual financial report audited by the Auditor General in accordance with the auditing provisions contained in the Schedule.

This clause is equivalent to section 301 of the *Corporations Act 2001 (Cth)*.

Subdivision 2 - Audit and auditor's report

**Clause 15      Audit opinion**

This clause provides that the Auditor General must form an opinion about whether:

- the financial reporting of a successor Western Power entity is in accordance with this Schedule;
- he or she has been given all information, explanation and assistance necessary for the conduct of the audit;
- the financial records kept by the successor entity are adequate to enable the preparation and audit of a financial report; and
- the successor entity has kept other records and registers as required by this Schedule.

This clause is equivalent to section 307 of the *Corporations Act 2001 (Cth)*.

**Clause 16 Auditor General's report on annual financial report**

This clause provides that the Auditor General must provide the Minister with a report detailing whether the Auditor General believes that the financial reporting of a successor Western Power entity is in accordance with the requirements of this Schedule.

Where the Auditor General does not believe that the successor entity's financial reporting meets the requirements of the Schedule, the Auditor General must state the reasons for this view in his or her report and attempt to quantify, where practicable, the effect of this non-compliance on the financial report. If it is not practicable to quantify the effect of non-compliance, the report must say why. The Auditor General's report must describe any irregularity or defect in the financial report and deficiency or shortcoming in respect of the matters set out in clause 15 (audit opinion).

This clause is equivalent to section 308 of the *Corporations Act 2001 (Cth)*.

**Clause 17 Auditor General's power to obtain information**

This clause provides that the Auditor General has a right of access at all reasonable times to the books of a successor Western Power entity and can require an officer of a successor entity to provide information, explanations or other assistance for the purposes of audit or review.

This clause is equivalent to section 310 of the *Corporations Act 2001 (Cth)*.

**Clause 18 Assisting Auditor General**

This clause imposes an obligation on an officer of a successor Western Power entity to allow the Auditor General to access the books of the successor entity and give the Auditor General any information, explanation or assistance required under clause 17 (Auditor General's power to obtain information) of the Schedule.

This clause is equivalent to section 312 of the *Corporations Act 2001 (Cth)*.

Subdivision 3 – Special provisions about consolidated financial statements

**Clause 19 Directors and officers of controlled entity to give information**

This clause imposes an obligation on a director or officer of a controlled entity, in the event that a successor Western Power entity is required to prepare consolidated financial statements, to give the successor entity any information which it requests for the purpose of preparing those statements.

This clause is equivalent to section 323 of the *Corporations Act 2001 (Cth)*.

**Clause 20 Auditor General's power to obtain information from controlled entity**

This clause entitles the Auditor General to have access to the books of a controlled entity and to require an officer of a controlled entity to provide the Auditor General with information, explanations or other assistance for the purposes of audit or review where the financial reporting of a successor Western Power entity includes consolidated financial statements.

This clause is equivalent to section 323A of the *Corporations Act 2001 (Cth)*.

**Clause 21 Controlled entity to assist the Auditor General**

This clause imposes an obligation on an officer or auditor of a controlled entity to allow the Auditor General to access the books of the controlled entity and give the Auditor General any information, explanation or assistance required under clause 20 (Auditor General's power to obtain information from controlled entity) of the Schedule.

This clause is equivalent to section 323B of the *Corporations Act 2001 (Cth)*.

**Clause 22 Application of subdivision to entity that has ceased to be controlled**

This clause extends the operation of clauses 19 (director's and officers of controlled entity to give information), 20 (Auditor General's power to obtain information from controlled entity) and 21 (controlled entity to assist the Auditor General) to the preparation or audit of a financial report that covers a controlled entity where that entity is no longer controlled by the successor Western Power entity concerned.

This clause is equivalent to section 323C of the *Corporations Act 2001 (Cth)*.

Subdivision 4 – Financial years of the corporation and the entities it controls

**Clause 23 Financial years**

This clause provides that the financial year of a successor Western Power entity is the 12 months period ending on 30 June.

This clause is equivalent to section 323D of the *Corporations Act 2001 (Cth)*.

## **Division 4 - Accounting standards**

### **Clause 24 Accounting standards**

This clause states that an accounting standard applies to periods ending after the commencement of the standard or periods ending or starting on or after a later date specified in the standard. This clause also makes provision for the directors of a successor Western Power entity to elect (in writing) to apply a particular accounting standard from an earlier date, provided this is not expressly prohibited in the standard.

This clause is equivalent to section 334 of the *Corporations Act 2001 (Cth)*.

### **Clause 25 Equity accounting**

This clause provides that nothing in the Schedule prevents accounting standards from incorporating equity accounting principles.

This clause is equivalent to section 335 of the *Corporations Act 2001 (Cth)*.

### **Clause 26 Interpretation of accounting standards**

This clause sets out provisions relating to the interpretation of accounting standards. Expressions used in the accounting standard are to be given the same meaning as they have in Chapter 2M of the *Corporations Act 2001 (Cth)* unless the contrary intention appears, and the provisions of Part 1.2 of the *Corporations Act 2001 (Cth)* apply as if the standard's provisions were provisions of that Chapter.

This clause is equivalent to section 337 of the *Corporations Act 2001 (Cth)*.

### **Clause 27 Evidence of text of accounting standard**

This clause is applicable to a document and a copy of a document that purports to be published on behalf of the AASB or ASIC and to set out the text of:

- a specified standard as in force at a specified time under section 334 of the *Corporations Act 2001 (Cth)*; or
- a specified provision of a standard of that kind.

The clause provides that a document to which this clause applies is proof in proceedings under the Bill that a specified standard was in force at that time under that section and that the text set out in the document is the text of the specified standard or provision of the standard.

This clause is equivalent to section 339 of the *Corporations Act 2001 (Cth)*.

## **Division 5 - Exemptions and modifications**

### **Clause 28 Treasurer's power to make specific exemption orders**

This clause empowers the Treasurer to, upon an application made by a successor Western Power entity, make an order in writing exempting a director, a successor entity or the Auditor General from complying with all or specified requirements of Divisions 2 and 3 of the Schedule. An application must be authorised by a resolution of the directors and lodged with the Treasurer. The order may be conditional and continue for a limited or indefinite period of time.

The Treasurer is required to give the successor entity concerned notice of the making, revocation or suspension of an order, and must cause the text of an order to be laid before both Houses of Parliament within 14 days of being made. Where the House is not sitting at the commencement of the 14 day period, and the Treasurer believes it will not sit during the specified period, the Treasurer must provide a copy of the order to the Clerk of the House and that copy is deemed to have been laid before that House of Parliament.

This substance of this clause is similar to section 340 of the *Corporations Act 2001 (Cth)*.

### **Clause 29 Criteria for specific exemption orders and class orders**

This clause sets out the preconditions which must be satisfied before the Treasurer makes an order under clause 28 (Treasurer's power to make specific exemption orders) of the Schedule. These include that complying with the requirements of Divisions 2 and 3 would make the financial report or other reports misleading, would be inappropriate in the circumstances or would impose unreasonable burdens.

This clause is equivalent to section 342 of the *Corporations Act 2001 (Cth)*.

### **Clause 30 Extension of time**

This clause provides for the Minister to extend any of the time limits imposed by this Schedule for performance of obligations by a person other than the Auditor General. The provisions of clause 28(5) of the Schedule, which deals with the Treasurer's power to make specific exemption orders, apply where the Minister grants an extension of time.

## **Division 6 - Sanctions for contraventions of this Schedule**

### **Clause 31      Contravention of Divisions 2 and 3**

Subclause (1) of this clause requires a director of a successor Western Power entity to take all reasonable steps to comply with, or secure compliance with, Divisions 2 or 3 of this Schedule. Subclauses (2) and (3) provide that if a director of a successor Western Power entity contravenes subclause (1), the director will be liable. Two alternative penalties are prescribed, the higher of the two penalties being applicable where a breach of subclause (1) was committed with intent to deceive or defraud the Treasurer, the Minister or creditors of the successor entity.

Subclause (4) of this clause provides that subclause (1) does not apply to clauses 17 (Auditor General's power to obtain information), 18 (assisting Auditor General), 20 (Auditor General's power to obtain information from controlled entity) or 21 (controlled entity to assist the Auditor General).

This clause is equivalent to section 344 of the *Corporations Act 2001 (Cth)*.

## **Division 7 - Miscellaneous**

### **Clause 32      Deadline for reporting to the Minister**

This clause provides that a successor Western Power entity must provide the Minister with a copy of its annual report (as required by clause 105 of the Bill which deals with annual reports) as soon as possible and no later than the prescribed day. The clause defines "prescribed day" as the 10<sup>th</sup> working day after the receipt by the directors of the Auditor General's report under clause 16 (Auditor General's report on annual financial report) of this Schedule.

This clause is equivalent to section 315 of the *Corporations Act 2001 (Cth)*.

### **Clause 33      Annual financial reporting to the Minister**

This clause sets out the documents which must be included in a successor Western Power entity's annual report under clause 105 of the Bill, which deals with annual reports. These include:

- the financial report for the year;
- the directors' report for the year;
- the Auditor General's report for the year; and
- a copy of any order of the Treasurer under clause 28 (Treasurer's power to make specific exemption orders) of this Schedule.

**Clause 34      Audit**

This clause provides that if the Auditor General is unable to complete the audit of a successor Western Power entity before 30 September in any year, the Auditor General must submit an interim report to the Minister setting out the reasons why the Auditor General has not been able to complete the audit. The interim report must be laid before both Houses of Parliament by the Minister within 7 sitting days of the Minister receiving the report.

The clause also provides that section 92 of the *Financial Administration and Audit Act* applies to the audit of the successor entity.

**Clause 35      Powers and duties of the Auditor General**

This clause states that where the Auditor General forms the view that there has been a contravention of any provision of the Schedule and the contravention has not been or will not be adequately dealt with by bringing it to the attention of the relevant successor Western Power entity's board or by comment in the Auditor General's report, the Auditor General is required to report the matter to the Minister in writing. The provisions of sections 78 – 80, 82 – 91 and 95 of the *Financial Administration and Audit Act* apply to the successor entity as if it were a statutory authority named in Schedule 1 of that Act.

## **Schedule 5 – Amendment to other Acts**

This Part makes a number of consequential amendments to items of legislation in furtherance of the purposes of the Bill. In a number of cases, amendments are required to substitute the phrase “Western Power Corporation” with a reference to all or some of the successor entities to Western Power that are to be established under the Bill.

### **Division 1- *Constitution Acts Amendment Act 1899***

**Clause 1            The Act amended**

This clause provides that amendments in this Division are to the *Constitution Acts Amendment Act 1899*.

**Clause 2            Schedule V amended**

References to “Western Power Corporation” in this Act are repealed and replaced with references to the successor entities of Western Power.

### **Division 2 - *Economic Regulation Authority Act 2003***

**Clause 3            The Act amended**

This clause provides that amendments in this Division are to the *Economic Regulation Authority Act 2003*.

**Clause 4            Section 20 amended**

Reference in section 20(5) in the definition of “relevant entity” is amended by deleting reference to the relevant entity in paragraph (c) and replacing it with references to the successor entities of Western Power.

### **Division 3 - *Electricity Act 1945***

**Clause 5            The Act amended**

This clause provides that amendments in this Division are to the *Electricity Act 1945*.

**Clause 6            Section 5 amended**

This clause repeals the definition of “Western Power Corporation” in this Act and the phrase “but does not include the Western Power Corporation” in the definition of “supply authority”.

#### **Division 4 - *Electricity Corporation Act 1994***

This Division essentially amends the existing *Electricity Corporation Act 1994* so as to repeal all provisions except those relating to access to the electricity transmission and distribution systems.

Most of the repealed provisions from the *Electricity Corporation Act 1994* are mirrored in this Bill and applicable to the successor entities to Western Power.

This Division amends the remaining provisions so as to allow for the continuation of Western Power's existing obligations to provide third party access to its transmission and distribution capacity. These are transitional obligations which will remain in force until such time as the Electricity Networks Corporation has an access arrangement approved by the Economic Regulation Authority under the Electricity Networks Access Code, pursuant to Part 8 of the *Electricity Industry Act 2004*.

**Clause 7            The Act amended**

This clause provides that amendments in this Division are to the *Electricity Corporation Act 1994*.

**Clause 8            Long title amended**

This clause repeals the long title (which referred to the establishment of Western Power) and inserts a new long title, which reflects that the amended Act primarily deals with access to the electricity transmission and distribution systems.

**Clause 9            Section 1 amended**

This clause amends the short title of the Act from the *Electricity Corporation Act 1994* to the *Electricity Transmission and Distribution Systems (Access) Act 1994*.

**Clause 10          Sections 2 and 3 replaced by section 2**

This clause repeals section 2 (which provided for the Act's commencement) and section 3 (definitions) as these sections will no longer be applicable to the amended Act. This clause inserts a new section 2 which defines "corporation" for the purposes of the amended Act as the Electricity Networks Corporation or the Regional Power Corporation. These are the 2 successor entities that will own electricity transmission and distribution systems. In addition, definitions relating to "isolated system" and "North West interconnected system" are included.

**Clause 11**      **Parts 2, 3, 4 and 5 repealed**

This clause repeals Part 2 (establishment of Western Power), Part 3 (Western Power's functions and powers), Part 4 (Western Power's accountability) and Part 5 (financial provisions relating to Western Power). Largely, similar provisions are contained in this Bill (Parts 2, 3, 4 and 5) as applying to the successor Western Power entities.

**Clause 12**      **Part 6 heading replaced**

This clause replaces the heading of Part 6 with "Access to electricity transmission and distribution systems". The previous heading was "Access, pricing and procurement".

**Clause 13**      **Section 89 amended**

This clause amends the definitions of "electricity distribution capacity", "electricity distribution system", "electricity transmission capacity", "electricity transmission system" and "user" in section 89, so that these definitions only apply to the successor Western Power entities under the amended Act. This clause also deletes the definition of "new generation".

Additionally, a new sub-section 89(3) is added which provides that for the purposes of Schedule 5 clause 6 and Schedule 6 clause 6, the North West interconnected system and all isolated systems which will be owned and operated by Regional Power Corporation are to be regarded as a single electricity system. This is to enable the Regional Power Corporation to produce reports on an aggregated basis and not detailed individual reports for each of the North West interconnected system and the 26 isolated systems.

**Clause 14**      **Sections 92 and 93 repealed**

This clause repeals sections 92 and 93 from the existing Act. Section 92 related to the procurement of new generation. Procurement of new generation is to be addressed under wholesale market arrangements established under Part 9 of the *Electricity Industry Act 2004*.

Section 93 provided for the progressive introduction of electricity transmission and distribution retail contestability. The current electricity transmission and distribution access orders (made under section 93 of the existing Act) which apply to Western Power will need to be repealed and new orders created which only apply to the Electricity Networks Corporation (responsible for providing access to electricity transmission and distribution capacity in the SWIS) and the Regional Power Corporation (responsible for providing access to electricity transmission and distribution capacity outside the SWIS).

Access orders for access to the electricity systems owned by Electricity Networks Corporation and Regional Power Corporation are now to be made by the Minister under Schedule 6, clause 2 of the *Electricity Corporation Act 1994*.

**Clause 15      Section 94 amended**

This clause makes minor consequential amendments to section 94.

**Clause 16      Section 95 amended**

This clause makes a minor consequential amendment to section 95.

**Clause 17      Section 95A amended**

This clause aims to ensure that provisions of the *Electricity Corporation Act 1994* may be progressively repealed as a transition to the new electricity access arrangements under Part 8 of the *Electricity Industry Act 2004*. This matter was also previously provided for under section 95A of the *Electricity Corporation Act 1994*.

**Clause 18      Section 96 inserted**

This clause inserts a new section in the amended Act which provides that the Governor may make regulations in relation to all matters that are required, permitted, necessary or convenient for giving effect to the purposes of the amended Act.

**Clause 19      Part 7 and Schedules 1, 2, 3 and 4 repealed**

This clause repeals Part 7 and Schedules 1, 2, 3 and 4. Part 7 contained miscellaneous provisions relating to Western Power such as how documents are to be executed; Schedule 1 contained provisions as to constitution and proceedings of the board; Schedule 2 contained provisions as to duties of directors and related provisions; Schedule 3 contained provisions as to the financial administration and audit of the Corporation; and Schedule 4 contained provisions to be included in articles of association of subsidiaries of the Corporation. Similar provisions in relation to the successor Western Power entities are contained in Part 6 and Schedules 1, 2, 3 and 4 of this Bill.

**Clause 20      Schedule 5 amended**

Schedule 5 caters for access to transmission capacity. One of the key features of the new electricity market is the establishment of the Western Australian Electricity Networks Access Code. This Code provides for obligatory third party access to designated infrastructure. Heads of power to establish the Code are provided for under the *Electricity Industry Act 2004* with the Code itself effected through regulations. Until such time as State Networks'

access arrangement is approved under the Electricity Networks Access Code, Schedules 5 and 6 of the existing Act will need to remain in effect (as will the *Electricity Transmission Regulations 1996*, *Electricity Distribution Regulations 1997* and *Electricity Referee and Dispute Resolution Regulations 1997*).

References to "the corporation" (ie, Western Power) in Schedules 5 and 6 will be replaced with references to both the Electricity Networks Corporation and Regional Power Corporation, imposing equivalent obligations and powers on these entities as were previously placed upon Western Power.

**Clause 21      Schedule 6 amended**

Schedule 6 caters for access to distribution capacity. See further explanatory comments in relation to clause 20 above. In addition, the current electricity and distribution orders made pursuant to section 93 of the existing Act will need to be repealed and new orders created which apply to State Networks and the Regional Power Corporation. New clauses 2(1b) and 2(1c) of Schedule 6 empower the Minister to make these replacement orders.

**Clause 22      Schedule 7 repealed and savings provision**

This clause repeals Schedule 7, which related to the procurement of new generation. This saving provision is necessary to enable the current Western Power procurement process to be completed. This function is to be allocated to the Electricity Retail Corporation upon the commencement date.

**Division 5- *Electricity Industry Act 2004***

**Clause 23      The Act amended**

This clause provides that amendments in this Division are to the *Electricity Industry Act 2004*.

**Clause 24      Section 3 amended**

This clause repeals the definitions of "Western Power Corporation" and "relevant corporation" in this Act and replaces them with definitions of the four new entities and the phrase "electricity corporation".

**Clause 25      Section 12 amended**

This clause replaces reference to the relevant corporation with reference to the "electricity corporation or a subsidiary of an electricity corporation."

**Clause 26      Section 31 amended**

Reference in section 31(4)(a) to the “*Electricity Corporation Act 1994*” is deleted and replaced with reference to the “*Electricity Corporations Act 2005*”.

**Clause 27            Section 39 amended**

This clause provides for the making of compensation payments by the Electricity Networks Corporation or the Regional Power Corporation to its customers in the event prescribed reliability and quality of supply standards are not met. These compensation payments are to be included as part of a network quality and reliability of supply code to be established under section 39 of the *Electricity Industry Act 2004*.

**Clause 28            Section 45 amended**

This clause provides for a definition of “relevant corporation” for the purposes of section 45 of the *Electricity Industry Act 2004* as the previous definition of “relevant corporation” under section 3 has been deleted by means of clause 24 of this Schedule.

**Clause 29            Section 46 amended**

This clause provides for a definition of “Western Power Corporation” for the purposes of section 46 as the previous definition of “Western Power Corporation” under section 3 has been deleted by means of clause 24 of this Schedule.

This clause also specifies that if a new corporation is to undertake a licensed activity that immediately before the commencement day was undertaken by the Western Power Corporation, the new corporation is to be treated as an existing operator in respect of that activity.

**Clause 30            Sections 54A and 54B inserted**

This clause provides that, if by the commencement date:

- the Minister has not approved a prescribed form of contract under section 55 of the *Electricity Industry Act 2004*; and
- the Economic Regulation Authority has not yet approved the standard form contract as submitted by Western Power under section 49 of the Act,

the Electricity Retail Corporation and the Regional Power Corporation must offer to supply electricity to their customers under a contract prescribed by the Minister under clause 179 of this Bill.

Failure to comply with the obligation to offer to supply electricity under a prescribed form of contract may be subject to a:

- letter of reprimand; or

- monetary penalty, not exceeding \$100,000.

Prior to imposing a penalty, the Economic Regulation Authority must notify the corporation of the proposed action and provide it with an opportunity to make submissions on the matter.

Penalties may only be recovered in a court of competent jurisdiction.

**Clause 31      Sections 55 and 56 repealed**

This section provides for the repeal of sections 55 and 56. The matters previously addressed under sections 55 and 56 are now addressed under clause 30 of this Schedule.

**Clause 32      Section 60 amended**

This clause repeals the definition of “corporation” and replaces it with a new definition of “corporation” which reflects the restructure of Western Power into four separate entities.

**Clause 33      Section 71 amended**

This clause repeals the phrase “Western Power Corporation is the supplier of last resort for the designated area” and replaces it with two new subclauses which designate the Electricity Retail Corporation and the Regional Power Corporation as the supplier of last resort in their designated areas.

**Clause 34      Section 106 amended**

This clause repeals reference to the “*Electricity Corporation Act 1994*” and replaces it with reference to the “*Electricity Transmission and Distribution Systems (Access) Act 1994*”.

**Clause 35      Section 119 amended**

This clause replaces the definition of “existing facilities” with a new definition of “existing facilities” to reflect the restructure of Western Power into four separate entities.

**Clause 36      Part 9A inserted**

This clause provides for the establishment of a Tariff Equalisation Fund which is to be used to fund the difference between the actual cost of supply and the price paid by customers in areas outside of the South West interconnected system. The Electricity Networks Corporation will be required to make payments to the fund. Funds received will be used to pay for the Regional Power Corporation’s cost of supply.

This funding arrangement provides for the existing internal transfer of funds within Western Power in a more transparent manner and

provides for ongoing funding arrangements between the Networks Corporation and Regional Power Corporation.

The proposed section 129A defines the purpose of the Tariff Equalisation Fund, and Part 9A. The purpose of Part 9A is to contribute towards maintaining the financial viability of the Regional Power Corporation while enabling the regulated retail tariffs for electricity that is not supplied from the South West interconnected system to be, so far as is practicable, the same as the regulated retail tariffs for electricity that is supplied from that system.

The proposed section 129B will define the terms used in Part 9A, which include:

- “Code” means the Electricity Networks Access Code in force under section 104 (Minister to establish Code);
- “efficient cost of supply” means the costs that would be incurred by a prudent service provider acting efficiently and in accordance with accepted and good industry practice.
- “user” means both a user as defined in section 103 (a party with an arrangement for access under the Electricity Networks Access Code) or a “user” defined under the preserved access regime in the *Electricity Transmission and Distribution Systems (Access) Act*;
- “regulated retail tariffs” means the tariffs set by the Minister pursuant to regulations under section 132(1) (regulations as to fees and charges for functions of arbitrator and Board), and applying to specified classes of end use customers, or section 124(4) of the *Energy Operators (Powers) Act 1979*;
- “tariff equalisation contribution” means the amount determined by the Treasurer under clause 129D(2) (Determination of tariff equalisation contributions), which in practice will be paid by Electricity Networks Corporation to the Treasurer, and then paid by the Treasurer to Regional Power Corporation. and
- “Tariff Equalisation Fund” refers to the account established by the Treasurer to hold contribution amounts.

Proposed section 129C will establish the Tariff Equalisation Fund as an account under the Trust Fund constituted under the *Financial Administration and Audit Act*. Contributions required to be paid by Electricity Networks Corporation are to be credited to the Fund. In addition, investment income from the Fund will also be credited to the Fund.

Proposed section 129D will provide that the Treasurer is to determine whether a disparity exists between the efficient cost of supply to areas outside of the South West interconnected system, and the regulated retail tariff. If the Treasurer determines that such a disparity exists, then the Treasurer is to determine the contribution amount that is to be paid by Electricity Networks Corporation for the purposes of this Part, and in respect of a specified period.

If the Treasurer determines that a disparity exists, the Treasurer is required to publish in the Gazette the tariff equalisation contribution that is payable by the Networks Corporation.

In determining the tariff equalisation contribution, the Treasurer must have regard to:

- the amount necessary to compensate Regional Power Corporation for the disparity;
- the extent to which amounts paid to Regional Power Corporation in a previous period were greater or less than the disparity between efficient cost of electricity supply and supply at the regulated retail tariff;
- moneys in the Fund; and
- any other prescribed matters.

The Treasurer must consult with the Minister for Energy before making a determination regarding the payable tariff equalisation contribution.

Proposed section 129E will provide that the Treasurer may seek advice from the Economic Regulation Authority as to the proposed tariff equalisation contribution, or any other matter the Treasurer considers relevant.

The Economic Regulation Authority must give the Treasurer advice, if requested to do so. Any advice given by the Economic Regulation Authority must be published in the *Gazette* with the Treasurer's notice regarding the determined tariff equalisation contribution.

Proposed section 129F will provide that the Electricity Networks Corporation is to pay the contribution into the Fund in the manner prescribed. Subsection (2) provides for a "pass-through mechanism" whereby users are to pay to the Electricity Networks Corporation amounts in respect of the contribution, in accordance with the Electricity Networks Access Code.

Subsection (3) provides that the Code may make provision for the manner in which amounts are to be collected from network users, and requires the Authority to recognise the obligations of Electricity Networks Corporation under Part 9A when approving an access arrangement lodged under the Electricity Networks Access Code (this Code is established under Part 8 of the *Electricity Industry Act 2004*).

Lastly, subsection (4) provides that the mechanisms under subsection (2) relating to the obligation of users to make payments in accordance with Electricity Networks Access Code do not apply until such time as an access arrangement has been approved for Electricity Networks Corporation. Before this time, regulations may be made requiring users under the access regime preserved in the *Electricity Transmission and Distribution Systems (Access) Act* to make payments to Electricity Networks Corporation in respect of contributions payable by it.

Proposed section 129G will provide that if a contribution is payable by the Electricity Networks Corporation in respect of a period, the Treasurer is to pay to Regional Power Corporation, from the Tariff Equalisation Fund, amounts considered necessary for the purposes of this Part having regard to certain matters.

Proposed section 129H will place an obligation upon Regional Power Corporation and Electricity Networks Corporation to provide to the Treasurer and the Authority such information as is necessary for the performance of their functions under this Part.

Proposed section 129I will provide that regulations can only be made under this Part if the Treasurer so recommends.

Proposed section 129J will state that sections 57(2) and (3) to (11) of the *Financial Administration and Audit Act 1985* apply to any power conferred on the Treasurer under this Part. This provision functions to clarify and limit the Treasurer's power of delegation.

### **Division 6 - *Energy Corporations (Transitional and Consequential Provisions) Act 1994***

#### **Clause 37      The Act amended**

This clause provides that amendments in this Division are to the *Energy Corporations (Transitional and Consequential Provisions) Act 1994*.

#### **Clause 38      Section 50 amended**

This clause amends section 50 of the *Energy Corporations (Transitional and Consequential Provisions) Act 1994* which essentially provides that any debentures or inscribed stock which devolved to Western Power or Gas Corporation upon the disaggregation of the State Energy Commission of Western

Australia ("**SECWA**") continue to be governed by certain sections of the *State Energy Commission Act 1979* despite the repeal of those sections, as if those sections remained in force and references to SECWA in those sections were references to, Western Power or Gas Corporation.

This section is amended so that it refers to the successor entities of Western Power.

### **Division 7 - *Energy Operators (Powers) Act 1979***

#### **Clause 39      The Act amended**

This clause provides that amendments in this Division are to the *Energy Operators (Powers) Act 1979*.

#### **Clause 40      Section 4 amended**

This clause inserts a new definition of "electricity corporation" by reference to each of the Western Power successor entities.

Additionally, the definition of "energy operator" is deleted and replaced with a new definition that reflects the disestablishment of Western Power and the creation of an electricity industry licensing regime as provided for under the *Electricity Industry Act 2004*.

The principal new feature of the new definition in relation to electricity industry energy operators is that the meaning of a reference to "energy operator" in a provision of the *Energy Operators (Powers) Act 1979* is to be determined by the operation of section 45(1) of the *Electricity Industry Act 2004*. However, if no regulations have been made under section 45(1), an energy operator is taken to be an "electricity corporation". The meaning of the term "energy operator" in respect of the gas industry licensing regime has been retained in the Bill.

This clause deletes the definition of "Western Power Corporation" in subsection (1) and replaces it with a new definition which refers to each of the Western Power successor entities.

#### **Clause 41      Section 124 amended**

This clause makes a number of changes to the power making by-laws under section 124.

Section 124 is amended to allow each of the four newly created corporations to exercise the by-law making power currently exercised by Western Power. Subclauses (2), (3) and (4) make a number of a minor, consequential amendments. Subclause (5) replaces "Western Power Corporation" with "energy operator" in section 124(5), which deals with the making of declarations relating to certain matters, including system frequency.

Subclause (6) specifies that for the purposes of section 124, “the corporation” includes any subsidiary of the corporation.

**Division 8 - *Equal Opportunity Act 1984***

**Clause 42      The Act amended**

This clause provides that amendments in this Division are to the *Equal Opportunity Act 1984*.

**Clause 43      Section 139 amended**

Section 139(1)(c) of the *Equal Opportunity Act* applies Part IX of that Act to Western Power. Part IX deals with equal opportunity in public employment.

The reference to “Western Power Corporation” in this section is repealed and replaced with a reference to the successor entities of Western Power.

**Division 9 - *Gas Pipelines Access (Western Australian) Act 1998***

**Clause 44      The Act amended**

This clause provides that amendments in this Division are to the *Gas Pipelines Access (Western Australia) Act 1998*

**Clause 45      Section 80 amended**

Section 80 of the *Gas Pipelines Access (Western Australia) Act 1998* allows the Western Australian Gas Disputes Arbitrator to make use of government staff, other than an officer or employee of an “energy corporation”, which term is defined to include the Electricity Corporation (ie. Western Power) established under the *Electricity Corporation Act 1994*.

References to “energy corporation” in section 80 are repealed and replaced with a reference to “electricity corporation”, which is then defined as the successor entities of Western Power. This amendment also effectively removes the reference to Gas Corporation, which was disestablished in 2000.

**Division 10 - *Land Administration Act 1997***

**Clause 46      The Act amended**

This clause provides that amendments in this Division are to the *Land Administration Act 1997*.

**Clause 47      Section 160 amended**

Section 159 of the *Land Administration Act 1997* gives the Minister responsible for the *Land Administration Act 1997* the power to delegate certain functions in relation to the compulsory acquisition of land and compensation, to various Ministers, including the Minister responsible for the administration of the *Energy Operators (Powers) Act 1979*. Section 160(1)(c) in turn gives the Minister for Energy the power to delegate powers delegated under section 159 to Western Power Corporation.

A reference to “Western Power Corporation” in section 160(1)(c) is repealed and replaced with the Electricity Networks Corporation and Regional Power Corporation.

**Division 11 - *Metropolitan Region Town Planning Scheme Act 1959***

**Clause 48      The Act amended**

This clause provides that amendments in this Division are to the *Metropolitan Region Town Planning Scheme Act 1959*.

**Clause 49      Second Schedule amended**

Under section 35C of the *Metropolitan Region Town Planning Scheme Act 1959*, the Western Australian Planning Commission may (with the approval of the Minister), if it considers that any land in the metropolitan area may be required for one or more of the purposes specified in the Second Schedule to that Act, declare that land to be a planning control area. The Second Schedule of that Act lists a number of purposes for which land may be required, for the purposes of section 35C. One of the purposes listed is “Western Power Corporation.”

This Act is amended by replacing “Western Power Corporation” as a purpose for which land may be required in the Second Schedule with “the generation, transmission and distribution of electricity.”

**Division 12 - *Public Sector Management Act 1994***

**Clause 50      The Act amended**

This clause provides that amendments in this Division are to the *Public Sector Management Act 1994*.

**Clause 51      Schedule 1 amended**

Western Power Corporation is listed in Schedule 1 of the *Public Sector Management Act 1994* as an entity which is not a public sector organisation for the purposes of that Act

The reference to “Western Power Corporation” in Schedule 1 is repealed and replaced with a reference to the successor entities of Western Power.

**Division 13 - *Public Works Act 1902***

**Clause 52      The Act amended**

This clause provides that amendments in this Division are to the *Public Works Act 1902*.

**Clause 53      Section 5A amended**

Section 5A of the *Public Works Act 1902* gives the Minister responsible for that Act the power to delegate certain functions to various Ministers, including the Minister charged with the administration of the *Electricity Corporation Act 1994*. Section 5B(1)(c) allows the Minister charged with the administration of the *Electricity Corporation Act* to delegate any of the powers delegated under section 5A to Western Power or an officer of Western Power.

The reference to the *Electricity Corporation Act 1994* in 5A(d) is replaced with a reference to the *Electricity Corporations Act 2005*.

**Clause 54      Section 5B amended**

This clause replaces the reference to “Western Power Corporation” in section 5B(1)(c) with a reference to each of the successor entities of Western Power.

**Division 14 - *State Records Act 2000***

**Clause 55      The Act amended**

This clause provides that amendments in this Division are to the *State Records Act 2000*.

**Clause 56      Schedule 3 amended**

The “Electricity Corporation” established under the *Electricity Corporation Act 1994* is listed as an organisation under Schedule 3 of the *State Records Act 2000*.

The reference to “Electricity Corporation” in Schedule 3 is repealed and replaced with a reference to the successor entities of Western Power.

**Division 15 - *Town Planning and Development Act 1928***

**Clause 57      The Act amended**

This clause provides that amendments in this Division are to the *Town Planning and Development Act 1928*.

**Clause 58**      **Section 27A amended**

Section 27A of the *Town Planning and Development Act 1928* deals with, among other things, the creation of easements over land in favour of certain persons or authorities where the requirements of section 27A(1) are satisfied. Paragraph (iv) of the provision specifies "the Western Power Corporation under the *Electricity Corporation Act 1994* for the purpose of the supply of electricity or access to electricity supply works" as such a person or authority.

This clause deletes the reference to the Western Power Corporation, as described above, and replaces it with a reference to the holder of a distribution licence or integrated regional licence (as defined in the *Electricity Industry Act 2004*) for the purpose of the supply of electricity from, or access to, a distribution system.