

No. 11 of 2002.

Electricity Commission (Privatization) Act 2002.

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INDEPENDENT STATE OF PAPUA NEW GUINEA.



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INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT

entitled

Electricity Commission (Privatization) Act 2002,

Being an Act to provide for –

- (a) the privatization of the business of the Papua New Guinea Electricity Commission; and
- (b) the incorporation under the *Companies Act 1997* of a successor company and the transfer to that successor company of various assets and liabilities of the Commission; and
- (c) the transfer to the successor company of employees of the Commission required by the successor company and the preservation and transfer to the successor company of the superannuation and other entitlements of those employees; and
- (d) the transfer to the successor company of the Commission's water use permits and the extension of those water use permits; and
- (e) the Minister to give directions regarding community service obligations; and
- (f) related purposes,

MADE by the National Parliament to come into operation in accordance with a notice in the National Gazette by the Head of State, acting with, and in accordance with, the advice of the Minister.

1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

(1) This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C (qualified rights) of the *Constitution*, namely –

- (a) the right to liberty of the person conferred by Section 42 of the *Constitution*; and

- (b) the right to freedom from arbitrary search of person or property and entry of premises, conferred by Section 44 of the *Constitution*; and
- (c) the right of freedom of expression and publication conferred by Section 46 of the *Constitution*; and
- (d) the right to peacefully assemble and associate and to form or belong to, or not belong to, political parties, industries organisation and other associations conferred by Section 47 of the *Constitution*; and
- (e) the right to freedom of choice of employment in any calling for which a person has the qualifications (if any) lawfully required conferred by Section 48 of the *Constitution*; and
- (f) the right to reasonable privacy in respect of his private and family life, his communications with other persons and his personal papers and effects conferred by Section 49 of the *Constitution*; and
- (g) the right of reasonable access to official documents conferred by Section 51 of the *Constitution*; and
- (h) the right to protection from unjust deprivation of property conferred by Section 53 of the *Constitution*,

is a law that is made (pursuant to Section 38 of the *Constitution*) –

- (i) taking account of the National Goals and Directive Principles (including, in particular, the goal that Papua New Guinea should, among other things, be economically independent and its economy basically self reliant and to achieve development primarily through the use of Papua New Guinea forms of economic organisation) and the Basic Social Obligations (including, in particular, the obligations to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the interest not only of the present generation but also of future generations), for the purpose of giving effect to the public interest in public safety, public order, public welfare, and the development of underprivileged or less advanced groups or areas; and
- (j) in order to protect the exercise of the rights and freedom of others; and
- (k) to make provision for cases where the exercise of one such right may conflict with the exercise of another.

(2) This Act, to the extent that it causes or permits the compulsory taking of any property or any interest in or a right over any property referred to in Section 53 of the *Constitution*, is a law by which the property is required for the public purposes, or for the reason of, facilitating the provision of the service of electricity power supply to the people of Papua New Guinea, as a contribution to the social and economic development of the nation.

(3) This Act, to the extent that it creates or otherwise gives rise to rights, privileges, obligations and duties that are not the same as between citizens, is intended to be a law for the special benefit, welfare, protection and advancement of

members of underprivileged and less advanced groups and residents of less advanced areas for the purposes of Section 55 of the *Constitution*.

(4) For the purposes of Section 41 of the *Organic Law on Provincial Governments and Local-level Governments*, it is declared that this Act relates to a matter of national interest and it is further declared that this Act deals with a matter of urgent national importance and it is in the national interest that this Act be made without delay.

2. INTERPRETATION.

In this Act, unless the contrary intention appears –

“**asset**” means –

- (a) a present, future, vested or contingent legal or equitable estate or interest in real or personal property of any description (including money) and includes a chose in action; or
- (b) a present, future, vested or contingent right, power, privilege or immunity;

“**Commission**” means the Papua New Guinea Electricity Commission established by the *Electricity Commission Act 1961*;

“**liability**” means a present, future, vested or contingent liability, debt, duty or obligation of any description (whether incurred in Papua New Guinea or elsewhere) and includes a duty or non-pecuniary obligations;

“**new employer**” means the body to which the employment of an employee of the Commission is transferred pursuant to Section 5(1) or (2);

“**Privatization Commission**” means the Privatization Commission established under the *Privatization Act 1999*;

“**privatization policy**” has the meaning given in the *Privatization Act 1999*;

“**State owned entity**” means –

- (a) a company incorporated under the *Companies Act 1997* the issued shares of which are all owned by the State or a Minister hold such shares on trust for the State; or
- (b) a statutory body established by an Act; or
- (c) a trust where the State or the Minister as trustee for the State owns all the beneficial interest in the assets of the trust;

“**successor company**” means the company incorporated under Section 3(1);

“**transferee**” means the body to which any assets or liabilities of the Commission are transferred pursuant to Section 4(1) or (2); and

“**works**” has the meaning given in the *Electricity Commission Act 1961*.

3. PRIVATIZATION COMMISSION SHALL INCORPORATE A SUCCESSOR COMPANY.

(1) For the purposes of this Act, the Privatization Commission shall incorporate a company under the *Companies Act 1997* having a constitution.

(2) The constitution of the successor company shall, inter alia –

- (a) contain such provisions as are directed by or as are necessary to give effect to any decision of the National Executive Council relating to the privatization of the business conducted by the Commission; and
- (b) contain powers enabling the company to carry on the business and deal with the assets and liabilities transferred to it under Section 4; and
- (c) subject to Section 9, provide that, so long as the majority of the issued shares in the company is owned by the State, a Minister holding such shares on trust for the State or a State owned entity, one of the basic objectives of the company, insofar as its electricity generation, supply and sale business is concerned, shall be to perform its functions and direct its policies to the greatest advantage of the people of Papua New Guinea.

(3) The successor company shall, until the transfer of any shares referred to in Section 4(3), be wholly owned by the State, and the shareholders on behalf of the State shall be the Minister or a State owned entity nominated by the Minister.

4. TRANSFER OF ASSETS, LIABILITIES AND SHARES.

(1) The Head of State, acting on advice, may, by notice in the National Gazette, transfer such of the assets and liabilities of the Commission as are identified (whether specifically or by general description) in the notice to the successor company for the consideration specified in the notice with effect from the date specified in the notice.

(2) The Head of state, acting on advice, may, by notice in the National Gazette, transfer any asset or liability of the Commission that is not transferred under Subsection (1) to a State owned entity for the consideration specified in the notice with effect from the date specified in the notice.

(3) The Head of State, acting on advice, may, by notice in the National Gazette, transfer any shares in the successor company held in accordance with any privatization policy in respect of the privatization of the Commission.

(4) When any assets or liabilities are transferred by a notice under Subsection (1) or (2), the following provisions have effect (subject to the notice): –

- (a) by virtue of this subsection, the assets vest in the transferee without the need for any conveyance, transfer, assignment or assurance and become the assets of the transferee;
- (b) by virtue of this subsection, the liabilities become the liabilities of the transferee and cease to be liabilities of the Commission;

- (c) all proceedings relating to the assets or liabilities pending by or against the Commission are taken to be proceedings pending by or against the transferee;
- (d) any act, matter or thing done or omitted to be done by, to or in respect of the Commission in relation to the assets or liabilities (to the extent that the act, matter or thing has any force or effect) is taken to have been done or omitted to be done by, to or in respect of the transferee;
- (e) a reference, in any other Act, in any instrument made under any Act, or in any document of any kind, to the Commission is (to the extent that it relates to those assets or liabilities) to be read as, or as including, a reference to the transferee;
- (f) any chose in action that is vested in the transferee by virtue of that notice may be sued on, recovered or enforced by or against the transferee in its own name and it shall not be necessary for the transferee or the Commission to give notice to any person of the transfer of the chose in action;
- (g) any right or obligation that becomes a right or obligation of the transferee by virtue of that notice may be sued on, recovered or enforced by or against the transferee in its own name and it shall not be necessary for the transferee or the Commission to give notice to any person of the transfer of the right or obligation.

(5) Nothing done, authorised or allowed by or under Subsection (1), (2), (3) or (4) or a notice under Subsection (1), (2) or (3) is to be regarded –

- (a) as constituting a breach of, or default under, a statute or other law; or
- (b) as constituting a breach of, or default under, a deed, agreement or other instrument or as requiring any act to be done under a deed, agreement or other instrument; or
- (c) as giving rise to any right or remedy of any party to any deed, agreement or other instrument, or as causing or permitting the termination of any deed, agreement or other instrument; or
- (d) as releasing any surety or other obligee wholly or in part from any obligation.

(6) Where, by virtue of this section, the rights and obligations of the Commission under a deed, agreement or other instrument become the rights and obligations of a transferee –

- (a) the transferee becomes a party to the deed, agreement or other instrument in place of the Commission; and
- (b) the deed, agreement or other instrument has effect as if the transferee had always been a party to the deed, agreement or other instrument; and

- (c) acts performed by the Commission under the deed, agreement or other instrument are deemed to have been performed by the transferee.

(7) Any register maintained under any Act on which any property which is transferred by a notice under Subsection (1) or (2) is registered in the name of the Commission is deemed to be amended, as from the date of the transfer of that property, by substituting the transferee for the Commission.

- (8) Without limiting the generality of Subsection (7) –

- (a) where the property which is transferred is land, the Registrar of Titles shall, on written application by the transferee, without formal transfer, enter and register the transferee as the proprietor of the land in the Register Book or the Register of Leases maintained under the *Land Registration Act 1981* (as appropriate) and issue the Certificate of Title or State Lease or other instrument evidencing title to the land in the name of the transferee; and
- (b) where the property which is transferred is an interest in land, the Minister responsible for land matters is deemed to have approved the transfer of that interest in land to the transferee where such approval is otherwise required under the *Land Act 1996*; and
- (c) where the property which is transferred is the subject of a mortgage or charge in favour of the Commission, the Registrar of Companies shall, on written application by the transferee, without formal transfer, enter and register the transferee as mortgagee or chargee of the property in the appropriate register maintained under the *Companies Act 1997*.

5. TRANSFER OF EMPLOYEES.

(1) The Head of State, acting on advice, may, by notice in the National Gazette, transfer such employees of the Commission who are identified in the notice, either in generic or specific terms, to the employment of the successor company with effect from the date specified in the notice.

(2) The Head of State, acting on advice, may, by notice in the National Gazette, transfer any employees of the Commission identified in the notice, either in generic or specific terms, that are not transferred to the employment of the successor company under Subsection (1) to the employment of a State owned entity with effect from the date specified in the notice.

(3) On the transfer of any employee's employment in accordance with Subsections (1) and (2) the employee ceases to be an employee of the Commission and becomes an employee of the new employer on the same terms and conditions of employment as applied to the employee immediately before the transfer of employment, and those terms and conditions shall continue to have effect until varied either by agreement or otherwise in accordance with law.

(4) An employee to whom Subsection (1) or (2) applies is deemed to have an accrued entitlement to benefits in his employment with the new employer that is

equivalent to the benefits which he had accrued with the Commission immediately prior to the date of the transfer of his employment to the new employer.

(5) A transfer of the employment of an employee under Subsection (1) or (2) shall not, and shall not be taken –

- (a) to be a breach, variation or termination of any contract of employment of, or to interrupt the period or continuity of employment for, that employee, or to create any new contract of employment or to create any entitlement with respect to employee benefits including annual leave, furlough leave and superannuation entitlement beyond those which would have been applicable to the employee had he continued to be employed by the Commission; or
- (b) to confer any entitlement on that employee to receive payment of any accrued entitlements; or
- (c) to confer any entitlement on that employee to make any claim by way of redundancy, retrenchment or otherwise as a result of the transfer of employment

(6) Notwithstanding the provisions of any other law, the successor company may, with the approval of the Minister, establish a staff superannuation fund for the benefit of its employees provided that the benefits conferred by such superannuation fund are not less favourable to its members than the benefits available from the National Provident Fund or any successor to the National Provident Fund.

(7) For the purposes of this section –

“employee” includes any former employee of the Commission who has accrued superannuation entitlements in respect of his employment by the Commission which remain to the credit of his account with the POSFB and to which he is immediately entitled at the date of the first transfer of employment by a notice pursuant to this section;

“employee entitlements” means the employee contribution component of the superannuation entitlements of each employee of the Commission immediately prior to the date of the first transfer of employment by a notice pursuant to this section, including all accrued interest thereon as calculated by the POSFB and certified by the Auditor-General;

“employer contributions” means the employer contribution component of the superannuation entitlements of each employee of the Commission immediately prior to the date of the first transfer of employment by a notice pursuant to this section, including all accrued interest thereon as calculated by the POSFB and certified by the Auditor-General;

“National Provident Fund” means the National Provident Fund established under the *National Provident Fund Act 1980*;

“POSFB” means the Public Officer’s Superannuation Fund Board established under the *Public Officers Superannuation Fund Act 1990*;

“**relevant fund**” means, where the successor company has established a staff superannuation fund pursuant to Subsection (6), that fund, and where it has not, the National Provident Fund.

(8) On the date of the first transfer of employment by a notice pursuant to this section –

- (a) employee entitlements shall be transferred by the POSFB to the relevant fund without penalty or deduction or tax; and
- (b) the State shall pay, or secure the payment of, the employer contributions to the relevant fund without penalty.

(9) This section applies notwithstanding the provisions of –

- (a) Section 36A of the *Public Officers Superannuation Fund Act 1990*; and
- (b) any other law.

6. TAXES AND DUTIES.

(1) For the purposes of the *Income Tax Act 1959*, a transferee is deemed to have acquired the assets and liabilities transferred to it by a notice under Section 4(1) or (2) at a value equal to the amount specified in the notice, either in relation to a particular asset or liability or in relation to a general category of asset or liability.

(2) Shares issued by the successor company to the Minister or a State owned entity nominated by the Minister, in either case as the holder of those shares on behalf of the State, are deemed to have fully paid and issued and allotted for valuable consideration other than cash.

(3) A transfer of assets or liabilities by a notice under Section 4(1) or (2) shall be exempt from any tax, levy, charge or duty payable under any Act, including, but not limited to –

- (a) the *Companies Act 1997*; and
- (b) the *Income Tax Act 1959*; and
- (c) the *Instruments Act 1953*; and
- (d) the *Land Registration Act 1981*; and
- (e) the *Stamp Duties Act 1952*; and
- (f) the *Value Added Tax Act 1998*.

(4) Except as directed by the Minister, no registration fee shall be payable in respect of the authorised capital of the successor company or any State owned entity referred to in Section 4(2) and no tax or duty shall be payable on the issue or allotment of shares in the successor company or in any State owned entity referred to in Section 4(2) to the Minister as trustee for the State or otherwise to a State owned entity.

7. TRANSFER AND EXTENSION OF WATER USE PERMITS.

(1) For the purpose of this section, “water use permits” means all the water use permits issued to the Commission pursuant to Section 40 of the *Water Resources Act 1982* including, but not limited to, water use permit number 29/77, 29/80, 29/94, 26/8, 29/290, 29/81, 29/82, 29/83, 29/75, 29/93, 29/754 and 29/215.

(2) Notwithstanding any law to the contrary, the water use permits may, by notice in the National Gazette by the Head of State, acting on advice, be transferred to the successor company and the term of each such water use permit shall thereupon be extended so that it expires 99 years after the date of the publication of the notice in the National Gazette.

(3) The conditions relating to and governing the operation of the water use permits as extended pursuant to Subsection (2) shall be the same as the conditions imposed on the water use permits prior to their extension other than the term thereof.

(4) The extension of the term of a water use permit pursuant to Subsection (2) does not preclude the revocation of that water use permit in accordance with any applicable law.

8. STATUTORY EASEMENTS RELATING TO WORKS.

(1) Notwithstanding the absence of a dominant tenement, an entity specified in a notice published in National Gazette by the Head of State, acting on advice (in this section called the “specified entity”), shall have an easement over land where –

- (a) works owned or operated by the specified entity are on, above or under the land and the land does not belong to the specified entity; and
- (b) those works were, as at the date specified in the first notice published pursuant to Section 4(1), owned or operated by the Commission and the land did not belong to the Commission.

(2) The easement entitles the specified entity –

- (a) to maintain the relevant works on, above or under the land affected by the easement; and
- (b) to enter the land, by its agents or employees, for the purpose of operating, examining, maintaining, repairing, modifying or replacing the relevant works; and
- (c) to use the works for or in connection with the generation and supply of electricity; and
- (d) to bring on to the land any vehicles or equipment that may be reasonable necessary for any of the above purposes.

(3) Section 26(2), (3) and (5) of the Electricity Industry Act (Chapter 78) (and any regulations made for the purposes of any of those provisions) apply to the entry on land and carrying out of work under this section in the same way as if the land

were land which was entered, and the work were work which was undertaken, under Section 26 of the Electricity Industry Act (Chapter 78).

(4) The specified entity shall made good any damage caused by the exercise of powers under this section as soon as practicable or pay reasonable compensation for the damage.

(5) If the specified entity has an easement relating to works over another person's land otherwise than by virtue of this section, the application of the easement under this section to the land is excluded to the extent necessary to avoid the same part of the land being subject to both easements.

(6) The specified entity may, by instrument in writing –

(a) suspend or limit rights or impose conditions on the exercise of rights arising under the easement under this section; or

(b) surrender (in whole or in part) the easement under this section,

and such an instrument has effect according to its terms.

9. MINISTER MAY GIVE DIRECTIONS REGARDING COMMUNITY SERVICE OBLIGATIONS.

(1) For the purposes of this section –

“community service obligation” means the obligation on an entity specified in a notice in the National Gazette by the Head of State, acting on advice, insofar as its electricity generation, supply and sale business is concerned, to achieve the objective, referred to in Section 3(2)(c), to perform its functions and direct its policies to the greatest advantage of the people of Papua New Guinea;

“financial detriment” includes, without limitation

(a) costs or expenditure incurred or likely to be incurred in excess of that which would otherwise be incurred or likely to be incurred; and

(b) revenue that would be forgone or likely to be forgone which would otherwise be received or likely to be received; and

(c) both fixed and recurring costs and expenditure.

(2) Subject to this section, the Minister may, after consultation with the governing body of an entity specified in a notice in the National Gazette by the Head of the State (in this section called “the specified entity”), acting on advice, give to the governing body such written directions in relation to the performance of the community service obligation as appear to the Minister to be necessary in the public interest and the specified entity shall perform the community service obligation in accordance with those directions.

(3) A written direction given by the Minister under Subsection (2) shall specify the amount by which the specified entity is to be compensated in accordance with Subsection (4) for performing the community service obligation.

(4) Where the specified entity satisfies the Minister that it will, or will be likely to, suffer financial detriment as a result of complying with a direction given under Subsection (2), the specified entity shall be entitled to be compensated by the State for an amount that the Minister, after consultation with the governing body of the specified entity, reasonably determines to be the amount necessary to adequately compensate the specified entity for the financial detriment suffered, or likely to be suffered, both immediately and in the future as a result of complying with the direction.

(5) The Minister shall cause a copy of a direction under Subsection (2) to be laid before Parliament within 15 sitting days after the direction is given.

10. CERTIFICATES.

(1) The Minister may certify whether specified assets or liabilities have been transferred by a notice under Section 4 and, if so, the identity of the transferee.

(2) A certification by the Minister under Subsection (1) is evidence of the matter certified.

11. REGULATIONS.

(1) The Head of State, acting on advice, may, by regulation –

- (a) make such modifications to the provisions of this Act or to any notice which has been published in the National Gazette as may appear necessary for preventing anomalies; and
- (b) make such additional, incidental, consequential or supplementary provisions as may be necessary for the purpose of giving full effect to the provisions or intention of this Act.

(2) Any such modifications or provisions referred to in Subsection (1) made by the Head of State have, and are deemed always to have had, the same force and effect as if they had been enacted by way of an amendment to this Act or to any such notice, and on their publication in the National Gazette, this Act or such notice is amended accordingly.

Office of Legislative Counsel, PNG