

South Australia

# Essential Services Commission Act 2002

An Act to establish the Essential Services Commission; and for other purposes.

---

## Contents

### Part 1—Preliminary

- 1 Short title
- 3 Interpretation

### Part 2—Essential Services Commission

- 4 Essential Services Commission
- 5 Functions
- 6 Objectives
- 7 Independence
- 8 Commission may publish statements, reports and guidelines
- 9 Commission must publish Charter
- 10 Consultation
- 11 Memoranda of Understanding
- 12 Membership of Commission
- 13 Commissioners
- 14 Acting Chairperson
- 15 Staff
- 16 Consultants
- 17 Advisory committees
- 18 Delegation
- 19 Conflict of interest
- 20 Meetings of Commission
- 21 Common seal and execution of documents
- 22 Application of money received by Commission
- 23 Annual performance plan and budget
- 24 Accounts and audit

### Part 3—Price regulation

- 25 Price regulation
- 26 Making and effect of price determinations
- 27 Offence to contravene price determination

### Part 4—Industry codes and rules

- 28 Codes and rules

### Part 5—Collection and use of information

- 29 Commission's power to require information

30 Obligation to preserve confidentiality

## Part 6—Reviews and appeals

31 Review by Commission

32 Appeal

33 Exclusion of other challenges to price determinations

## Part 7—Inquiries and reports

34 Inquiry by Commission

35 Minister may refer matter for inquiry

36 Notice of inquiry

37 Conduct of inquiry

38 Reports

## Part 8—Miscellaneous

39 Annual report

40 Warning notices and assurances

41 Register of warning notices and assurances

42 Injunctions

43 False or misleading information

44 Statutory declarations

45 General defence

46 Offences by bodies corporate

47 Continuing offence

48 Order for payment of profit from contravention

49 Immunity from personal liability

50 Evidence

51 Service

52 Regulations

53 Review of Act

## Schedule 1—Appointment and selection of experts for Court

## Schedule 2—Transitional provisions

2 Transitional

## Legislative history

---

### **The Parliament of South Australia enacts as follows:**

## **Part 1—Preliminary**

### **1—Short title**

This Act may be cited as the *Essential Services Commission Act 2002*.

### **3—Interpretation**

In this Act—

***Chairperson*** means the person appointed as the Chairperson of the Commission under Part 2;

**Commission** means the Essential Services Commission established under Part 2;

**Commissioner** means the Chairperson or another Commissioner appointed to the Commission under Part 2;

**contravention** includes a failure to comply;

**essential services** means any of the following:

- (a) electricity services;
- (b) gas services;
- (c) water and sewerage services;
- (d) maritime services;
- (e) rail services;
- (f) any other services prescribed for the purpose of this definition;

**industry Minister**, in relation to a regulated industry, means the Minister administering the Act by which the regulated industry is declared for the purposes of this Act;

**inquiry** means an inquiry by the Commission under Part 7;

**price determination** means a determination by the Commission under Part 3;

**regulated entity** means an entity operating in a regulated industry;

**regulated industry** means a specified industry, or specified activities, consisting of, involved in or related to the provision of essential services, declared by another Act to constitute a regulated industry for the purposes of this Act;

**relevant industry regulation Act** means another Act by which a regulated industry is declared for the purposes of this Act, and includes regulations under that other Act.

## Part 2—Essential Services Commission

### 4—Essential Services Commission

- (1) The *Essential Services Commission* is established.
- (2) The Commission—
  - (a) is a body corporate; and
  - (b) has perpetual succession and a common seal; and
  - (c) is capable of suing and being sued in its corporate name.
- (3) The Commission has all the powers of a natural person together with powers conferred on the Commission by or under this or any other Act.

### 5—Functions

The Commission has the following functions:

- (a) to regulate prices and perform licensing and other functions under relevant industry regulation Acts;

- (b) to monitor and enforce compliance with and promote improvement in standards and conditions of service and supply under relevant industry regulation Acts;
- (c) to make, monitor the operation of, and review from time to time, codes and rules relating to the conduct or operations of a regulated industry or regulated entities;
- (d) to provide and require consumer consultation processes in regulated industries and to assist consumers and others with information and other services;
- (e) to advise the Minister on matters relating to the economic regulation of regulated industries, including reliability issues and service standards;
- (f) to advise the Minister on any matter referred by the Minister;
- (g) to administer this Act;
- (h) to perform functions assigned to the Commission under this or any other Act;
- (i) in appropriate cases, to prosecute offences against this Act or a relevant industry regulation Act.

## 6—Objectives

In performing the Commission's functions, the Commission must—

- (a) have as its primary objective protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services; and
- (b) at the same time, have regard to the need to—
  - (i) promote competitive and fair market conduct; and
  - (ii) prevent misuse of monopoly or market power; and
  - (iii) facilitate entry into relevant markets; and
  - (iv) promote economic efficiency; and
  - (v) ensure consumers benefit from competition and efficiency; and
  - (vi) facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment; and
  - (vii) promote consistency in regulation with other jurisdictions.

## 7—Independence

Except as provided under this Act or any other Act, the Commission is not subject to Ministerial direction in the performance of its functions.

## 8—Commission may publish statements, reports and guidelines

The Commission may publish statements, reports and guidelines relating to the performance of its functions.

## 9—Commission must publish Charter

- (1) The Commission must, in consultation with the Minister, develop and publish a Charter of Consultation and Regulatory Practice including guidelines relating to processes for making price determinations or codes or rules and conducting inquiries.
- (2) The Charter of Consultation and Regulatory Practice—
  - (a) must include such matters as are prescribed by regulation; and
  - (b) may include any other matters that the Commission considers appropriate.

## 10—Consultation

- (1) This section applies to the Commission and to prescribed agencies for the purposes of ensuring that—
  - (a) the regulatory and decision making processes of the Commission and prescribed agencies are closely integrated and better informed; and
  - (b) overlap or conflict between existing and proposed regulatory schemes is avoided.
- (2) The Commission must as early as practicable consult with a relevant prescribed agency—
  - (a) in the making of a price determination or a code or rules; and
  - (b) in the conduct of an inquiry, after first consulting with the Minister; and
  - (c) in preparing and reviewing the Charter of Consultation and Regulatory Practice.
- (3) If requested in writing to do so by the Commission, a prescribed agency must consult with the Commission—
  - (a) in relation to any matter specified by the Commission that is relevant to the objectives or functions of the Commission under this Act and under any relevant industry regulation Act; or
  - (b) in respect of a matter specified by the Commission that may impact on a regulated industry.
- (4) A prescribed agency must ensure that consultation occurs as early as practicable in the regulatory, advisory or decision making processes of the prescribed agency.
- (5) The requirements under this section are in addition to any other requirements or processes under any other legislation or regulatory scheme.
- (6) In this Part—

***prescribed agency*** means a person, body or agency that—

  - (a) has functions or powers under relevant health, safety, environmental or social legislation applying to a regulated industry; and
  - (b) is prescribed by regulation for the purposes of this Part.

## 11—Memoranda of Understanding

- (1) In this section—  
*prescribed body* means—
  - (a) a person, body or agency that—
    - (i) is a prescribed agency; or
    - (ii) represents the interests of users or consumers; and
  - (b) is prescribed by regulation for the purposes of this section.
- (2) The Commission and a prescribed body must enter into a Memorandum of Understanding by a date determined by the Minister.
- (3) A Memorandum of Understanding—
  - (a) must include such matters as are prescribed; and
  - (b) may include any other matters that the parties consider appropriate.
- (4) The Commission must ensure that a Memorandum of Understanding is published—
  - (a) in the Gazette; and
  - (b) on the internet.

## 12—Membership of Commission

The Commission will be constituted of—

- (a) a Commissioner appointed by the Governor as the Chairperson; and
- (b) such number of additional Commissioners, full-time or part-time, as are appointed by the Governor.

## 13—Commissioners

- (1) A person may be appointed as a Commissioner who is qualified for appointment because of the person's knowledge of, or experience in, one or more of the fields of industry, commerce, economics, law or public administration.
- (2) A Commissioner will be appointed—
  - (a) —
    - (i) in the case of the Chairperson—for a term of 5 years;
    - (ii) in the case of any other Commissioner—for a term not exceeding 5 years; and
  - (b) on terms and conditions as to remuneration and other matters determined by the Governor.
- (3) At the expiration of a term of appointment, a Commissioner will be eligible for reappointment.
- (4) The conditions of appointment of a Commissioner must not, without the consent of the Commissioner, be varied while the Commissioner is in office so as to become less favourable to the Commissioner.

- (5) The Chairperson must not engage, without the consent of the Minister, in any other remunerated employment.
- (6) The office of a Commissioner becomes vacant if the Commissioner—
  - (a) dies; or
  - (b) resigns by written notice to the Minister or is not re-appointed at the end of a term of appointment; or
  - (c) is removed from office under this section; or
  - (d) is convicted of an indictable offence or sentenced to imprisonment for an offence; or
  - (e) becomes bankrupt or applies to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
  - (f) becomes a member, or a candidate for election as a member, of the Parliament of the State, the Commonwealth, or any other State of the Commonwealth.
- (7) The Supreme Court may, by order made on the application of the Minister, remove a Commissioner from office for—
  - (a) misconduct; or
  - (b) incapacity to perform satisfactorily the Commissioner's functions; or
  - (c) material contravention of, or failure to comply with, the requirements of this or any other Act.
- (8) The Supreme Court may, by order made on the application of the Minister, suspend a Commissioner from office pending determination of an application for removal of the Commissioner.
- (9) A Commissioner may only be removed or suspended from office as provided in this section.

#### **14—Acting Chairperson**

- (1) The Governor may appoint an Acting Chairperson to act in the office of the Chairperson and a person so appointed has, while so acting, all the functions and powers of the Chairperson.
- (2) An Acting Chairperson may act in the office of the Chairperson—
  - (a) while—
    - (i) the Chairperson is unable to perform official functions; or
    - (ii) the office of the Chairperson is vacant,but not on a continuous basis for more than 6 months; or
  - (b) if the Chairperson is disqualified from acting in relation to a particular matter—in relation to that matter.
- (3) The terms and conditions of appointment of an Acting Chairperson will be as determined by the Governor.

## 15—Staff

The staff of the Commission may comprise—

- (a) persons employed in the Public Service of the State and assigned to assist the Commission;
- (b) persons appointed by the Commission on terms and conditions determined by the Commission.

## 16—Consultants

The Commission may engage consultants on terms and conditions considered appropriate by the Commission.

## 17—Advisory committees

The Commission may establish advisory committees to provide advice on specified aspects of the Commission's functions.

## 18—Delegation

- (1) Subject to this section, the Commission may delegate functions or powers to a Commissioner or any person or body of persons that is, in the Commission's opinion, competent to perform or exercise the relevant functions or powers.
- (2) A delegation under this section—
  - (a) must be in writing; and
  - (b) may be conditional or unconditional; and
  - (c) is revocable at will; and
  - (d) does not prevent the delegator from acting in any matter.

## 19—Conflict of interest

- (1) The Chairperson, an Acting Chairperson, a Commissioner or a delegate of the Commission must inform the Minister in writing of—
  - (a) any direct or indirect interest that the person has or acquires in any business, or in any body corporate carrying on business, in Australia or elsewhere; or
  - (b) any other direct or indirect interest that the person has or acquires that conflicts or may conflict with the person's functions.
- (2) The Chairperson, Acting Chairperson, Commissioner or delegate must take steps to resolve a conflict or possible conflict between a direct or indirect interest and the person's functions in relation to a particular matter, and, unless the conflict is resolved to the Minister's satisfaction, the person is disqualified from acting in relation to the matter.
- (3) This section does not apply if the interest is as a result of the supply of goods or services that are available to members of the public on the same terms and conditions.
- (4) A failure to comply with this section does not affect the validity of an act or decision of the Chairperson, Acting Chairperson, Commissioner or delegate.



## **20—Meetings of Commission**

- (1) The Chairperson may convene as many meetings of the Commission as he or she considers necessary for the efficient conduct of its affairs.
- (2) The Chairperson must preside at a meeting of the Commission.
- (3) A quorum of the Commission consists of a majority of the Commissioners in office for the time being.
- (4) A decision arising at a meeting of the Commission is a decision of the Commission if carried by a majority of the votes cast by Commissioners at the meeting.
- (5) Each Commissioner present at a meeting of the Commission has 1 vote on any question arising for decision and, if the votes are equal, the Chairperson may exercise a casting vote.
- (6) Subject to this Act, the Commission may regulate its own procedure.

## **21—Common seal and execution of documents**

- (1) The common seal of the Commission must not be affixed to a document except in pursuance of a decision of the Commission and the affixing of the seal must be attested by the signatures of 1 or more Commissioners.
- (2) The Commission may, by instrument under its common seal, authorise a Commissioner, an employee of the Commission (whether nominated by name or by office or title) or any other person to execute documents on behalf of the Commission subject to conditions and limitations (if any) specified in the instrument of authority.
- (3) Without limiting subsection (2), an authority may be given so as to authorise 2 or more persons to execute documents jointly on behalf of the Commission.
- (4) A document is duly executed by the Commission if—
  - (a) the common seal of the Commission is affixed to the document in accordance with this section; or
  - (b) the document is signed on behalf of the Commission by a person or persons in accordance with an authority conferred under this section.
- (5) Where an apparently genuine document purports to bear the common seal of the Commission, it will be presumed in any legal proceedings, in the absence of proof to the contrary, that the common seal of the Commission has been duly affixed to that document.

## **22—Application of money received by Commission**

Except as otherwise directed by the Treasurer, fees or other amounts received by the Commission under this or any other Act will be paid into the Consolidated Account.

## **23—Annual performance plan and budget**

- (1) The Commission must, from time to time, prepare and submit to the Minister a performance plan and budget for the next financial year or for some other period determined by the Minister.
- (2) The performance plan must set out the Commission's major projects, and its goals and priorities with respect to the full range of the Commission's functions, for the period to which the plan relates.

- (3) The budget must set out estimates of the Commission's receipts and expenditures for the period to which the budget relates.
- (4) The plan and the budget must conform with any requirements of the Minister as to the form of the plan or budget or the matters to be addressed by the plan or budget.
- (5) The Minister may approve a plan or budget submitted under this section with or without modification.

## **24—Accounts and audit**

- (1) The Commission must ensure that proper accounting records are kept of the Commission's receipts and expenditures.
- (2) The Auditor-General may at any time, and must at least once in each year, audit the accounts of the Commission.

## **Part 3—Price regulation**

### **25—Price regulation**

- (1) The Commission may make determinations regulating prices, conditions relating to prices and price-fixing factors for goods and services in a regulated industry.
- (2) The Commission may only make a price determination if authorised to do so by a relevant industry regulation Act or by regulation under this Act.
- (3) A price determination may regulate prices, conditions relating to prices or price-fixing factors in a regulated industry in any manner the Commission considers appropriate, including—
  - (a) fixing a price or the rate of increase or decrease in a price;
  - (b) fixing a maximum price or maximum rate of increase or minimum rate of decrease in a maximum price;
  - (c) fixing an average price for specified goods or services or an average rate of increase or decrease in an average price;
  - (d) specifying pricing policies or principles;
  - (e) specifying an amount determined by reference to a general price index, the cost of production, a rate of return on assets employed or any other specified factor;
  - (f) specifying an amount determined by reference to quantity, location, period or other specified factor relevant to the supply of goods or services;
  - (g) fixing a maximum average revenue, or maximum rate of increase or minimum rate of decrease in maximum average revenue, in relation to specified goods or services;
  - (h) monitoring the price levels of specified goods and services.
- (4) In making a price determination, the Commission must (in addition to having regard to the general factors specified in Part 2) have regard to—
  - (a) the particular circumstances of the regulated industry and the goods and services for which the determination is being made;

- (b) the costs of making, producing or supplying the goods or services;
  - (c) the costs of complying with laws or regulatory requirements;
  - (d) the return on assets in the regulated industry;
  - (e) any relevant interstate and international benchmarks for prices, costs and return on assets in comparable industries;
  - (f) the financial implications of the determination;
  - (g) any factors specified by a relevant industry regulation Act or by regulation under this Act;
  - (h) any other factors that the Commission considers relevant.
- (5) In making a price determination under this section, the Commission must ensure that—
- (a) wherever possible the costs of regulation do not exceed the benefits; and
  - (b) the decision takes into account and clearly articulates any trade-off between costs and service standards.
- (6) Subsections (3), (4) and (5) have effect in relation to a regulated industry subject to the provisions of the relevant industry regulation Act for that industry.
- (7) In this section—  
*price* includes a price range.

## **26—Making and effect of price determinations**

- (1) Before making a price determination, the Commission may send a copy of a draft of the determination—
- (a) to the Minister and the industry Minister; and
  - (b) to each regulated entity to which the determination will apply; and
  - (c) to any other person the Commission considers appropriate.
- (2) A price determination must include a summary of the information on which the determination is based and a statement of the reasons for the making of the determination.
- (3) The Commission must—
- (a) send a copy of a price determination—
    - (i) to the Minister and the industry Minister; and
    - (ii) to each regulated entity to which the determination applies; and
    - (iii) to any person who made a submission to an inquiry to which the determination relates and who has asked for a copy of the determination; and
  - (b) ensure that copies of the determination are available for inspection and purchase by members of the public.
- (4) Notice of the making of a price determination must be published—
- (a) in the Gazette; and

- (b) in a newspaper circulating generally in the State; and
  - (c) on the internet.
- (5) The notice must include a brief description of the nature and effect of the price determination, details of when the determination takes effect and how a copy of the determination may be inspected or purchased.
  - (6) A price determination takes effect on the date on which notice of its making is published in the Gazette or a later date of commencement specified in the determination.
  - (7) A price determination has effect until it is revoked or until an expiry date specified in the determination.
  - (8) A price determination may be varied or revoked by subsequent determination.

## **27—Offence to contravene price determination**

A regulated entity must not contravene a price determination or part of a price determination that applies to the entity.

Maximum penalty: \$1 000 000.

## **Part 4—Industry codes and rules**

### **28—Codes and rules**

- (1) The Commission may make codes or rules relating to the conduct or operations of a regulated industry or regulated entities.
- (2) The Commission may vary or revoke a code or rules made under this section.
- (3) The Commission must, before making, varying or revoking a code or rules, consult with the industry Minister and such representative bodies and participants in the regulated industry as the Commission considers appropriate.
- (4) A code or rules may apply or incorporate, wholly or partially and with or without modification, a document referred to in the code or rules, as in force from time to time or as in force at a particular time.
- (5) The Commission must—
  - (a) give notice of the making, variation or revocation of a code or rules—
    - (i) to the Minister and the industry Minister; and
    - (ii) to each regulated entity to which the code or rules apply; and
  - (b) ensure that copies of the code or rules (as in force from time to time) are available for inspection and purchase by members of the public.
- (6) Notice of the making of a code or rules, or the variation or revocation of a code or rules, must be published in the Gazette.
- (7) A code or rule, or variation or revocation of a code or rule, takes effect on the date on which it is notified in the Gazette or a later date specified by the Commission in the code or a rule.
- (8) The Commission must keep the contents and operation of codes and rules under review with a view to ensuring their continued relevance and effectiveness.

## **Part 5—Collection and use of information**

### **29—Commission's power to require information**

- (1) The Commission may, by written notice, require a person to give the Commission, within a time and in a manner stated in the notice (which must be reasonable), information in the person's possession that the Commission reasonably requires for the performance of the Commission's functions.
- (2) A person must comply with a requirement under this section.  
Maximum penalty: \$20 000 or imprisonment for 2 years.
- (3) A person cannot be compelled to give information under this section if the information might tend to incriminate the person of an offence.

### **30—Obligation to preserve confidentiality**

- (1) Information gained under this Part that—
  - (a) could affect the competitive position of a regulated entity or other person; or
  - (b) is commercially sensitive for some other reason,is, for the purposes of this Act, confidential information and a person performing a function under this Act or a relevant industry regulation Act is guilty of an offence if the person discloses such information otherwise than as authorised under this section.  
Maximum penalty: \$20 000 or imprisonment for 2 years.
- (2) Confidential information may be disclosed if—
  - (a) the disclosure is made to another who is also performing a function under this Act or a relevant industry regulation Act; or
  - (b) the disclosure is made with the consent of the person who gave the information or to whom the information relates; or
  - (c) the disclosure is authorised or required under any other Act or law; or
  - (d) the disclosure is authorised or required by a court or tribunal constituted by law; or
  - (e) the disclosure is authorised by regulation.
- (3) The Commission may disclose confidential information if the Commission is of the opinion that the public benefit in making the disclosure outweighs any detriment that might be suffered by a person in consequence of the disclosure.
- (4) If a person, when giving information to the Commission in response to a requirement of the Commission under this Part, claims that the information is confidential information, the Commission must, before disclosing the information otherwise than as referred to in subsection (2), give the person written notice of the proposed disclosure and the reasons for the disclosure.
- (5) A person performing a function under this Act or a relevant industry regulation Act must not use confidential information for the purpose of securing a private benefit for himself or herself or for some other person.  
Maximum penalty: \$20 000 or imprisonment for 2 years.

- (6) Information classified by the Commission as being confidential under subsection (1) is not liable to disclosure under the *Freedom of Information Act 1991*.

## Part 6—Reviews and appeals

### 31—Review by Commission

- (1) An application may be made to the Commission—
- (a) by the Minister, or by a regulated entity to which the determination applies, for a review of a price determination; or
  - (b) by a person of whom a requirement has been made by written notice under Part 5 for a review of the decision of the Commission to make that requirement; or
  - (c) by a person who has been given written notice under Part 5 of the proposed disclosure of information that the person claimed to be confidential information for a review of the decision of the Commission to disclose the information.
- (2) An application for a review must—
- (a) be in writing; and
  - (b) set out the price determination or part of the price determination, or the decision, to which the application relates; and
  - (c) set out in detail the grounds on which the applicant seeks review and the decision sought on the review; and
  - (d) be accompanied by any information that the applicant considers should be taken into account by the Commission on the review; and
  - (e) be lodged with the Commission within 10 working days after the price determination is published or after receipt of the written notice referred to in subsection (1) (as the case requires).
- (3) If an application is made for a review of a price determination—
- (a) the Commission must give a copy of the application to each other person who could also have applied for review of the determination; and
  - (b) invite each such person to join as a party to the review and make submissions on the matter the subject of the review in a manner and within a period specified by the Commission.
- (4) The Commission may stay the operation of the price determination or decision to which the application relates.
- (5) If a price determination is stayed, the Commission must cause notice of the stay of the determination—
- (a) to be given to the Minister, the industry Minister and to each regulated entity to which the determination applies; and
  - (b) to be published in the Gazette.
- (6) A review must be decided within 6 weeks of the application being lodged with the Commission.

- (7) If a review is not decided within that period, the Commission is to be taken to have confirmed the price determination or decision.
- (8) After considering the application, the Commission may confirm, vary or substitute the price determination or decision.
- (9) The Commission must give the applicant and any other person who joins as a party to the review written notice of the Commission's decision, and the reasons for the decision, on the review.
- (10) If the Commission decides on a review of a price determination to vary or substitute the determination, the Commission must vary or substitute the determination by a further determination in accordance with Part 3 but that further determination may not be made the subject of an application for a review under this section.

### 32—Appeal

- (1) The applicant for a review under this Part, or any other party to the review who made submissions on the review, who is dissatisfied with the price determination or decision as confirmed, varied or substituted by the Commission on the review may appeal to the Administrative and Disciplinary Division of the District Court (*the Court*) against the determination or decision.
- (2) The Court must sit with experts selected in accordance with Schedule 1.
- (3) An appeal must be made—
  - (a) within 10 working days after receipt of the written notice of the decision on the review; or
  - (b) if the Commission failed to make a decision on the review within the allowed period, within 10 working days after the end of that period,(which period cannot be extended).
- (4) If an appeal is made under this section, any other party to the review who made submissions on the review must be given notice of the appeal and may, on application, be joined as a party to the appeal.
- (5) If a price determination is stayed by the Commission or the Court, the Commission or the Court must cause notice of the stay of the determination—
  - (a) to be given to the Minister, the industry Minister and to each regulated entity to which the determination applies; and
  - (b) to be published in the Gazette.
- (6) On an appeal, the Court is only to consider the information on which the Commission based the price determination or decision that was the subject of the review and any information put before the Commission on the review.
- (7) The Court may, on an appeal—
  - (a) affirm the decision appealed against; or
  - (b) remit the matter to the Commission for consideration or further consideration in accordance with any directions of the Court.
- (8) An appeal under the *District Court Act 1991* will lie against a decision of the Court under this section on a question of law (but not on a question of fact).

### **33—Exclusion of other challenges to price determinations**

The validity of a price determination may not be challenged in a prosecution or other proceedings concerning non-compliance with the determination or by any other proceedings apart from a review or appeal under this Part.

## **Part 7—Inquiries and reports**

### **34—Inquiry by Commission**

The Commission may, after consultation with the Minister, conduct an inquiry if the Commission considers an inquiry is necessary or desirable for the purpose of carrying out the Commission's functions.

### **35—Minister may refer matter for inquiry**

- (1) The Commission must conduct an inquiry into any matter that the Minister, by written notice, refers to the Commission.
- (2) The Commission must conduct an inquiry into any matter relating to a regulated industry that the industry Minister, by written notice, refers to the Commission.
- (3) An industry Minister must consult with the Minister before referring a matter to the Commission.
- (4) The written notice must specify the terms of reference for the inquiry.
- (5) The Minister referring a matter may do one or more of the following:
  - (a) require that a report on the inquiry be delivered to the Minister within a specified period;
  - (b) require the Commission, as part of the inquiry, to consider whether a price determination should be made under Part 3, and if satisfied that it should, to make such a determination under that Part in conjunction with the making of its report on the inquiry;
  - (c) require the Commission to make a draft report publicly available or available to specified persons or bodies during the inquiry;
  - (d) require the Commission to make a draft price determination publicly available or available to specified persons during the inquiry;
  - (e) require the Commission to consider specified matters;
  - (f) give the Commission specific directions in respect of the conduct of the inquiry.
- (6) A Minister who has referred a matter may, by written notice, vary the terms of reference or a requirement or direction under subsection (5).

### **36—Notice of inquiry**

- (1) The Commission must publish notice of an inquiry in a newspaper circulating generally in the State.
- (2) The notice must specify—
  - (a) the purpose of the inquiry; and



- (b) the period during which the inquiry is to be held; and
  - (c) the period within which, and the form in which, members of the public may make submissions, including details of public hearings; and
  - (d) the matters that the Commission would like submissions to deal with.
- (3) If the inquiry relates to a matter referred to the Commission by a Minister, the notice must include the terms of reference and any requirements or directions of the Minister relating to the inquiry.
  - (4) The Commission must publish a further notice if the terms of reference or any requirement or direction relating to the inquiry are varied.
  - (5) The Commission must send a copy of a notice published under this section to regulated entities that the Commission considers may be affected by the inquiry and any person or body that the Commission considers should be notified.

### **37—Conduct of inquiry**

- (1) Subject to any requirement or direction of a Minister under this Part, an inquiry—
  - (a) may be conducted in such manner as the Commission considers appropriate; and
  - (b) may (but need not) involve public hearings.
- (2) The Commission is not, in the conduct of an inquiry, bound by the rules of evidence.
- (3) The power of the Commission to make a requirement under Part 5 includes, for the purposes of an inquiry, the power to require that a person attend before the Commission at a specified time and place and that the person answer questions or produce documents or records as required by the Commission.

### **38—Reports**

- (1) The Commission must deliver a copy of the Commission's final report on an inquiry to the relevant Minister.
- (2) The Commission may, during the course of an inquiry, deliver a special report to the relevant Minister.
- (3) The Commission must identify in a report any information contained in the report that the Commission considers is confidential information in accordance with Part 5.
- (4) The relevant Minister must, within 12 sitting days after receipt of a report, cause a copy of the report (excluding any information identified under subsection (3) as confidential information) to be laid before both Houses of Parliament.
- (5) The relevant Minister must, after a report has been laid before both Houses of Parliament or, if Parliament is not sitting, within 28 days after receiving a report, ensure that copies of the report (excluding any information identified under subsection (3) as confidential information) are available for public inspection.
- (6) After the relevant Minister has made a report publicly available, the Commission must ensure that copies (excluding any information identified under subsection (3) as confidential information) are available for purchase by members of the public.

- (7) If information is excluded from a report as being confidential information, a note to that effect must be included in the report at the place in the report from which the information is excluded.
- (8) In this section—
- relevant Minister*, in relation to an inquiry into a matter, means—
- (a) if the Commission conducted the inquiry on its own initiative, the Minister; or
  - (b) in any other case, the Minister who referred the matter to the Commission.

## Part 8—Miscellaneous

### 39—Annual report

- (1) The Commission must, within 3 months after the end of each financial year, deliver to the Minister a report on the administration of this Act during that financial year.
- (2) The Minister must cause a copy of the report to be laid before both Houses of Parliament within 12 sitting days after receipt of the report.

### 40—Warning notices and assurances

- (1) If it appears to the Commission that a person has been guilty of a contravention of this Act, the Commission may issue a warning notice to the person, warning the person that the person will be prosecuted for the contravention unless—
- (a) if the contravention is capable of being rectified, the person takes action specified in the notice to rectify the contravention within the period specified in the notice; and
  - (b) the person gives the Commission an assurance, in the terms specified in the notice, and within the period specified in the notice, that the person will avoid a future such contravention.
- (2) A warning notice issued under this section, and an assurance given under this section, must be in writing.
- (3) The action that may be specified in a warning notice to rectify a contravention may include action to remedy adverse consequences of the contravention, for example (without limitation)—
- (a) the refunding of an amount wrongly paid to the person as a result of the contravention; or
  - (b) the payment of compensation to a person who has suffered loss, damage or injury as a result of the contravention; or
  - (c) the disclosure of information; or
  - (d) the publication of advertisements relating to the contravention or relating to action to rectify or remedy the contravention.
- (4) The Commission may, by written notice to a person, vary a warning notice issued to the person.

- (5) If the Commission issues a warning notice to a person, the Commission must not proceed against the person in respect of the contravention to which the notice relates, unless the person—
- (a) fails to take action specified in the notice to rectify the contravention within the period specified in the notice; or
  - (b) fails to give the Commission an assurance in the terms specified in the notice within the period specified in the notice; or
  - (c) contravenes an assurance given by the person in response to the notice.

#### **41—Register of warning notices and assurances**

- (1) The Commission must keep a register of warning notices issued by the Commission under this Part, and a register of assurances given to the Commission under this Part.
- (2) A person may, without payment of a fee, inspect a register kept under this section.

#### **42—Injunctions**

- (1) If the District Court is satisfied, on the application of the Minister, the Commission or any other person, that a person has engaged or proposes to engage in conduct that constitutes or would constitute a contravention of this Act, the Court may grant an injunction in such terms as the Court determines to be appropriate.
- (2) If the District Court is satisfied, on the application of the Minister or the Commission that a person has engaged in conduct constituting a contravention of this Act, the Court may grant an injunction requiring that person to take specified action to remedy any adverse consequence of that conduct.
- (3) The action that may be required by an injunction to remedy adverse consequences of conduct constituting a contravention may include (without limitation)—
  - (a) the refunding of an amount wrongly paid as a result of the contravention; or
  - (b) the payment of compensation to a person who has suffered loss, damage or injury as a result of the contravention; or
  - (c) the disclosure of information; or
  - (d) the publication of advertisements relating to the contravention or relating to action to rectify or remedy the contravention.
- (4) An injunction may be granted by the District Court under this section—
  - (a) in proceedings in which the Court convicts a person of an offence to which the application relates; or
  - (b) in proceedings brought before the Court for the purpose of obtaining the injunction.
- (5) The power of the District Court to grant an injunction restraining a person from engaging in conduct may be exercised—
  - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
  - (b) whether or not the person has previously engaged in conduct of that kind; and

- (c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.
- (6) The power of the District Court to grant an injunction requiring a person to do an act or thing may be exercised—
  - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that act or thing.
- (7) An interim injunction may be granted under this section pending final determination of the application.
- (8) A final injunction may, by consent of the parties, be granted under this section without proof that proper grounds for the injunction exist.
- (9) Where the Minister or the Commission applies for an injunction under this section, no undertaking as to damages will be required.
- (10) The Minister may give an undertaking as to damages or costs on behalf of some other applicant and, in that event, no further undertaking will be required.
- (11) An injunction under this section may be rescinded or varied at any time.

#### **43—False or misleading information**

A person must not make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of any particular) in any information given under this Act.

Maximum penalty: \$20 000 or imprisonment for 2 years.

#### **44—Statutory declarations**

If a person is required by or under this Act to give information to the Commission, the Commission may require that the information be verified by statutory declaration and, in that event, the person will not be taken to have given the information as required unless it has been verified in accordance with the requirements of the Commission.

#### **45—General defence**

It is a defence to a charge of an offence against this Act if the defendant proves that the offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence.

#### **46—Offences by bodies corporate**

If a body corporate is guilty of an offence against this Act, each director of the body corporate is, subject to the general defence under this Part, guilty of an offence and liable to the same penalty as may be imposed for the principal offence.

#### **47—Continuing offence**

- (1) A person convicted of an offence against a provision of this Act in respect of a continuing act or omission—
  - (a) is liable, in addition to the penalty otherwise applicable to the offence, to a penalty for each day during which the act or omission continued of not more than one-fifth of the maximum penalty prescribed for that offence; and
  - (b) is, if the act or omission continues after the conviction, guilty of a further offence against the provision and liable, in addition to the penalty otherwise applicable to the further offence, to a penalty for each day during which the act or omission continued after the conviction of not more than one-fifth of the maximum penalty prescribed for the offence.
- (2) If an offence consists of an omission to do something that is required to be done, the omission will be taken to continue for as long as the thing required to be done remains undone after the end of the period for compliance with the requirement.

#### **48—Order for payment of profit from contravention**

The court convicting a person of an offence against this Act may order the convicted person to pay to the Crown an amount not exceeding the court's estimation of the amount of any monetary, financial or economic benefits acquired by the person, or accrued or accruing to the person, as a result of the commission of the offence.

#### **49—Immunity from personal liability**

- (1) No personal liability attaches to any person engaged in the administration or enforcement of this Act for an act or omission in good faith in the performance or exercise, or purported performance or exercise, of a function or power under this Act.
- (2) A liability that would, but for subsection (1), lie against a person lies instead against the Crown.

#### **50—Evidence**

- (1) If, in any legal proceedings, a person is alleged to have held a specified appointment under this Act at a specified time, the allegation is taken to have been proved in the absence of proof to the contrary.
- (2) In any legal proceedings, an apparently genuine document purporting to be a certificate of the Commission certifying as to the making, issuing, receipt or contents of a delegation, price determination, requirement, decision, order, code, rules, notice or assurance under this Act constitutes proof of the matters so certified in the absence of proof to the contrary.

#### **51—Service**

- (1) A notice or other document required or authorised to be given to or served on a person under this Act may be given or served—
  - (a) by delivering it personally to the person or an agent of the person; or
  - (b) by leaving it for the person at the person's place of residence or business with someone apparently over the age of 16 years; or

- (c) by posting it to the person or agent of the person at the person's or agent's last known place of residence or business.
- (2) Without limiting the effect of subsection (1), a notice or other document required or authorised to be given to or served on a person may be given to or served on the person in accordance with the *Corporations Act 2001* of the Commonwealth (if applicable to the person).

## 52—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) Without limiting subsection (1), the regulations may deal with the following matters:
  - (a) fees to be paid in respect of any matter under this Act and the recovery, refund, waiver or reduction of such fees; and
  - (b) penalties not exceeding \$5 000 for contravention of a regulation.
- (3) The regulations may—
  - (a) be of general application or limited in application according to the persons, areas, times or circumstances to which it is expressed to apply;
  - (b) provide that a matter or thing in respect of which regulations may be made is to be determined, regulated or prohibited according to the discretion of the Minister or the Commission.

## 53—Review of Act

- (1) The Minister is to review this Act to determine the effectiveness of the work of the Commission and the attainment of the objects of this Act.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act and a report on the outcome of the review is to be completed within 6 months after that period of 3 years.
- (3) The Minister must cause a copy of the report on the outcome of the review to be tabled in each House of Parliament within 12 sitting days after its completion.

## Schedule 1—Appointment and selection of experts for Court

- (1) The Minister must establish a panel of experts who may sit as assessors with the Court consisting of persons with knowledge of, or experience in, a regulated industry or in the fields of commerce or economics.
- (2) A member of a panel is to be appointed by the Minister for a term of office not exceeding 3 years and on conditions determined by the Minister and specified in the instrument of appointment.
- (3) A member of a panel is, on the expiration of a term of office, eligible for reappointment.
- (4) Subject to subclause (5) and except in the case of an appeal limited to a question of law, a judicial officer of the Court must select 2 members from the panel to sit with the Court on an appeal.
- (5) A member of a panel who has a direct or indirect pecuniary or other interest in a matter before the Court is disqualified from participating in the hearing of the matter.

- (6) Subclause (5) does not apply if the interest is as a result of the supply of goods or services that are available to members of the public on the same terms and conditions.
- (7) If a member of a panel sitting with the Court dies or is for any reason unable to continue with any proceedings, the Court constituted of the judicial officer who is presiding at the proceedings and the other member of the panel sitting with the Court may, if the judicial officer so determines, continue and complete the proceedings.
- (8) If proceedings are reheard, the Court may have regard to any record of proceedings made in the earlier proceedings (including a record of evidence taken in those proceedings).

## Schedule 2—Transitional provisions

### 2—Transitional

- (1) The Commission is the same body corporate as the South Australian Independent Industry Regulator established under the *Independent Industry Regulator Act 1999*.
- (2) A reference in an Act or instrument to the South Australian Independent Industry Regulator is (where the context permits) to be read as a reference to the Commission.
- (3) A delegation, appointment, determination, requirement, decision, order, code or rule made under a provision of the *Independent Industry Regulator Act 1999* and in force under that Act immediately before the commencement of this clause continues subject to this Act as if made under the corresponding provision of this Act.
- (4) Subject to this Act, the person immediately before the commencement of this clause holding the office of the South Australian Independent Industry Regulator is to be taken to have been appointed as the Chairperson of the Commission until—
  - (a) the end of the period when the person's term of appointment as the Independent Industry Regulator would have expired; or
  - (b) if the Governor extends the period under this clause, the end of the period as so extended.
- (5) The *Acts Interpretation Act 1915* applies, except to the extent of any inconsistency with the provisions of this Schedule, to the repeal effected by this Act.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Legislation repealed by principal Act

The *Essential Services Commission Act 2002* repealed the following:

*Independent Industry Regulator Act 1999*

### Legislation amended by principal Act

The *Essential Services Commission Act 2002* amended the following:

*Local Government Act 1999*

*Maritime Services (Access) Act 2000*

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2002	14	<i>Essential Services Commission Act 2002</i>	5.9.2002	12.9.2002 except s 9—1.3.2003 ( <i>Gazette 12.9.2002 p3393</i> )
2007	6	<i>Barley Exporting Act 2007</i>	5.4.2007	Sch 3 (cl 1)—1.7.2007 ( <i>Gazette 31.5.2007 p2216</i> )

### Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Long title	amended under <i>Legislation Revision and Publication Act 2002</i>	
Pt 1		
s 2	<i>omitted under Legislation Revision and Publication Act 2002</i>	
Sch 2		
cl 1	<i>omitted under Legislation Revision and Publication Act 2002</i>	
Sch 3	<i>omitted under Legislation Revision and Publication Act 2002</i>	