

GLADSTONE POWER STATION AGREEMENT BILL 1993

EXPLANATORY NOTES

This Bill relates to the proposed sale of the Gladstone Power Station to a joint venture consisting of a number of companies nominated by Comalco Limited.

The legislation provides for the Premier to enter into a State agreement with the purchaser and the operator of the Gladstone Power Station.

The sale package requires the Queensland Electricity Commission to enter into commercial contracts for the sale of the Gladstone Power Station and for the purchase and sale of electricity. As part of the sale package, several other Government bodies are to enter into commercial contracts, e.g. Queensland Rail relating to haulage of coal.

This legislation is in relation to the State agreement to be entered into by the State with the purchaser and the operator of the Gladstone Power Station.

Under the package:

- The purchaser of the Gladstone Power Station, will supply electricity to-
 - the Boyne Island smelter; and
 - the Queensland Electricity Commission;
- If Queensland Electricity Commission is in breach of certain power pooling arrangements through an unremedied payment default, the purchaser may supply electricity to third parties;
- A third potline will be constructed and brought into operation at the Boyne Island smelter;

- The State has an exclusive right to re-acquire the Gladstone Power Station under certain circumstances set out in the package.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 provides that the short title is to be the *Gladstone Power Station Agreement Act 1993*.

Clause 2 defines certain terms used in the Bill.

PART 2—STATE AGREEMENT

This Part contains the following clauses:

Clause 3 authorises the Premier (“the Minister”) to make, on behalf of the State, an agreement substantially in the form of the agreement set out in the Schedule to the Bill and for the agreement to be entered into before 31 December 1993 or such later day as described by the Governor in Council by Regulation. This clause also provides that the Minister must give notice of the date of the making of the agreement and the parties to the agreement by notice in the Government Gazette.

Clause 4 provides that the State agreement has effect as if it were part of the Act. The clause also provides that, if a provision of the State agreement is inconsistent with an Act, the provision prevails and the Act is not effective to the extent of the inconsistency. This clause also preserves the right of the Parliament to make laws that affect the rights or obligations of any party under the State agreement or any other agreement.

Clause 5 provides for the amendment of the State agreement by further agreement between the Minister on behalf of the State and the other parties to the State agreement if the proposed further agreement has been approved by regulation. The Minister must notify the date of the making of the further agreement by notice in the Government Gazette.

Clause 6 provides for the amendment of the Second Schedule (The Gladstone Power Station Environmental Policy Schedule) to the State agreement by further agreement between the chief executive of the department principally responsible for environmental planning on behalf of the State and the other parties to the State agreement if the proposed further agreement has been approved by regulation. The chief executive must notify the date of the making of the further agreement by notice in the Government Gazette.

Clause 7 provides that the State agreement may be enforced, subject to section 55 of the *Property Law Act 1974*, only by, or on behalf of, a party to the State agreement or a successor or permitted assign of a party. This does not apply to enforcement of legislation modified by the State agreement.

PART 3—STATE AND OTHER AGREEMENTS

Clause 8 provides that this Part overrides any other Act.

Clause 9 authorises the Minister to direct State instrumentalities (including local authorities) and all other entities of the State to make arrangements to facilitate the timely making of the State agreement and associated agreements.

Clause 10 authorises and requires the State, Ministers, State instrumentalities (including local authorities) and all other entities of the State to do all things necessary or convenient to perform and give effect to directions of the Minister under clause 9 and the State agreement.

Clause 11 authorises the Queensland Electricity Commission to sell the Gladstone Power Station.

Clause 12 authorises other State bodies to enter into and perform their respective obligations under the agreements that form part of the sale and operating package for the sale of the Gladstone Power Station.

PART 4—LICENCE

Clause 13 relates to the licence that, under the State agreement, is to be issued under the *Electricity Act 1976*. The form of the licence is set out in a

schedule to the State agreement. This clause provides that:

- The Minister charged with the administration of the *Electricity Act 1976* is authorised to issue the licence.
- The licence is to be deemed to be a licence issued under section 138 of the (*Electricity Act 1976*) but subsection (5) [specification in the licence of bodies to be supplied with electricity] and subsection (6) [specification in the licence of applicable provisions of the *Electricity Act 1976*] do not apply.
- Sections 139 to 146 and 398 of the *Electricity Act 1976* do not apply to the licence.
- Clauses 14 to 17 apply in relation to the licence as if they were provisions of the *Electricity Act 1976*.

Clause 14 provides that the licence may be amended by the Minister charged with the administration of the *Electricity Act 1976* with the agreement of the purchasers of the Gladstone Power Station and that the notification of the variation be given by notice in the Government Gazette.

Clause 15 authorises that Minister, by written notice to the purchasers of the Gladstone Power Station, to revoke the licence on any of the grounds set out in the licence.

Clause 16 provides that the licence is terminated on the occurrence of any event set out in the licence as grounds for termination of the licence.

Clause 17 permits assignment, mortgage or charging of the licence, or an interest in the licence, on the terms and conditions set out in the licence.

Clause 18 facilitates the supply and transmission of electricity in accordance with arrangements between the Queensland Electricity Commission and each of the purchasers of the Gladstone Power Station. This will particularly enable the transmission of electricity to the Boyne Island smelter. Without this clause, it could be argued that the Queensland Electricity Commission is not authorised under the *Electricity Act 1976* to transmit the electricity in the terms of the arrangements.

Clause 19 confirms that the Queensland Electricity Commission has no power under the *Electricity Act 1976* to determine or control prices of, or

methods of charge for, electricity supplied under the licence. Prices are to be determined by commercial agreement.

PART 5—AMENDMENT OF ELECTRICITY ACT 1976

Clause 20 provides that the *Electricity Act 1976* is amended as set out in Part 5.

Clause 21 inserts the definitions “Scheme” and “Superannuation Board” in section 6 of the Act.

Clause 22 replaces section 353 with a section that permits changes to be made to the Queensland Electricity Supply Industry Employees Superannuation Scheme, if necessary, to extend its application to persons who are not employed in the electricity supply industry and their dependants. This is to fulfil the Government’s undertaking that it would facilitate the participation of the purchasers and employees at the Gladstone Power Station in the Scheme, if desired.

This would relate to employees, contractors and other non-executive directors nominated by their employer if their employer:

- is for the time being an employer prescribed by regulation;
- agrees with the Superannuation Board to be a “participating employer”, for so long as the agreement is not withdrawn; and
- is approved by the Commission for so long as the approval is not revoked.

The clause also provides that regulations may be made amending the Articles of the Queensland Electricity Supply Industry Employees’ Superannuation Scheme with respect to:

- the terms on which an employer may become, and continue to be, a participating employer;
- the effect on the Scheme, the members of the Scheme and benefits under the Scheme of-
- the change of status of a participating employer, - for example, on

winding up or dissolution, becoming bankrupt, restructuring or ceasing to carry on business; and

- the reduction, suspension or termination of contributions by a participating employer; and
- a participating employer ceasing (for example by withdrawing from the Scheme or by action by the Board) to be a participating employer and the consequent effect on the Scheme and its members (including any cessation of membership) and benefits under the Scheme; and
- amendment of the Articles of the Scheme as may be necessary or appropriate to facilitate the inclusion of these “electricity employees” as members of the Scheme.

Clause 23 amends section 354 by removing words defining the Superannuation Board and by inserting the definition in clause 20 in section 6 of the Act.

Clause 24 amends section 377 of the Electricity Act to provide for any “electricity employees” under the new section 353 and their employers (“participating employers”) to contribute to the Scheme.

PART 6—MISCELLANEOUS

Clause 25 is included as the sale agreement provides for freehold title to be transferred to the purchasers. Presently the Queensland Electricity Commission holds the land as a special lease. To obtain the freehold, the Queensland Electricity Commission would, under the *Land Act 1962*, have to pay a purchasing price to the State equal to the unimproved value of the land. This clause provides that for the conversion of the leasehold land to freehold title, the land is deemed to have a value of \$1. This relieves the Queensland Electricity Commission of the liability to pay the purchasing price to the State.

Clause 26 provides for the Queensland Electricity Commission to issue to each employee, who, upon completion of the sale of the Gladstone Power Station becomes an employee of the purchaser/operator of the power station, a certificate of the employee’s entitlements and current status of employment at

the date of the completion of the sale of Gladstone Power Station. The clause also provides a mechanism for correction of inaccurate certificates.

Clause 27 authorises regulations to be made under the *Electricity Act 1976* to change the Articles of the Queensland Electricity Supply Industry Employees' Superannuation Scheme Queensland and the Rules for the Electricity Industry Employer-funded Accumulations Superannuation Fund with respect to the benefits and entitlements and responsibilities of current employees at the Gladstone Power Station who, on completion of the sale of the Gladstone Power Station, become employees of the purchaser/operator of the power station.

Clause 28 ensures that the Queensland Electricity Commission may hand over documents that relate to the Gladstone Power Station to the purchaser as required by the terms of the Sale agreement and declares that the documents are not public records under the *Libraries and Archives Act 1988*.

Clause 29 confirms that the Queensland Electricity Commission is not authorised under section 36D of the *Electricity Act 1976* to formulate policies regarding industrial awards and conditions of employment of employees at the Gladstone Power Station.

Clause 30 permits the Governor in Council by regulation to approve for the purposes of the *Commonwealth Trade Practices Act 1976* certain activities that are to be carried on in relation to the Gladstone Power Station. The effect of such a regulation will be that the Commonwealth Act will then not apply to those activities. The purchasers are independently seeking authorisation under that Act and this provision will only be utilised if such approval is not forthcoming.

Clause 31 empowers the Governor in Council to make regulations for the purposes of the Act and the State agreement.

SCHEDULE

The Schedule sets out the terms of the State agreement.

PART I—PRELIMINARY

Clauses 1 and 2 relate to interpretation of the State agreement.

Clause 3 acknowledges the Premier's ("**the Minister**") authority to enter into the State agreement.

Clause 4 authorises the Minister to decide on behalf of the State matters relating to the State agreement.

Clause 5 sets out the conditions precedent upon which the coming into force of the State agreement is dependent.

Clause 6 requires the Purchaser ("**the Participants**") to give accurate copies of executed Transaction Documents to the Minister.

Clause 7 acknowledges that under the Bill the State agreement has the force of law. The effect of such a provision is to elevate contractual rights and obligations to the status of legislation.

PART II—OBLIGATIONS OF THE STATE

Clause 8 restricts the power of the Minister for Energy under Section 61 of the Electricity Act to make a rationing order which prohibits, restricts, controls or regulates the supply of electricity by the Queensland Electricity Commission to the Boyne Island Smelter where such an order would prevent Queensland Electricity Commission from complying with its obligations under Clause 7 of the Interconnection and Power Pooling Agreement.

Clause 9 requires the Minister for Energy to issue the licence referred to in clause 12 of the Bill to the Gladstone Power Station Licensee.

Clause 10 sets out the undertaking by the State to maintain the credit rating of the QEC at or above an "A" rating (as determined by S & P - Australian Ratings) for the period commencing on the Date of Transfer and expiring on the first to occur of the following events:

- (a) the date upon which the balance of debt outstanding has been fully and finally repaid;

(b) the lawful termination by Queensland Electricity Commission or the discharge, by performance, effluxion of time or otherwise of the Interconnection and Power Pooling Agreement;

(c) twenty years from the Date of Transfer (subject to certain exceptions).

Clause 11 prohibits, subject to certain exceptions and qualifications (set out in paragraphs (c), (d), (e) and (f) of *Clause 11*), the State or any body (including a statutory body), authority (including a local authority), agency or public officer of the State, from taking any action or combination of actions that is discriminatory to a material extent against the Gladstone Power Station or the Participants as compared with other operating (as at the Date of Transfer) coal-fired power stations in the State.

Paragraph (b) of *Clause 11* sets out the matters to be taken into account when determining whether discriminatory action has been taken.

Clause 12 exempts the Participants, Boyne Smelters Limited, the Operator of the Gladstone Power Station and the Licensee from electricity taxes of the State that would otherwise be levied against Boyne Smelters Limited.

Clause 13 confers protection on the Participants from the application of State legislation which regulates environmental matters provided the requirements (which are specifically authorised by the State agreement) prescribed by the GPS Environmental Policy Schedule set out in the Second Schedule to the State agreement are complied with.

The offence provisions of the State environmental legislation (as modified to the extent of any inconsistency with the requirements prescribed by the GPS Environmental Policy Schedule) continue to apply in respect of non-compliances with the requirements prescribed by the GPS Environmental Policy Schedule (which remains in force only for so long as the State agreement is on foot).

Clause 14 relates to disposal of ash at the Gladstone Power Station. If certain conditions are satisfied, the parties to the Ash Management Agreement and the Operator are deemed not to have caused, permitted or approved action causing, land contamination by virtue of the disposal of ash.

The pre-conditions for this are:

- (a) compliance with physical/chemical criteria of ash as specified in the GPS Environmental Policy Schedule;
- (b) compliance in all material respects with the rehabilitation obligations as specified in the GPS Environmental Policy Schedule.

Clause 15 paragraph (a) prohibits the State from resuming or compulsorily acquiring (or permitting resumption/acquisition) pursuant to any State legislation, of any part of the Gladstone Power Station Site where such resumption or acquisition would unduly prejudice or interfere with the operation of the Gladstone Power Station by the Participants.

Clause 15 paragraph (b) deems the Gladstone Power Station Site to be included in the Special Facilities (Gladstone Power Station) Zone.

Clause 16 deems the Queensland Electricity Commission and the Queensland Electricity Generating Board to have complied with all respects of the requirements of the *Building Act 1975* (as amended) and the *Standard Building By-Laws 1975* (as amended) in relation to the construction of Generating Units 5 and 6 at the Gladstone Power Station.

PART III—RIGHTS OF THE STATE

Clause 17 confers on the State the exclusive right, until 1 April, 2001, to reacquire the GPS in the event that the Boyne Island Smelter has not been expanded (by construction and commissioning of the Third Potline) by 30 September, 1998.

The right to reacquire the Gladstone Power Station is subject to Force Majeure which is defined in paragraph (b) of *Clause 17* and includes the events set out in paragraph (c) of *Clause 17*.

Clause 18 exempts from stamp duty any instruments and transactions executed or entered into within 3 years from the date of the transfer of the GPS which evidence the acquisition of the GPS, the funding of that acquisition, the funding of the Smelter expansion (and upgrade), related Smelter Participant

re-organisation and the allotment or transfer of equity in the Participants to Long-Term Investors.

If a Long-Term Investor does not continuously hold the interest acquired from an initial Participant for a period of at least 7 years, then that long-term investor will be liable to pay to the State the amount of stamp duty exempted.

Paragraph (f), paragraph (g) and paragraph (h) of *Clause 18* require the Participants and other related bodies to pay an amount comparable to the stamp duty on any super profit (as calculated in accordance with the formula set out in paragraphs (f), (g) and (h), respectively) gained on a disposal of the Relevant Assets within 5 years after the Date of Transfer.

PART IV—LIABILITY OF PARTIES

Clause 19 provides that amendments to the original Capacity Purchase Agreement or the Interconnection and Power Pooling Agreement do not affect the rights or obligations of the State in relation to its credit support undertaking unless the amendment has the prior written approval of the Minister.

Clause 20 provides that the liability of the Participants are several as regards monetary obligations and joint as regards non-monetary obligations.

PART V—MORTGAGE, ASSIGNMENT AND TERMINATION

Clause 21 prohibits, and makes void, any assignment, mortgage or charge of the rights or interests of a Participant's, the Operator's or any mortgagee or chargee's without the prior written consent of the Minister.

Paragraph (c) confers on a non-defaulting Participant (and any mortgagee or chargee exercising power of sale) a right to assign the whole of that Participant's interest to another Participant.

Paragraph (d) prohibits a Participant (or any mortgagee or chargee exercising power of sale) from assigning any of the rights or interests of that Participant without the prior written consent of the Minister.

Paragraph (e) prohibits the Operator from assigning the whole of its rights and interests under the State agreement without the prior written consent of the Minister.

Where the Minister's consent is required under this clause it shall not be unreasonably withheld in specified circumstances where the appropriate deeds have been entered into in favour of the State.

Paragraph (f) provides that where a Participant or the Operator has lawfully assigned its rights under the State agreement, it is released from its obligations under the State Agreement to the extent of the interest so assigned.

Clause 22 entitles the State to terminate the entire State agreement in the manner prescribed if:

- (a) the Interconnection and Power Pooling Agreement is lawfully terminated by Queensland Electricity Commission or is otherwise discharged;
- (b) the State (or a Statutory body nominated by it) acquires the Gladstone Power Station from the Participants (or any mortgagee or receiver of the Participants exercising power of sale);

Clause 22 entitles the State to terminate a participant's interest in the State agreement if:

- (a) the Capacity Purchase Agreement with that participant is lawfully terminated by the Queensland Electricity Commission or is otherwise discharged;
- (b) that Participant goes into voluntary liquidation and fails to observe a material financial obligation under a Transaction Document (other than the Capacity Purchase Agreement) by reason of its own default and the failure is not finally cured within 90 days;
- (c) that Participant fails to remedy a default under the State agreement within 90 days of the date of receipt of notice from the Minister to remedy the default; or
- (d) that Participant fails to pay an amount for which it is liable under clause 18 within 90 days of the date of the Minister's demand.

Paragraph (c) provides that rights and liabilities accrued prior to termination

survive termination.

PART VI—GENERAL

Clause 23 sets out the requirements for the giving of notices and other communications.

Clause 24 specifies the procedure to be followed in the event of a dispute arising. Within 30 days of the giving of a Notice of Dispute, the parties are to meet in Brisbane to attempt in good faith, and using their reasonable endeavours, to resolve the dispute. If the dispute is not resolved within 60 days of the date on which the Notice of Dispute is given, a party to the dispute may commence Court proceedings.

Clause 25 provides that the State agreement is governed by the laws of Queensland, that each party unconditionally submits to the exclusive jurisdiction of the Courts of Queensland, and that service of process may be effected on a party at its address under Clause 23.

Clause 26 provides that the State agreement may be amended in accordance with Section 5 of the legislation.

Clause 27 provides that waiver by a party of a provision or a right granted under the State agreement will not be effective except in writing signed by the party granting the waiver.

Clause 28 provides that single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that right separately or concurrently with any other right, power or remedy. Delay in exercising a right, power or remedy does not prevent its exercise.

Clause 29 provides that the rights, powers and remedies provided in the State agreement are cumulative and not exclusive of those provided by law independently of the State agreement.

Clause 30 confirms that the State agreement embodies the whole agreement between the parties.

Clause 31 requires that each party bear its own costs in relation to the State agreement.

Clause 32 prohibits the Minister, in amending conditions or directions to persons under the State agreement, from giving conditions or directions so as to adversely effect the other parties or persons claiming through or under them.

FIRST SCHEDULE

This Schedule sets out the form of the licence to supply electricity to be issued under the State agreement.

SECOND SCHEDULE

This Schedule sets out the GPS Environmental Policy Schedule referred to in Clause 13 of the State agreement.