

# **ELECTRICITY—NATIONAL SCHEME (QUEENSLAND) BILL 1997**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Objectives of the Legislation**

The objective of the Bill is to provide for the application of the National Electricity Law in Queensland.

#### **Reasons for the objectives and how they will be achieved**

##### *Background*

The Governments of southern and eastern Australia have agreed to establish a National Electricity Market (NEM) in which the supply of electricity will be open to competition. The objective is to improve the allocation of national resources and deliver cheaper electricity to consumers in Queensland and the other jurisdictions participating in the NEM; New South Wales, Victoria, South Australia and the Australian Capital Territory.

The operation of the NEM is to be governed by rules contained in the National Electricity Code (the Code). The Code covers entry into the NEM and technical rules about the NEM's operation, and sets out the functions of two new companies: the National Electricity Market Management Company (NEMMCO) and the National Electricity Code Administrator (NECA). The Code is now being considered by the Australian Competition and Consumer Commission (ACCC) for authorisation and approval as an access regime under the *Trade Practices Act 1974*.

The Governments of jurisdictions participating in the NEM decided that it would be appropriate to support the operation of the Code through legislation, with the purpose of ensuring that the rules of the market are consistent and enforceable across all of the participating jurisdictions. This will optimise the efficiency and effectiveness of the NEM and, in particular,

assure market participants that the NEM is governed under a stable regime. Therefore, on 9 May 1996, Queensland and the other participating jurisdictions signed the National Electricity Market Legislation Agreement (the Agreement).

The Agreement provides for the enactment by South Australia of legislation to establish the force and effect of the Code. To ensure the Code's consistent application across the NEM, the Agreement requires Queensland and the other remaining participating jurisdictions to give force to South Australia's legislation through the enactment of application of laws legislation.

South Australia enacted the *National Electricity (South Australia) Act* in June 1996. Under the terms of the Agreement, Queensland and the other remaining participating jurisdictions are to apply as law in their jurisdictions a Schedule to the *National Electricity (South Australia) Act* known as the National Electricity Law (the Law).

The Electricity—National Scheme (Queensland) Bill 1997 is in a form nearly identical to Part 2 of the *National Electricity (South Australia) Act 1996* which provides for the Law's application in South Australia. The draft application Bills of the other remaining participating jurisdictions, which have been approved by the Minister for Mines and Energy in accordance with the Agreement, are also in this form.

It is proposed that Queensland will proclaim its application legislation when it commences an electricity market that utilises the NEM arrangements. However, it should be noted that the Agreement requires each jurisdiction to apply the Law by June 1998, unless jurisdictions agree otherwise.

#### *Provisions of the National Electricity Law*

The Law, which the Bill provides will be applied in Queensland as the National Electricity (Queensland) Law, provides for Designated Ministers to approve the Code. This process will be followed after the Code has passed successfully through the ACCC. A number of constitutional provisions of the Code, relating particularly to NECA and its functions, are classed as protected provisions which can be amended only with the unanimous approval of the Designated Ministers. Other provisions of the Code, which are technical and relate only to market operations, are

amendable by NECA subject to the approval of the ACCC. (In this sense, the market will be administered and operated similarly to the stock exchange).

The Law requires all market participants to register with NEMMCO to operate in the NEM, unless they are exempted from the effect of the Code. NECA is to administer the Code and make decisions about its application to particular persons. However, NECA must pursue certain proceedings and civil penalties in regard to the operation of the Law and the Code through the National Electricity Tribunal.

The Tribunal is established under the *National Electricity (South Australia) Act 1996* and its functions and powers are set out in the Law. The Tribunal may operate in any jurisdiction that applies the Law. This arrangement will ensure that due process is followed in the enforcement of the provisions of the Code. Appeals from decisions of the Tribunal may be made to the Supreme Court. Other provisions of the Law ensure that where persons rights and liberties are made dependent on an administrative power, the administrative power is appropriately defined.

The Law also provides for the establishment and maintenance of statutory funds by NECA and NEMMCO to cover, respectively, the receipt and payment of civil penalties imposed under the Code (and associated costs) and the receipt and payment of monies incurred through the management of the NEM.

Schedule 1 to the Law sets out provisions relating to the interpretation of the Law to ensure that it is given consistent meanings across the jurisdictions participating in the NEM.

### **Administrative cost to Government of implementation**

It is not expected that application of the Law will create any significant costs to the Government.

### **Fundamental legislative principles**

The Electricity-National Scheme (Queensland) Bill is drafted to provide for the application, as a law of Queensland, the National Electricity Law, which is a Schedule to the *National Electricity (South Australia) Act 1996*.

If the Bill is enacted, upon its proclamation a law will apply in Queensland that has not been passed, and will not be amended, by the

Queensland Parliament. The view might be expressed that the Bill therefore has insufficient regard for the institution of Parliament. There are, however, precedents. In particular, the Corporations Law and the Australian Financial Institutions Code operate under applications of laws schemes.

A copy of each of the Law and the current draft of the Code have been tabled with the Electricity-National Scheme (Queensland) Bill for the consideration of the Parliament. These documents provide Parliament and the Scrutiny of Legislation Committee with a background to the purpose of, and operations proposed by, the Bill. It is proposed that, after the Government has considered and approved the Code (following its authorisation and approval by the ACCC), it will be tabled in Parliament by the Minister for Mines and Energy prior to the proclamation of the *Electricity—National Scheme (Queensland) Act 1997*.

The application of law regime is essential to ensuring the nationally consistent operation of the electricity supply industry which is central to the strength of the economy. Further, the establishment and maintenance of a consistent and stable legislative regime is necessary for the efficient operation of, and sound investment decisions in, the National Electricity Market.

## **Consultation**

The Departments of Premier and Cabinet, Treasury, Economic Development and Trade and Mines and Energy have been consulted on the preparation of this Bill. In accordance with the Agreement, the Designated Ministers of the other jurisdictions participating in the NEM have considered the Bill and agreed that it conforms with the Agreement, thereby giving Queensland's Designated Minister leave to introduce the Bill into the Parliament of Queensland.

## **NOTES ON PROVISIONS**

### **PART 1—PRELIMINARY**

*Clause 1* is formal.

*Clause 2* is a commencement provision.

*Clause 3* contains a number of definitions for the purposes of the measure.

*Clause 4* provides that the measure, the *National Electricity (Queensland) Law* and the *National Electricity (Queensland) Regulations* are to bind the crown.

*Clause 5* provides for the extra-territorial effect of the measure, the *National Electricity (Queensland) Law* and the *National Electricity (Queensland) Regulations*.

## **PART 2—NATIONAL ELECTRICITY (QUEENSLAND) LAW AND NATIONAL ELECTRICITY (QUEENSLAND) REGULATIONS**

*Clause 6* applies the *National Electricity Law* set out in the schedule as a law of Queensland. The clause also provides that the Law as so applying may be referred as the *National Electricity (Queensland) Law*.

*Clause 7* provides that the regulations in force under Part 4 apply as regulations in force for the purposes of the *National Electricity (Queensland) Law* and, as so applying, may be referred to as the *National Electricity (Queensland) Regulations*.

*Clause 8* contains a number of definitions for the purposes of the *National Electricity (Queensland) Law* and the *National Electricity (Queensland) Regulations*.

The Schedule set out below does not reflect part of the *Electricity—National Scheme (Queensland) Bill*, but reflects that part of the *National Electricity (South Australia) Act* that the Bill proposes be applied in Queensland as the *National Electricity (Queensland) Law*. The Schedule is provided here for the information of the Parliament.

## **SCHEDULE**

### *National Electricity Law*

#### **PART 1—PRELIMINARY**

*Clause 1* states that the Law may be cited as the *National Electricity Law*.

*Clause 2* states that the Law is to commence in accordance with provision under the *National Electricity (Queensland) Act 1966*.

*Clause 3* contains the principal definitions of words and expressions used in the Law.

*Clause 4* states that Schedule 1 contains miscellaneous provisions relating to interpretations of the Law.

*Clause 5* sets out the States that are taken to be participating jurisdictions for the purpose of the Law and the circumstances in which another jurisdiction may become a participating jurisdiction or a participating jurisdiction will cease to be a participating jurisdiction.

#### **PART 2—NATIONAL ELECTRICITY CODE**

*Clause 6* provides for approval of the initial National Electricity Code by the Ministers of the participating jurisdictions, and for notice to be given of that approval and of any amendment of the code. The clause also contains evidentiary provisions as to the contents and making of amendments of the code.

*Clause 7* provides that certain provisions of the code are to prevail in the event of inconsistency with other provisions of the code and that those provisions may not be amended without unanimous approval of the Ministers of all the participating jurisdictions.

*Clause 8* sets out the requirements for availability of the code.

### **PART 3—REGISTRATION WITH NEMMCO**

*Clause 9* requires any person owning, controlling or operating a transmission or distribution system for supply of electricity to wholesale or retail customers that is connected to another such system to be registered by NEMMCO in accordance with the code unless that person is the subject of a derogation or otherwise exempt under the code from the requirement to be registered.

Similarly, any person owning, controlling or operating a generation system that supplies electricity to such a transmission or distribution system will be required to be registered by NEMMCO unless subject to such a derogation.

A person other than NECA or NEMMCO will be required to obtain authorisation under the code in order to administer or operate a wholesale market for the dispatch of electricity generating units or loads.

A person will also be required to be registered with NEMMCO in order to purchase electricity from the wholesale market for the dispatch of electricity generating units or loads unless that person is the subject of a derogation or otherwise exempt under the code from the requirement to be registered.

A breach of this provision is to attract a maximum penalty of \$100,000 and \$10,000 for each day that the offence continues.

### **PART 4—PROCEEDINGS AND CIVIL PENALTIES**

*Clause 10* prohibits proceedings from being brought against a person to whom the code applies in respect of an alleged contravention of the code unless the Law or the code recognises that the contravention gives rise to an obligation or liability to the person bringing the proceedings. NECA may, however, bring proceedings against Code participants for any alleged contraventions of the code.

In proceedings alleged contraventions of the code may only be relied on by NECA, or by a Code participant in relation to another Code participant.

*Clause 11* enables NECA to demand, by notice in writing, the civil penalty prescribed by regulation for a breach of a Class A provision of the code. If a penalty so demanded is not paid within 28 days and no application is made for review of NECA's decision to demand the penalty, NECA may apply to the Tribunal under Part 5 for an order for payment of the penalty.

*Clause 12* provides that NECA may apply to the Tribunal for an order under Part 5 if NECA considers a Code participant to be in breach of a provision of the code.

*Clause 13* requires civil penalties paid to NECA to be paid upon the civil penalties fund established by NECA under Part 6.

*Clause 14* provides that an order of the Tribunal or payment of a civil penalty may be registered and enforced in a court with jurisdiction for recovery of debts up to the amount of the penalty.

*Clause 15* provides that an amount due by a Code participant to another Code participant which is not paid within 28 days after it is due in accordance with the code may be recovered in a court of competent jurisdiction.

## **PART 5—NATIONAL ELECTRICITY TRIBUNAL**

### **DIVISION 1—TRIBUNAL**

*Clause 16* provides that the Tribunal is the National Electricity Tribunal to be established under Part 3 of the *National Electricity (Queensland) Act 1996* and that the Tribunal has the functions and powers conferred on it under the national electricity legislation.

*Clause 17* provides that the functions of the Tribunal are-

- to review decisions of NECA under clause 11 and decisions of NECA or NEMMCO that are, under the national electricity legislation or the code, reviewable decisions;
- to hear and determine applications to the Tribunal by NECA alleging breaches of the code by code participants.



The clause spells out that a decision of NECA not to bring proceedings in respect of a Code breach will not be reviewable.

*Clause 18* provides for the composition of the Tribunal.

*Clause 19* provides for appointments to the Tribunal to be made by the governor of Queensland on the recommendation of a majority of the ministers of the participating jurisdictions. Appointments are to be made on a part-time basis.

*Clause 20* provides that the chairperson or a deputy chairperson of the Tribunal; is to be a practitioner of the High Court or a Supreme Court of not less than five year's standing.

*Clause 21* provides for the terms and conditions of appointment of a member of the Tribunal.

*Clause 22* provides for the registration and termination of the appointment of a member of the Tribunal.

*Clause 23* provides for the appointment of an acting chairperson of the Tribunal and the terms and conditions of such an appointment.

*Clause 24* requires the disclosure of conflicts of interest by the members of the Tribunal; and provides for the non-participation of members in proceedings in which they are interested.

## **DIVISION 2—PROCEEDINGS BEFORE TRIBUNAL**

*Clause 25* enables the chairperson of the Tribunal to give directions as to the constitution of the Tribunal and the arrangement of the business of the Tribunal for particular proceedings.

*Clause 26* requires the Tribunal to be constituted by the chairperson or a deputy chairperson or 2 or 3 members at least one of whom is the chairperson or a deputy chairperson.

*Clause 27* deals with the situation in which a member ceases to be available for the hearing of a proceeding during the course of that hearing.

*Clause 28* states that sittings of the Tribunal may be held at any place in a State or Territory that is a participating jurisdiction.

*Clause 29* specifies the persons who will be parties to a proceeding before the Tribunal.

*Clause 30* enables the Tribunal to decide whether the interests of a person are affected by a decision of NECA or NEMMCO and hence whether the person should be joined as a party to a proceeding for review of the decision.

*Clause 31* enables a person to be represented before the Tribunal by some other person who need not be a legal practitioner.

*Clause 32* provides for the Tribunal to follow an informal procedure in its proceedings and enables procedural directions to be given.

*Clause 33* enables the chairperson of the Tribunal to direct the parties to a proceeding for the review of a decision to hold a conference. If agreement is reached by the parties at the conference, the Tribunal may make a decision in accordance with that agreement.

*Clause 34* requires the proceedings of the Tribunal to be held in public. The Tribunal may, in appropriate circumstances, prohibit or restrict the publication or disclosure of evidence given before the Tribunal.

*Clause 35* requires the Tribunal to give every party to a proceeding a reasonable opportunity to present its case, inspect relevant documents and make submissions in relation to those documents.

*Clause 36* sets out the particular powers of the Tribunal for the purpose of a proceeding such as power to take evidence on oath or affirmation, to proceed in the absence of a party, to adjourn proceedings and to issue summonses.

*Clause 37* enables the Tribunal to make an order staying or otherwise affecting the operation or implementation of a decision to which the proceeding before the Tribunal relates.

*Clause 38* sets out the way in which questions arising in proceedings before the Tribunal are to be decided, that is, by majority opinion with questions of law being decided by the person presiding in the proceeding or by the chairperson.

*Clause 39* enables the Tribunal, in a proceeding on an application for review of a decision, to dismiss the application if the applicant fails to appear at a conference or a hearing of the proceeding or to strike out a party who fails to appear at a conference or a hearing.

*Clause 40* gives the Tribunal the power to do all things necessary for the hearing and determination of a proceeding.

*Clause 41* sets out the powers that may be exercised by the Tribunal for the purpose of reviewing a decision. It also provides that decisions of the Tribunal are to be in writing and when they come into effect.

*Clause 42* requires the Tribunal to give written reasons for a decision made by it.

*Clause 43* provides that a person whose interests are affected by a reviewable decision may apply to the Tribunal for review of the decision, and sets out the time frame for making such an application.

*Clause 434* sets out the orders that the Tribunal may make where NECA applies to the Tribunal alleging a breach of the code by a Code participant. The orders include orders imposing civil penalties up to the levels described in the note relating to clause 13 of the Bill, orders of an injunctive nature and orders suspending the registration of code participants or other rights of code participants under the code.

*Clause 45* empowers the Tribunal to order a Code participant to pay an unpaid amount demanded by NECA as a civil penalty. The clause makes it clear that any inquiry as to whether the breach occurred must take place in a proceeding for review of NECA's decision to demand payment of the civil penalty and not in the proceedings for recovery of the penalty.

*Clause 46* makes provision for appeals to the Supreme Court against decisions of the Tribunal on questions of law, including any question as to whether a person's interests are affected by a decision of NECA or NEMMCO.

*Clause 47* enables the Supreme Court to make an order staying or otherwise affecting the operation or implementation of a decision of the Tribunal that is the subject of an appeal to the Supreme Court.

*Clause 48* enables the Tribunal to refer a question of law arising in a proceeding before the Tribunal to the Supreme Court.

*Clause 49* enables the Tribunal to direct a party to a proceeding to pay the costs of the proceeding. In the absence of such a direction, each party is to bear its own costs.

*Clause 50* gives a member of the Tribunal, a person representing a party before the Tribunal, and a person summoned to attend or appear before the

Tribunal the same protection and immunity as if the proceeding were a proceeding in the High Court.

*Clause 51* makes it an offence if a person who is summoned to appear fails to appear as a witness before the Tribunal without reasonable excuse (maximum penalty: \$5,000).

*Clause 52* makes it an offence if a person appearing as a witness before the Tribunal refuses to be sworn to answer a question or produce a document without reasonable excuse (maximum penalty: \$5,000).

*Clause 53* provides a penalty for a person appearing as a witness before the Tribunal who knowingly gives evidence that is false or misleading (maximum penalty: \$10,000).

*Clause 54* creates offences dealing with contempt of the Tribunal (maximum penalty: \$10,000).

*Clause 55* prohibits a person from obstructing or improperly influencing the conduct of a hearing of the Tribunal (maximum penalty: \$10,000).

*Clause 56* prohibits a person from contravening an order of the Tribunal under clause 34 restricting publication of confidential material (maximum penalty: \$50,000) or any other order of the Tribunal (maximum penalty: \$20,000).

*Clause 57* exempts a person from giving evidence or producing a document in a court if to do so would be contrary to an order of the Tribunal under clause 34 restricting publication of confidential material.

*Clause 58* provides for the payment of allowances and expenses to witnesses appearing before the Tribunal.

### **DIVISION 3—MISCELLANEOUS**

*Clause 59* states that the chairperson of the Tribunal is responsible for managing the administrative affairs of the Tribunal.

*Clause 60* requires that there be a Registrar and Deputy Registrar of the Tribunal in each participating jurisdiction appointed and employed by NECA.

*Clause 61* requires the chairperson of the Tribunal to submit a draft budget to NECA for each financial year. NECA is to determine the budget

but may vary it only with the agreement of the Tribunal's chairperson or the approval of a majority of the Ministers of the participating jurisdictions.

*Clause 62* requires NECA to provide funds to the Tribunal in accordance with the Tribunal's budget.

*Clause 63* requires the chairperson of the Tribunal to provide an annual report to the Minister of each participating jurisdiction.

*Clause 64* enables the chairperson of the Tribunal to delegate his or her powers.

## **PART 6—STATUTORY FUNDS OF NECA AND NEMMCO**

*Clause 65* provides definitions for this Part of the National Electricity Law.

*Clause 66* makes provision for NECA to establish a civil penalties fund, into which all civil penalties received or recovered by NECA under the national electricity legislation will be paid. Payments out of the fund are also governed by this provision.

*Clause 67* makes provision for NEMMCO to establish and maintain Code funds as required by the code. The code will contain provisions governing payments into and out of the funds.

*Clause 68* enables NECA and NEMMCO to invest money standing to the credit of the civil penalty fund and the code funds.

*Clause 69* declares that neither NECA or NEMMCO, nor a director of NECA or NEMMCO, is a trustee or trustees of the money in the civil penalty fund or the code funds.

*Clause 70* states that in the winding up of NECA or NEMMCO money in the civil penalty fund and the code funds will be applied in accordance with the Corporations Law in discharging debts and claims but only to the extent that the debts or claims are liabilities referable to those funds.

## **PART 7—GENERAL**

*Clause 71* makes provision for a person authorised by NECA to obtain a search warrant from a Magistrate conferring power to enter and search for things reasonably suspected of being connected with a breach of the code.

*Clause 72* requires the person executing a search warrant first to attempt to obtain permission for entry from any person at the place to which the warrant relates unless there is reason to believe that immediate entry is required to ensure the safety of a person or the effective execution of the warrant.

*Clause 73* requires a person executing a search warrant to identify himself or herself to the occupier or a person apparently representing the occupier at the place to which the warrant relates and to give a copy of the warrant to such a person.

*Clause 74* sets out various further powers of a person executing a search warrant such as power to inspect, examine or photograph anything in the place to which the warrant relates and power to take extracts from and copy documents.

*Clause 75* allows the person executing a search warrant to seize things connected with a breach of the code other than the things named or described in the warrant if there are reasonable grounds to believe that the seizure of the things is necessary to prevent their concealment, loss or distribution or their use in further breaches of the code.

*Clause 76* provides that NEMMCO may, for public safety or electricity system security purposes, authorise a person to switch off or re-route a generator, to call equipment into service or take equipment out of service or to exercise other similar powers.

*Clause 77* makes it an offence if a person, without reasonable excuse, obstructs or hinders a person in the exercise of a power under a search warrant or a power under clause 76.

*Clause 78* provides that, subject to any agreement to the contrary, a Code participant will not be liable in damages for any partial or total failure to supply electricity unless the failure is due to anything done or omitted to be done by the code participant in bad faith or to the negligence of the code participant.

*Clause 79* provides for a certificate signed by a director of NECA to be evidence of a person's status as a Code participant.

*Clause 80* provides that where a corporation contravenes the National Electricity Law or Regulations or is in breach of the code, each officer of the Corporation will also be guilty of that contravention or breach if he or she knowingly authorised or permitted the contraventions or breach.

*Clause 81* makes it clear that for the purpose of determining the civil penalty for a Code breach that consists of a failure to do something that is required to be done, the breach is to be regarded as continuing until the act is done despite the fact that any period within which or time before which the act is required to be done has expired or passed.

## **SCHEDULE 1**

### *Miscellaneous Provisions Relating to Interpretation*

Schedule 1 contains uniform interpretation provisions of a kind which are usually contained in the Interpretation Act of a State or Territory.