



New South Wales

# Electricity Network Assets (Authorised Transactions) Bill 2015

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

The *Electricity Retained Interest Corporations Bill 2015* is cognate with this Bill.

## Overview of Bill

The object of this Bill is to authorise and facilitate the transfer to the private sector, or to any public sector agency, of certain electricity network assets of the State, and to make detailed provision regarding the transfer of electricity network employees and their rights and entitlements. The Bill provides for the following:

- (a) network infrastructure assets cannot be transferred to the private sector except by lease with an initial term not exceeding 99 years,
- (b) the private sector interest in the State's electricity network assets must not exceed 49%,
- (c) no transfer of any assets, rights or liabilities of Essential Energy is authorised,
- (d) the State's interest in transferred network infrastructure assets is protected by providing that a public sector agency must not transfer any interest in a network infrastructure asset lease or in the lessee of such a lease (with limited exceptions),
- (e) the Treasurer must ensure that an authorised network operator of a transacted distribution system or transacted transmission system provides an electricity price guarantee,
- (f) the proceeds of the transfer of electricity network assets to the private sector pursuant to an authorised transaction belong to and are payable directly to the State.

## Outline of provisions

### Part 1 Preliminary

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act, except proposed Schedule 5 (Ownership restrictions in floated transaction companies), which commences on a day to be appointed by proclamation.

**Clause 3** contains definitions of key terms used in the proposed Act. (Schedule 1 contains other definitions.) The clause defines *authorised transaction* to mean a transfer of electricity network assets authorised by Part 2 of the proposed Act. The term *electricity network SOC* is defined to mean TransGrid, Ausgrid and Endeavour Energy constituted as statutory State owned corporations under the *Energy Services Corporations Act 1995*. (Essential Energy is not an electricity network SOC for the purposes of the proposed Act.)

**Clause 4** defines *network infrastructure assets* as assets that are wholly owned by an electricity network SOC and form part of or are used in connection with the operation of a distribution system, transmission system or street lighting system, including electricity power lines and their supporting or protective structures and conduits, associated equipment, street lighting structures, buildings, plant and machinery and any freehold or leasehold interest in land.

### Part 2 The authorised transactions

**Clause 5** authorises the transfer of electricity network assets to the private sector or to any public sector agency. That authorisation is subject to the conditions that network infrastructure assets cannot be transferred to the private sector except by lease with an initial term not exceeding 99 years (without limiting any option to renew for an additional term or terms) and that the private sector interest in the State's electricity network assets must not exceed 49%.

**Clause 6** specifies the way in which the private sector interest in the State's electricity network assets is to be calculated for the purposes of the maximum 49% private sector interest.

**Clause 7** protects the State's interest in transferred network infrastructure assets by providing that a public sector agency must not transfer any network retained interest (any interest of a public sector agency in a network infrastructure asset lease or in the lessee of such a lease other than as lessor) held by the public sector agency.

**Clause 8** requires the Treasurer to ensure that an authorised network operator of a transacted distribution system or transacted transmission system provides an electricity price guarantee to the effect that:

- (a) the authorised network operator's total network charges for the financial year ending 30 June 2019 will be lower than for the financial year ending 30 June 2014, and
- (b) the authorised network operator will promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, safety, reliability and security of supply of electricity, and
- (c) the authorised network operator will comply with any Efficiency Benefit Sharing Scheme developed by the Australian Energy Regulator for the sharing of efficiency gains and losses between network operators and their customers that is applicable to the network operator.

The proposed section also provides for the Treasurer to request the NSW Electricity Price Commissioner to provide reports for each proposed authorised transaction as to whether the amount of the private sector investment for the purpose of acquiring an interest in electricity network assets (including the costs incurred for that purpose) is likely to increase network charges for the distribution or transmission system concerned and an annual report on compliance by the authorised network operator with its obligations under its electricity price guarantee.

**Clause 9** provides that the proceeds of the transfer of electricity network assets to the private sector pursuant to an authorised transaction belong to and are payable directly to the State. The provision also provides for allowable deductions authorised to be made from the transaction proceeds.

**Clause 10** requires a fund called the Electricity Network Residual Liabilities Fund to be established in the Special Deposits Account and provides that there is payable into the Fund such amount as the Treasurer directs to be paid out of the transaction proceeds and interest accruing on that amount.

### **Part 3 Facilitating the authorised transactions**

**Clause 11** provides that the Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction, and that those functions are not limited by specific functions created by the proposed Act.

**Clause 12** provides that an authorised transaction is to be effected as directed by the Treasurer in any manner that the Treasurer considers appropriate and that electricity network assets can be transferred pursuant to the proposed Act whether or not the land in, on or over which they are situated is owned by the owner of the assets.

**Clause 13** provides for the establishment of a State owned corporation as a transaction SOC for the purposes of an authorised transaction.

**Clause 14** provides for the establishment of companies as transaction companies for the purposes of an authorised transaction (including by means of the corporate conversion of an electricity network SOC). Transaction SOCs and transaction companies are referred to as transaction entities.

**Clause 15** provides that each electricity network SOC and each transaction entity has and may exercise all functions as are necessary or convenient for the purposes of an authorised transaction. The clause also authorises the Treasurer to act for or on behalf of and in the name of an electricity network SOC or a transaction entity in the exercise of any of its functions for the purposes of an authorised transaction.

**Clause 16** provides that electricity network SOCs and transaction entities are subject to the direction and control of the Treasurer in the exercise of any of their functions for the purposes of an authorised transaction while they are public sector agencies.

### **Part 4 Arrangements for transfer of staff**

**Clause 17** defines a *networks employee* as an employee of an electricity network SOC and a person who was an employee of an electricity network SOC immediately before the person's employment was transferred under the proposed Part to the employment of another public sector agency.

**Clause 18** provides for the transfer of an employee of an electricity network SOC to the employment of another public sector agency (with or without the consent of the employee).

**Clause 19** provides for the transfer of an employee of an electricity network SOC to the employment of a private sector entity (with or without the consent of the employee).

**Clause 20** provides for the continuity of the employment entitlements of employees transferred under the proposed Part.

**Clause 21** provides that a transfer under the proposed Part has effect despite any other law, contract or instrument under a law, does not constitute a retrenchment, redundancy or termination of employment and does not give rise to an entitlement to compensation.

**Clause 22** provides that a provision of the proposed Part has no effect to the extent of any inconsistency with Commonwealth workplace relations laws.

## Part 5 Arrangements for transfer of assets and functions

**Clause 23** authorises the Treasurer to make vesting orders under proposed Schedule 4 for the purposes of an authorised transaction.

**Clause 24** provides for the severance of fixtures owned by an electricity network SOC from land owned by an electricity network SOC or another public sector agency.

**Clause 25** provides for the Treasurer to give directions for the grant of any relevant authorisation under various laws to a person who becomes or is proposed to become the new operator of electricity network assets pursuant to an authorised transaction.

**Clause 26** authorises an electricity network SOC, a transaction entity or the Electricity Assets Ministerial Holding Corporation to acquire land for the purposes of an authorised transaction by agreement or compulsory acquisition. Land may be acquired only if the SOC, transaction entity or Corporation determines the land to be land on which electricity network assets of an electricity network SOC are situated, land used or occupied by an electricity network SOC or land adjoining such land.

**Clause 27** provides for the adjustment of the objectives and functions of an electricity network SOC to ensure that they remain appropriate following the transfer of electricity network assets pursuant to an authorised transaction.

## Part 6 Operation of transacted distribution and transmission systems

**Clause 28** specifies some of the terminology for transacted systems:

- (a) a *transacted distribution system* or *transacted transmission system* is a distribution system or transmission system after electricity network assets comprising a distribution or transmission system are transferred to the private sector for the purposes of an authorised transaction, and
- (b) an *authorised distributor* or *authorised transmission operator* is an entity that controls or operates a transacted distribution system or transacted transmission system, and
- (c) an *authorised network operator* is an authorised distributor or authorised transmission operator, and
- (d) a public sector agency that is the lessor of electricity network assets comprising a transacted distribution system or transacted transmission system is *the lessor* or *the owner* of the system.

**Clause 29** specifies the rights of the lessor of a transacted distribution system or transacted transmission system. In particular, ownership of electricity network assets by the lessor of such a system is to be treated as ownership by the Crown for the purposes of any provision of an Act that confers a right, privilege or immunity on the Crown as an owner of land or other assets. The proposed section also provides that the lessor of a transacted distribution system or transacted transmission system is not a distributor, transmission operator or network operator for the purposes of the *Electricity Supply Act 1995*.

**Clause 30** describes what is meant by a reference in any Act to the functions of a network operator, so as to include, in the case of an authorised distributor, the functions of establishing, maintaining and operating facilities for the distribution of electricity or, in the case of an authorised transmission operator, the functions of establishing, maintaining and operating facilities for the transmission of electricity and the functions of utilising and developing its facilities for the transmission of electricity to carry out telecommunications services.

**Clause 31** deals with the liability of authorised network operators. If an authorised network operator of a transacted distribution system or transacted transmission system contravenes a provision of the *Electricity Supply Act 1995* or the regulations under that Act in the course of or in connection with the operation of the distribution or transmission system, each authorised

network operator of the distribution or transmission system is taken to have contravened the same provision.

**Clause 32** provides that the regulations may provide that a reference in a specified provision of any other Act or statutory instrument to a public authority includes, or does not include, a reference to the owner, controller or operator of a transacted distribution system or transacted transmission system.

**Clause 33** provides that the regulations may modify any provision of the *Electricity Supply Act 1995* that confers a function on a network operator for the purposes of adapting the application of the provision to or in respect of the functions of the owner, controller or operator of a transacted distribution system or transacted transmission system.

**Clause 34** regulates the land acquisition functions of the lessor of a transacted distribution system or transacted transmission system, in particular, those functions cannot be exercised by the lessor in the lessor's own right but can be exercised by another network operator of the distribution or transmission system on behalf of the lessor, and the other network operator has full power and authority to exercise those functions on behalf of the lessor.

**Clause 35** provides for the protection of electricity works by providing that section 53 of the *Electricity Supply Act 1995* applies in respect of electricity works that form part of a transacted distribution system or transacted transmission system. (That section provides that no action by the owner or occupier of land on which electricity works are situated lies against the network operator by reason of the presence in, on or over the land of the electricity works or the operation or use of those electricity works and that the presence of those works, and their operation and use are, as between the owner or occupier of the land and the network operator, taken to be lawful for all purposes.)

**Clause 36** provides that the Treasurer may for the purposes of an authorised transaction request the Minister under the *Electricity Supply Act 1995* to grant a licence under that Act to an entity nominated by the Treasurer as the new operator of a transacted distribution system or transacted transmission system.

**Clause 37** prevents the boundaries of the distribution district for a transacted distribution system being varied under the *Electricity Supply Act 1995*, except with the consent in writing of the authorised distributor.

**Clause 38** provides that the exception from land tax provided for a sublessee in the *Land Tax Management Act 1956* does not apply to a sublessee under an authorised transaction and that the sublessee is liable for land tax accordingly.

**Clause 39** provides that, for the purposes of any environmental planning instrument, the supply of electricity by an authorised network operator is a public utility undertaking carried on by the authorised network operator as an electricity supply authority and that the carrying out of development by or on behalf of an authorised network operator for the purpose of an electricity transmission or distribution network constitutes the carrying out of that development by the authorised network operator as an electricity supply authority and public authority. After a distribution system or transmission system becomes a transacted distribution system or transacted transmission system, a reference in any environmental planning instrument to the former network operator is to be read as a reference to the authorised network operator that operates the transacted distribution system or transacted transmission system.

**Clause 40** provides that nothing done for the purposes of an authorised transaction requires the concurrence of the Minister under the *Coastal Protection Act 1979*. (The relevant provisions of that Act would require the concurrence of the Minister for a public authority to carry out certain development in the coastal zone, or grant any right or consent to use or occupy any part of the coastal zone or carry out development in the coastal zone, if the Minister is of the opinion that to do so may be inconsistent with the principles of ecologically sustainable development or adversely affect the coastal zone.)

## **Part 7 Operation of other laws**

**Clause 41** provides that various State taxes and charges are not payable by public sector agencies in connection with transactions for the purposes of an authorised transaction unless the Treasurer otherwise directs and authorises the Treasurer to exempt other persons from liability for State taxes and charges in connection with an authorised transaction.

**Clause 42** provides for the provisions of the proposed Act to prevail in the event of an inconsistency between the proposed Act and certain other State legislation.

**Clause 43** provides that the *Public Authorities (Financial Arrangements) Act 1987* does not apply to any transaction, agreement or other arrangement entered into for the purposes of an authorised transaction.

**Clause 44** authorises the release of information by the Auditor-General for the purposes of an authorised transaction.

**Clause 45** exempts contracts for the sale of land from section 52A of the *Conveyancing Act 1919* when entered into for the purposes of an authorised transaction. (That section requires certain documents to be attached to a contract for the sale of land and deems the contract to include certain terms, conditions and warranties.)

**Clause 46** prevents the operation of the proposed Act and the various arrangements and actions that it authorises from constituting a breach of various civil obligations.

**Clause 47** protects the State from claims for compensation in connection with the enactment or operation of the proposed Act.

**Clause 48** protects the validity of provisions of leases of electricity network assets entered into for the purposes of an authorised transaction.

## **Part 8 Miscellaneous**

**Clause 49** specifies the functions of the Electricity Assets Ministerial Holding Corporation (which are to hold, on behalf of the Crown, electricity network assets acquired by it or transferred to it, and to carry on any activities or business that relate to any electricity network assets held by it, including demanding, collecting and receiving charges, levies, rates and fees and other functions prescribed by the regulations). The clause also establishes a fund in the Special Deposits Account called the Electricity Assets Ministerial Holding Corporation Fund and provides for payments into and out of the Fund.

**Clause 50** deals with the functions of the New South Wales Treasury Corporation in connection with the provision of financial services for the purpose of an authorised transaction at the direction of the Treasurer.

**Clause 51** provides that the Treasurer may delegate to the Secretary of the Treasury, or to any other Government sector employee prescribed by the regulations, any function of the Treasurer under the proposed Act except the power of delegation.

**Clause 52** provides for the proposed Act to bind the State and all other Australian jurisdictions.

**Clause 53** provides for the operation of the proposed Act outside the State.

**Clause 54** provides for the construction of the proposed Act so as not to exceed the legislative power of the State.

**Clause 55** provides for when orders take effect and for evidence of and presumptions about orders.

**Clause 56** provides for how documents are to be given or served for the purposes of the proposed Act.

**Clause 57** enables the Governor to make regulations for the purposes of the proposed Act.

## **Schedule 1 Interpretative provisions**

**Schedule 1** contains definitions and other interpretative provisions for the purposes of the proposed Act.

## **Schedule 2 Provisions concerning transaction SOC**

**Schedule 2** contains special provisions for the board of directors, chief executive officer, dividends scheme and other procedures of a transaction SOC.

## **Schedule 3 Corporate conversion of electricity network SOC and transaction SOC**

**Schedule 3** provides the procedure for the corporate conversion of an electricity network SOC or transaction SOC into a transaction company.

## **Schedule 4 Vesting of assets, rights and liabilities**

**Schedule 4** provides for the making of vesting orders by the Treasurer for the purposes of an authorised transaction. Vesting orders operate to vest assets, rights and liabilities comprising electricity network assets in the transferee specified in the order. Vesting order can also vary the terms of an instrument or contract.

## **Schedule 5 Ownership restrictions in floated transaction companies**

**Schedule 5** provides for ownership restrictions in floated transaction companies, where electricity network assets are transferred pursuant to an authorised transaction by means of an initial public offer of shares in a transaction company. The proposed Schedule also provides for the location of Member Registers of floated transaction companies, record-keeping and information giving by such companies and the making of remedial orders if a prohibited ownership situation arises in relation to a floated transaction company.

## **Schedule 6 Savings, transitional and other provisions**

**Schedule 6** contains the following savings and transitional provisions consequent on the enactment of the proposed Act:

- (a) a savings and transitional regulation-making power,
- (b) provisions relating to electricity network SOC including the dissolution of such SOC, the cancellation of their distributor's licences and their reporting requirements, and the conversion of an electricity network SOC into a Ministerial Holding Corporation,
- (c) provisions relating to the establishment of Ministerial Holding Corporations, including their functions (which include to hold, on behalf of the Crown, assets, rights and liabilities acquired by them or transferred to them by or under an authorised transaction Act), Special Deposit Account funds for them, the transfer of their assets, rights and liabilities to another public sector agency and the change of their names,
- (d) transitional arrangements requiring the exercise of environmental assessment functions commenced to be exercised by an authorised network operator in relation to transacted distribution and transmission systems in a manner with which the Minister for Planning concurs or in compliance with appropriate regulations for the activity.

## **Schedule 7      Amendment of Acts and regulations**

**Schedule 7** amends the Acts and regulations specified in the Schedule. The majority of amendments are consequential on the proposed Act. The more substantive amendments are described below.

**Schedule 7.7** amends the *Electricity Supply Act 1995*, including as follows:

- (a) by transferring certain regulatory functions concerning electricity safety from the Secretary of the Department of Trade and Investment, Regional Infrastructure and Services to the Independent Pricing and Regulatory Tribunal,
- (b) by providing for the issue of Network Administration Orders for a network operator's distribution or transmission system, which authorise the Tribunal to take control of the operations of the distribution or transmission system concerned for the purpose of ensuring the continued safe, secure and reliable supply of electricity,
- (c) by providing for the appointment of a step-in operator on terms and conditions determined by the Tribunal to operate the distribution or transmission system concerned in accordance with the terms and conditions of the appointment and the directions of the Tribunal,
- (d) by setting out the powers and obligations of such a step-in operator, the recovery of costs incurred by or on behalf of the Tribunal and step-in operator under a Network Administration Order and protecting certain persons from liability under such an Order,
- (e) by providing for the Tribunal to accept enforceable undertakings by the holder of a licence in connection with the contravention by the holder of the Act's requirements or the conditions of a licence,
- (f) by requiring a person who operates a transmission system that is a transacted transmission system to do so in accordance with the authority of a transmission operator's licence,
- (g) by providing for the Minister to enforce the Act, the regulations and licences (if satisfied that the holder of a licence has contravened a requirement of the Act or regulations or the conditions of the licence) by directing a licensee to take specified action to remedy or mitigate the consequences of a contravention or prevent the continuance or recurrence of the contravention, by imposing a monetary penalty or by cancelling the licence,
- (h) by providing for the enforcement of licences by the Tribunal (if satisfied that the holder of a licence has contravened a requirement of the conditions of the licence) by directing licensees to take specified action to remedy or mitigate the consequences of a contravention or prevent the continuance or recurrence of the contravention, by imposing a monetary penalty or by cancelling the licence,
- (i) by providing for the review of licences by the Tribunal.

**Schedule 7.9** amends the *Electricity Supply (Safety and Network Management) Regulation 2014* to provide for the nomination of a person as an auditor of a network operator's safety management system.

**Schedule 7.12** amends the *Environmental Planning and Assessment Act 1979* to provide for the regulations to make provision for or with respect to the exercise by a prescribed determining authority of its environmental impact assessment functions, including by making provision for the approval by the Minister of a code that makes provision for or with respect to the matters for which the regulations make provision.

**Schedule 7.13** amends the *Environmental Planning and Assessment Regulation 2000* to further provide for environmental assessment under Part 5 of the *Environmental Planning and Assessment Act 1979*, by making special provisions relating to electricity distributors and transmission operators.