

Government Owned Corporations (Generator Restructure–CleanCo) Regulation 2019

Explanatory notes for SL 2019 No. 58

made under the

Government Owned Corporations Act 1993

General Outline

Short title

Government Owned Corporations (Generator Restructure–CleanCo) Regulation 2019

Authorising law

Sections 161 and 167 of the *Government Owned Corporations Act 1993*

Policy objectives and the reasons for them

In August 2018, the Queensland Government, delivering on a 2017 election commitment, approved the establishment of CleanCo Queensland Limited (CleanCo) as the State's new renewable energy government owned corporation (GOC).

CleanCo is a structural long-term reform that will positively impact the energy market through innovative and reliable renewables-focused energy solutions. It will trade energy products to support the increased utilisation of low and no emission power generation assets. CleanCo will improve competition in the wholesale electricity market and increase Queensland's electricity system security and reliability, placing downward pressure on electricity prices.

With a mandate to support the development of 1,000MW of new renewable energy generation by 2025, CleanCo will also assist the achievement of Queensland's Renewable Energy Target of 50 per cent renewable energy by 2030.

On 11 October 2018, CleanCo Queensland Limited was incorporated as a public company limited by shares. On 17 December 2018, CleanCo became a GOC with an external board of directors, through the making of the *Government Owned Corporations (CleanCo Queensland Limited) Amendment Regulation 2018*.

To complete the electricity generator GOC restructure, CleanCo will be transferred the ownership, title and dispatch rights of a specified and strategic portfolio of low and no emission power generation assets (Foundation Portfolio) from CS Energy Limited (CS Energy) and Stanwell Corporation Limited (Stanwell) and commence trading in the National Electricity Market (NEM). CleanCo will add to this Foundation Portfolio by acquiring, building, owning and maintaining new renewable energy generation assets.

While CleanCo will be dispatching the Foundation Portfolio into the NEM, given the complexity of operating power generation assets, CS Energy and Stanwell will continue to provide operations, maintenance and support services for the assets, under transitional services agreements (TSAs) until CleanCo has the required capability to safely and reliably operate the assets itself.

The purpose of this Regulation is to effect the progressive transfer of the assets, liabilities, instruments and employees relating to the Foundation Portfolio from Stanwell and CS Energy to CleanCo.

Achievement of policy objectives

The Regulation achieves its policy objectives by transferring the ownership of the assets, liabilities, instruments and employees relating to the Foundation Portfolio from Stanwell and CS Energy to CleanCo.

The Regulation allows for sequential transfer schedules to provide for an ordered and efficient electricity generator GOC restructure that ensures the State's generation assets continue to be operated safely and reliably as CleanCo progressively builds the capability to fully operate these assets.

While the majority of the Foundation Portfolio will be transferred from Stanwell and CS Energy to CleanCo when CleanCo commences trading in the NEM, the Regulation allows for scheduled items to transfer to CleanCo both before and after this time:

- Shortly after the notification of the Regulation, there is provision for transferring particular assets to CleanCo that may assist it in managing key business and regulatory risks in anticipation of being transferred the Foundation Portfolio.
- After the notification of the Regulation, the shareholding Ministers of Stanwell and CS Energy (for transfers moving from them respectively) may, by joint gazette notice with the shareholding Ministers of CleanCo, fix the date(s) when scheduled assets, liabilities, instruments and employees are to be transferred to CleanCo. This can occur up until 1 July 2021.

While the detailed items to transfer are to be defined in commercial-in-confidence schedules, the broad scope of the Foundation Portfolio, including the associated liabilities and instruments related to the power stations, that will be transferred to CleanCo is as follows:

- CS Energy – all contracts (including all relevant water contracts, excluding financial electricity contracts), assets and liabilities relating to the Wivenhoe Power Station, a 570MW, Hydro Pump Storage Power Station;
- Stanwell – all contracts (including all relevant gas and water contracts, excluding financial electricity contracts), assets, and liabilities relating to:
 - Swanbank Power Station Complex, including the Swanbank E gas generation unit and all surrounding land and related assets;
 - Barron Gorge Power Station, a 66MW Hydro Power Station;
 - Kareeya Power Station, an 88MW Hydro Power Station, including the nearby King Ranch timber plantation and the Tully Millstream site; and
 - Koombooloomba Power Station, a 7MW Hydro Power Station, and Koombooloomba Dam.

The Regulation provides flexibility to enable transfers to be made to CleanCo or wholly owned subsidiaries of CleanCo. Where a transfer schedule does not designate a recipient entity, the transfer will be to CleanCo.

The asset-based site employees for the Foundation Portfolio will continue to be employed by Stanwell and CS Energy (as relevant) while they operate the assets under TSAs with CleanCo. These employees will transition to CleanCo on transfer dates notified by shareholding Ministers' gazette notices once CleanCo has developed the capability to manage the Foundation Portfolio assets safely and reliably. In executing the restructure, there will be no loss or reduction of employee entitlements, no forced retrenchments and no forced employee relocations.

The Regulation provides a process for the transfer of liabilities expressly identified in a transfer schedule. It clarifies that, unless expressly identified in an exclusion schedule, a liability existing immediately before the transfer date which arises from a transferred asset, instrument or employee in a specified way (and which has not already been discharged), will also be transferred to CleanCo, without needing to be specified in a liability transfer schedule.

Additional provisions also clarify the liability positions of the GOCs for the benefit of third parties, including specifying:

- successor at law status for CleanCo in relation to transferred assets, liabilities and instruments, and liabilities relating to these which arise on or after transfer; and
- for the completion of proceedings commenced by or against the transferring GOC by that GOC, which retains the associated liabilities both of the proceedings and for the acts or omissions that are the subject of the proceedings.

The use of the Regulation to transfer the ownership of the assets, liabilities, instruments and employees relating to the Foundation Portfolio from Stanwell and CS Energy to CleanCo is reasonable and appropriate, and effective and proportional, as outlined under the heading 'Alternative ways of achieving policy objectives' below.

Consistency with policy objectives of authorising law

The Regulation is consistent with the main objects of the *Government Owned Corporations Act 1993*, which is to provide a structural reform process for GOCs, and to ensure the commercial success and efficiency of those entities.

Inconsistency with policy objectives of other legislation

The Regulation is consistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

The regulation-making power in section 161 of the *Government Owned Corporations Act 1993* is expressly designed to provide a mechanism by which assets, liabilities, instruments and employees may be transferred or reallocated between GOCs. It has been relied upon in implementing a number of Government-initiated restructures.

The use of the section 161 power recognises the emergent nature of CleanCo as a new GOC and the Government mandate for the transfer, as well as providing certainty to affected stakeholders. It also facilitates expeditious action to achieve the 2017 Government election commitment. A negotiated transfer process between the individual electricity generator GOCs would not be as well suited to accomplishing these objectives.

Benefits and costs of implementation

The Regulation will enable CleanCo to commence operation as the third energy generation GOC in Queensland. CleanCo will help achieve Queensland's Renewable Energy Target of 50 percent renewable energy generation and provide a structural long-term market based solution to put downward pressure on wholesale electricity prices. Through building, owning and operating renewable generation assets, CleanCo will also continue the Government's strong commitment to public ownership of electricity assets.

Costs of implementing the Regulation will be borne by the three affected GOCs, and will not negatively affect electricity prices for Queenslanders.

It is not anticipated that there will be additional costs to Government, and facilitating the transfer by Regulation will avoid higher transaction costs that may otherwise have been incurred if the transfers were negotiated commercially between the GOCs.

Consistency with fundamental legislative principles

The Regulation is consistent with fundamental legislative principles.

It is noted that the GOCs the subject of this Regulation are not individuals, but corporate entities.

While the Regulation results in changes to ownership of assets and in the legal rights and responsibilities as between CleanCo, Stanwell and CS Energy, no third-party rights are eliminated in this process, even if they become effective as against a different GOC or its subsidiary, because of the operation of the Regulation. Relevant provisions deal with successor in law and liabilities arising on or after transfer (sections 9 and 19), proceedings which have not been concluded at transfer (sections 10 and 20), the transfer and exclusion of liabilities (sections 6 and 16), the operation of transferred instruments (sections 7 and 17), and the employment arrangements of transferred employees (sections 8 and 18).

To the extent that employees are the subject of transfers under the Regulation, both Stanwell and CS Energy will have consultation obligations with which to comply. These will include providing details to employees of the effect of the change on them, in writing, and outlining measures being taken to avert or mitigate any adverse effect of the change. As part of the consultation process, employees and their representatives will have the opportunity to ask questions about the impact of the transfers.

The Regulation is made under specific heads of power in the *Government Owned Corporations Act 1993*, making a regulation rather than primary legislation the appropriate vehicle for these provisions.

The use of schedules for the specification of assets, liabilities, instruments and employees for the purposes of treatment under a regulation is a long-standing method of ensuring certainty of the subject matter of the Regulation, whilst maintaining the confidentiality of arrangements which are commercially sensitive. To the extent a transfer is to a wholly owned subsidiary of CleanCo, the use of these schedules to identify relevant instances is appropriate given CleanCo will still be receiving ultimate beneficial ownership. Any alternative approach would undermine the confidentiality provided by the transfer schedules, by requiring public identification of specific assets, liabilities, instruments and employees being transferred to specific recipient entities.

The fixing of further transfer dates by the shareholding Ministers by gazette notice for the transferring GOCs is permitted by section 26 of the *Statutory Instruments Act 1992*, which is not limited by the regulation-making power in the *Government Owned Corporations Act 1993*. The affected GOCs currently share the same shareholding Ministers, who will be well positioned to determine the appropriate dates for transfers in a way that best serves the purposes of this Regulation.

Consultation

CleanCo, Stanwell, CS Energy, the Queensland Audit Office and stakeholder union organisations have been consulted on the Regulation.

The Australian Competition and Consumer Commission and the Australian Energy Market Operator have been briefed on the proposed transfer of the Foundation Portfolio to CleanCo.

The consulted parties do not oppose the making of the Regulation. Protection of the rights of employees was a matter of concern for stakeholder unions. Provisions have been included in the Regulation to ensure the rights of transferred employees are protected. Consultation feedback has also assisted in ensuring there are appropriate and practical rules both from a GOC perspective, and for third parties, in relation to relevant liabilities of the GOC parties where transfers occur. In addition, consultation has contributed to ensuring the Regulation provides appropriate mechanics for practical matters such as transfers to a wholly-owned subsidiary of CleanCo and the potential for transfers of parts of (not just entire) instruments.

In accordance with the Queensland Government Guide to Better Regulation, the Office of Best Practice Regulation was not consulted in relation to the regulatory proposal. Queensland Treasury has self-assessed the Regulation to be excluded from further regulatory impact analysis under exclusion category (c) – regulatory proposals for the internal management of the public sector.