

**National Electricity (South Australia) (National
Electricity Law - Miscellaneous Amendments)
Amendment Bill**

Exposure Draft

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**National Electricity (South Australia)
(National Electricity Law -
Miscellaneous Amendments)
Amendment Bill**

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PART 1—PRELIMINARY

1 Short title

This Act may be cited as the *National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendment Act 2007*.

2 Commencement

- (1) This Act will come into operation on a day to be fixed by proclamation.
- (2) Section 7(5) of the *Acts Interpretation Act 1915* does not apply to this Act or a provision of this Act.

3 Definition

In this Act—

NEL means the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996*.

4 Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

**PART 2—AMENDMENT OF NATIONAL ELECTRICITY
(SOUTH AUSTRALIA) ACT 1996**

**5 Amendment of section 8(1) of the National
Electricity (South Australia) Act 1996—
Interpretation**

Section 8(1)—

- (a) before the definition of *the jurisdiction*
insert:

Court means the Supreme Court of South
Australia;

- (b) definition of *Supreme Court*—delete the
definition.

6 Amendment of section 2 of the NEL—Definitions

- (1) NEL, section 2—before the definition of *AEMC
initiated Rule* insert:

access determination means a determination of
the AER under Part 10;

access dispute has the meaning given by section
2A;

additional Minister initiated Rules means Rules
made under section 90A by the Minister in
right of the Crown of South Australia
administering Part 2 of the *National
Electricity (South Australia) Act 1996* of
South Australia;

AEMC means the Australian Energy Market
Commission established by section 5 of the
*Australian Energy Market Commission
Establishment Act 2004* of South Australia;

- (2) NEL, section 2, definition of ***AER economic regulatory function or power***—delete the definition and substitute:

AER means the Australian Energy Regulator established by section 44AE of the *Trade Practices Act 1974* of the Commonwealth;

AER economic regulatory decision means a decision (however described) of the AER under this Law or the Rules performing or exercising an AER economic regulatory function or power;

AER economic regulatory function or power means a function or power performed or exercised by the AER under this Law or the Rules that relates to the economic regulation of services provided by—

- (a) a regulated transmission system operator by means of, or in connection with, a transmission system; or
- (b) a regulated distribution system operator by means of, or in connection with, a distribution system,

and includes a function or power performed or exercised by the AER under the Rules that relates to the making of, as the case requires, a transmission determination or distribution determination;

associate, in relation to a person—

- (a) has the meaning it would have under Division 2 of Part 1.2 of the *Corporations Act 2001* of the Commonwealth if sections 13, 16(2) and 17 of that Act did not form part of that Act; or

- (b) means a person or class of person prescribed by the Regulations to be an associate;
- (3) NEL, section 2, definitions of ***Australian Energy Market Commission***, ***Australian Energy Regulator*** and ***Court***—delete the definitions.
- (4) NEL, section 2—after the definition of ***derogation*** insert:
- direct control network service*** has the meaning given by section 2B;
- dispute hearing*** means a hearing conducted by the AER for the purpose of making an access determination;
- distribution determination*** means a determination of the AER under the Rules that regulates any one or more of the following—
- (a) the terms and conditions for the provision of electricity network services that are the subject of economic regulation under the Rules including the prices an owner, controller or operator of a distribution system charges or may charge for those services;
- (b) the revenue an owner, controller or operator of a distribution system earns or may earn from the provision by that owner, controller or operator of electricity network services that are the subject of economic regulation under the Rules;
- distribution regulatory obligation or instrument*** means, in relation to the provision by a regulated distribution system operator of services that are the subject of a distribution determination—
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Part 2—Amendment of National Electricity (South Australia) Act 1996

- (a) a distribution reliability standard;
- (b) a distribution service standard;
- (c) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act that levies or imposes a tax or other levy that is payable by a regulated distribution system operator;
- (d) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act that regulates the use of land in a participating jurisdiction by a regulated distribution system operator;
- (e) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act that relates to the protection of the environment;
- (f) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act (other than national electricity legislation or an Act or an instrument referred to in paragraphs (c) to (e)) that materially affects the provision, by a regulated distribution system operator, of services that are the subject of a distribution determination,

but does not include a fine, penalty or compensation paid or to be paid (in whatever form) under an Act or an instrument referred to in paragraphs (c) to (f);

distribution reliability standard means a standard imposed by or under the Rules or jurisdictional electricity legislation relating to the reliability or performance of a distribution system;

distribution service standard means a standard relating to the standard of services provided by a regulated distribution system operator by means of, or in connection with, a distribution system imposed—

- (a) by or under jurisdictional electricity legislation; or
- (b) by the AER in accordance with the Rules;

- (5) NEL, section 2—after the definition of ***draft Rule determination*** insert:

electricity network service means a service provided by means of, or in connection with, a transmission system or distribution system;

- (6) NEL, section 2, definition of ***electricity services***—delete paragraph (b) and substitute:

- (b) electricity network services;

- (7) NEL, section 2—after the definition of ***final Rule determination*** insert:

form of regulation factors has the meaning given by section 2E;

general regulatory information order has the meaning given by section 28B;

- (8) NEL, section 2—after the definition of ***initial National Electricity Rules*** insert:

interconnected national electricity system means the interconnected transmission and distribution system in this jurisdiction and in the other participating jurisdictions used to

convey and control the conveyance of
electricity to which are connected—

- (a) generating systems and other facilities;
and
 - (b) loads settled through the wholesale
exchange operated and administered by
NEMMCO under this Law and the
Rules;
- (9) NEL, section 2, definition of *jurisdictional
electricity legislation*—
- (a) delete "any legislation" and substitute:
an Act
 - (b) delete "that legislation" and substitute:
that Act
- (10) NEL, section 2, definition of *national electricity
market objective*—delete the definition and
substitute:
national electricity objective means the objective
set out in section 7;
- (11) NEL, section 2, definition of *National Electricity
Rules*—
- (a) after paragraph (a) insert:
 - (ab) additional Minister initiated Rules; and
 - (b) in paragraph (b)(i)—after "Rules" insert:
or additional Minister initiated Rules
- (12) NEL, section 2, definition of *national electricity
system*—
- (a) delete "interconnected transmission and
distribution system referred to in paragraph
(b)" and substitute:
interconnected national electricity
system
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(b) delete paragraph (b) and substitute:

(b) the interconnected national electricity system;

(13) NEL, section 2—after the definition of *national electricity system* insert:

negotiated network service has the meaning given by section 2C;

(14) NEL, section 2—after the definition of *NEMMCO* insert:

network revenue or pricing determination means a distribution determination or a transmission determination;

network service provider means a Registered participant registered for the purposes of section 11(2) that owns, controls or operates a transmission system or distribution system that forms part of the interconnected national electricity system;

network service user means a user who is provided an electricity network service;

(15) NEL, section 2—after the definition of *offence provision* insert:

officer has the same meaning as in the *Corporations Act 2001* of the Commonwealth;

(16) NEL, section 2—after the definition of *power system security* insert:

prospective network service user means a person who seeks or wishes to be provided with an electricity network service.

- (17) NEL, section 2—after the definition of **Registered participant** insert:

regulated distribution system operator means an owner, controller or operator of a distribution system—

- (a) who is a Registered participant; and
- (b) whose revenue from, or price charged for, the provision of a network service is regulated under a distribution determination;

regulated network service provider means—

- (a) a regulated distribution system operator; or
- (b) a regulated transmission system operator;

- (18) NEL, section 2, definition of **regulated transmission system operator**—delete paragraph (b) and insert:

- (b) whose revenue from, or price charged for, the provision of a network service is regulated under a transmission determination;

- (19) NEL, section 2, definition of **regulatory obligation**—delete the definition and substitute:

regulatory information notice has the meaning given by section 28C;

regulatory information instrument means a general regulatory information order or a regulatory information notice;

- (20) NEL, section 2—after the definition of **Reliability Panel** insert:

revenue and pricing principles means the principles set out in section 7A;

ring fencing requirement has the meaning given
by section 2D;

- (21) NEL, section 2, definition of ***transmission determination***—delete the definition and substitute:

transmission determination means a
determination of the AER under the Rules
that regulates any one or more of the
following—

- (a) the terms and conditions for the provision of electricity network services that are the subject of economic regulation under the Rules including the prices an owner, controller or operator of a transmission system charges or may charge for those services;
- (b) the revenue an owner, controller or operator of a transmission system earns or may earn from the provision by that owner, controller or operator of electricity network services that are the subject of economic regulation under the Rules;

transmission regulatory obligation or instrument
means, in relation to the provision by a
regulated transmission system operator of
services that are the subject of a transmission
determination—

- (a) a transmission reliability standard;
- (b) a transmission service standard;
- (c) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act that levies or imposes a tax or other levy that is

payable by a regulated transmission system operator;

- (d) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act that regulates the use of land in a participating jurisdiction by a regulated transmission system operator;
- (e) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act that relates to the protection of the environment;
- (f) an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act (other than national electricity legislation or an Act or an instrument referred to in paragraphs (c) to (e)) that materially affects the provision, by a regulated transmission system operator, of services that are the subject of a transmission determination,

but does not include a fine, penalty or compensation paid or to be paid (in whatever form) under an Act or an instrument referred to in paragraphs (c) to (f);

- (22) NEL, section 2—after the definition of ***transmission service standard*** insert:

Tribunal means the Australian Competition Tribunal referred to in the *Trade Practices Act 1974* of the Commonwealth and includes a member of the Tribunal or a Division of the Tribunal performing functions of the Tribunal.

**7 Amendment of the NEL—New sections 2A to 2E
inserted**

NEL—after section 2 insert:

2A Meaning of access dispute

For the purposes of this Law, an access dispute is a dispute between —

- (a) a network service user or prospective network service user; and
- (b) a network service provider,

about an aspect of access to an electricity network service specified by the Rules to be an aspect about which there may be an access dispute.

2B Meaning of direct control network service

For the purposes of this Law, a direct control network service is an electricity network service—

- (a) the Rules declare or specify as a service the price for which, or the revenue to be earned from which, must be regulated under a distribution determination or transmission determination; or
- (b) if the Rules do not do so, the AER specifies, in a distribution determination or transmission determination, as a service the price for which, or the revenue to be earned from which, must be regulated under the distribution determination or transmission determination.

2C Meaning of negotiated network service

For the purposes of this Law, a negotiated network service is an electricity network service—

- (a) that is not a direct control network service; and
- (b) that—
 - (i) the Rules declare or specify as a negotiated network service; or
 - (ii) if the Rules do not do so, the AER specifies as a negotiated network service in a distribution determination or transmission determination.

2D Meaning of ring fencing requirement

- (1) For the purposes of this Law, a ring fencing requirement is a requirement under the Rules, or in a document (however described) prepared by the AER under the Rules, that requires a regulated network service provider to provide direct control network services as if those services were being provided by an entity that is unrelated to the regulated network service provider.
- (2) Without limiting subsection (1), a ring fencing requirement may include a requirement requiring a regulated network service provider to do any one or more of the following—
 - (a) structure, arrange and conduct its business activities so that the persons employed or engaged by the provider for the purpose of providing direct control network services are not directly involved in the provision of

other services by the regulated network service provider;

- (b) restrict the giving of information about direct control network services to persons not directly involved in the provision of those services by the regulated network service provider;
- (c) prepare, maintain and keep—
 - (i) consolidated accounts in respect of all services (including electricity network services) provided by the regulated network service provider; and
 - (ii) separate accounts for each direct control network service provided by the regulated network service provider.

2E Form of regulation factors

For the purposes of this Law, the form of regulation factors are—

- (a) the presence and extent of any barriers to entry in a market for electricity network services;
 - (b) the presence and extent of any network externalities (that is, interdependencies) between an electricity network service provided by a network service provider and any other electricity network service provided by the network service provider;
 - (c) the presence and extent of any network externalities (that is, interdependencies) between an electricity network service provided by a network service provider and any other service provided by the
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network service provider in any other market;

- (d) the extent to which any market power possessed by a network service provider is, or is likely to be, mitigated by any countervailing market power possessed by a network service user or prospective network service user;
- (e) the presence and extent of any substitute, and the elasticity of demand, in a market for an electricity network service in which a network service provider provides that service;
- (f) the presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be);
- (g) the extent to which a prospective network service user or network service user has adequate information to enable them to negotiate on an informed basis with a network service provider for the provision of an electricity network service to them by the network service provider.

8 Amendment of section 6 of the NEL—Ministers of participating jurisdictions

NEL—delete section 6(2) and (3).

9 Amendment of the NEL—New national electricity objective and new section 7A inserted

NEL—delete section 7 and substitute:

7 National electricity objective

The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for

the long term interests of consumers of electricity with respect to—

- (a) price, quality, safety, reliability and security of supply of electricity; and
- (b) the reliability, safety and security of the national electricity system.

7A Revenue and pricing principles

- (1) For the purposes of this Law, the revenue and pricing principles are the principles set out in subsections (2) to (7).
 - (2) A regulated network service provider should be provided with a reasonable opportunity to recover at least the efficient costs the operator incurs in—
 - (a) providing direct control network services; and
 - (b) complying with—
 - (i) a distribution regulatory obligation or instrument; or
 - (ii) a transmission regulatory obligation or instrument.
 - (3) A regulated network service provider should be provided with effective incentives in order to promote economic efficiency with respect to direct control network services the operator provides. The economic efficiency that should be promoted includes—
 - (a) efficient investment in a distribution system or transmission system with which the operator provides direct control network services; and
 - (b) the efficient provision of network services; and
-

- (c) the efficient use of the distribution system or transmission system with which the operator provides direct control network services.
 - (4) Allowance should be made for the value of a distribution system or transmission system with which a regulated network service provider provides direct control network services.
 - (5) Regard should be had to any valuation of a distribution system or transmission system set out in any—
 - (a) as the case requires, previous distribution determination or transmission determination; or
 - (b) determination or decision under the National Electricity Code or jurisdictional electricity legislation regulating the revenue earned, or prices charged, by a person providing services by means of that distribution system or transmission system.
 - (6) Regard should be had to the economic costs and risks of the potential for under and over investment by a regulated network service provider in, as the case requires, a distribution system or transmission system with which the operator provides direct control network services.
 - (7) Regard should be had to the economic costs and risks of the potential for under and over utilisation of a distribution system or transmission system with which a by a regulated network service provider provides direct control network services.
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10 Amendment of section 8 of the NEL—Reference to new national electricity objective

NEL, section 8(2)—delete "market".

11 Amendment of the NEL—New section 9A inserted

NEL—after section 9 insert:

9A "Propose-respond" model not to apply under this Law or the Rules unless Rules provide otherwise

- (1) Nothing in this Law or the Rules is to be taken as requiring the AER to make a network revenue or pricing determination in the same terms as proposed by the regulated network service provider to whom the determination will apply.
 - (2) Nothing in this Law or the Rules is to be taken as requiring the AER to amend a network revenue or pricing determination in the same terms as proposed by the regulated network service provider to whom the determination to be amended applies.
 - (3) Nothing in this Law or the Rules is to be taken as requiring the AER to—
 - (a) make a network revenue or pricing determination that includes anything proposed by the regulated network service provider to whom the determination will apply;
 - (b) to amend a network revenue or pricing determination to include anything proposed by the regulated network service provider to whom the determination to be amended applies.
 - (4) Subsections (1), (2) and (3) apply unless the Rules otherwise provide.
-

12 Amendment of section 11 of the NEL—Electricity market activities in this jurisdiction

(1) NEL, section 11(1)—delete "a generating system connected to the interconnected transmission and distribution system" and substitute:

, in this jurisdiction, a generating system connected to the interconnected national electricity system

(2) NEL, section 11(2)—delete "a transmission system or distribution system that forms part of the interconnected transmission and distribution system" and substitute:

, in this jurisdiction, a transmission system or distribution system that forms part of the interconnected national electricity system

(3) NEL, section 11(3)—after "administering" insert:

, in this jurisdiction,

(4) NEL, section 11(4)—after "engage in" insert:

, in this jurisdiction,

13 Amendment of section 15 of the NEL—New functions of AER

(1) NEL, section 15(a)—delete the paragraph and substitute:

(a) to monitor compliance by—

(i) Registered participants and other persons with this Law, the Regulations and the Rules; and

(ii) regulated network service providers with network revenue or pricing determinations; and

(2) NEL, section 15(b)—delete "that are not offence provisions" and substitute:

, including offences against this Law

(3) NEL, section 15—after paragraph (c)(iii) insert:

(iv) in relation to offences against this Law; and

(4) NEL, section 15—after paragraph (e) insert:

(ea) to prepare and publish reports on the financial and operational performance of network service providers in providing electricity network services; and

(5) NEL, section 15—after its present contents (now to be designated as subsection (1)) insert:

(2) The AER has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

14 Amendment of the NEL—New section 16 substituted

NEL—delete section 16 and substitute:

16 Manner in which AER performs AER economic regulatory functions or powers

(1) The AER must, in performing or exercising an AER economic regulatory function or power—

(a) perform or exercise that function or power in a manner that will or is likely to contribute to the achievement of the national electricity objective; and

(b) if the function or power performed or exercised by the AER relates to the making of a distribution determination or transmission determination, ensure that the regulated network service

provider to whom the determination will apply, and any affected Registered participant, are, in accordance with the Rules—

- (i) informed of material issues under consideration by the AER; and
- (ii) given a reasonable opportunity to make submissions in respect of that determination before it is made.

(2) In addition, the AER—

- (a) must take into account the revenue and pricing principles—
 - (i) when exercising a discretion in making those parts of a transmission determination or distribution determination relating to direct control network services; or
 - (ii) when making an access determination relating to—
 - (A) a price to be charged for the provision of a direct control network service; or
 - (B) a charge for a network service; and
- (b) may take into account the revenue and pricing principles when performing or exercising any other AER economic function or power, if the AER considers it appropriate to do so.

(3) For the purposes of subsection (2)(a)(ii)(B), a reference to a "direct control network service" in the revenue and pricing principles must be read as a reference to a "electricity network service".

(4) In this section—

affected Registered participant means a Registered participant (other than the regulated network service provider to whom the distribution determination or transmission determination will apply) whose interests are affected by the distribution determination or transmission determination.

15 Amendment of the NEL—New section 18 inserted

NEL—delete section 18 and substitute:

18 Confidentiality

Section 44AAF of the *Trade Practices Act 1974* of the Commonwealth has effect for the purposes of this Law, the Regulations and the Rules as if it formed part of this Law.

Note

See also Division 6.

16 Amendment of NEL—New heading to Division 2 of Part 3

NEL—delete the heading to Division 2 of Part 3 and substitute:

Division 2—Search warrants

**17 Amendment of the NEL—New section 20
substituted and new sections 20A and 20B inserted**

NEL—delete section 20 and substitute:

20 Authorised person

- (1) The AER may, in writing, authorise a person that the AER considers is suitably qualified or trained to be an authorised person for the purposes of this Division.
- (2) An authorised person must comply with any direction of the AER in exercising powers or functions as an authorised person.

20A Identity cards

- (1) The AER must issue an identity card to an authorised person.
- (2) The identity card must contain the name, a recent photograph and the signature of the authorised person.
- (3) An authorised person must carry the identity card at all times when exercising powers or performing functions as an authorised person.
- (4) An authorised person must produce his or her identity card for inspection—
 - (a) before exercising a power as an authorised person; or
 - (b) at any time during the exercise of a power as an authorised person, if asked to do so.

20B Return of identity cards

If a person to whom an identity card has been issued ceases to be an authorised person, the person must return the identity card to the AER as soon as practicable.

Penalty: \$500.

18 Amendment of section 21 of the NEL

(1) NEL—delete section 21(1) and substitute:

(1) An authorised person may apply to a magistrate for the issue of a search warrant in relation to a particular place if the person—

(a) believes on reasonable grounds that—

(i) there is or has been or will be a breach of a relevant provision; and

(ii) there is or may be a thing or things of a particular kind connected with that breach on or in that place; or

(b) reasonably suspects that—

(i) there may have been a breach of a relevant provision; and

(ii) there is or may be a thing or things of a particular kind connected with that breach on or in that place.

(2) NEL, section 21(2)(d)—delete "photograph" and substitute:

record an image of

**19 Amendment of NEL—New Divisions 3 to 7 of Part 3
inserted**

NEL—delete section 28 and substitute:

**Division 3—General information gathering
powers**

**28 Power to obtain information and
documents in relation to performance and
exercise of functions and powers**

- (1) If the AER has reason to believe that a person is capable of providing information or producing a document that the AER requires for the performance or exercise of a function or power conferred on it under this Law or the Rules, the AER may, by notice in writing, serve on that person a notice (a **"relevant notice"**).
- (2) A relevant notice may require the person to—
 - (a) give to the AER, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any information of the kind referred to in subsection (1); or
 - (b) produce to the AER, or to a person specified in the notice acting on its behalf, in accordance with the notice, any documents of the kind referred to in subsection (1).

- (3) A person must not—
- (a) without reasonable excuse, refuse or fail to comply with a relevant notice; or
 - (b) in purported compliance with a relevant notice, provide information that is false or misleading in a material particular.

Penalty:

- (a) in the case of a natural person—\$2000;
 - (b) in the case of a body corporate—\$10 000.
- (4) It is a reasonable excuse for the purposes of subsection (3)(a) if a person is not capable of complying with a relevant notice.
- (5) It is a reasonable excuse for a natural person to—
- (a) fail to provide information of the kind referred to in subsection (1) to the AER; or
 - (b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice acting on behalf of the AER,

if to do so might tend to incriminate the person, or make the person liable to a criminal penalty, under a law of this jurisdiction or another jurisdiction in Australia (whether or not that other jurisdiction is a participating jurisdiction).

- (6) It is not a reasonable excuse for a person to—
- (a) fail to provide information of the kind referred to in subsection (1) to the AER; or
-

- (b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice acting on behalf of the AER,
- on the ground of any duty of confidence.
- (7) This section does not require a person to—
- (a) provide information that is the subject of legal professional privilege; or
 - (b) produce a document the production of which would disclose information that is the subject of legal professional privilege.
- (8) This section does not require a person to—
- (a) provide information that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or
 - (b) produce a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or
 - (c) provide information, or produce a document, that would disclose the deliberations of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory.
- (9) A person incurs, by complying with a relevant notice, no liability for breach of contract, breach of confidence or any other civil wrong.
-

Division 4—Regulatory information notices and general regulatory information orders

Subdivision 1—Interpretation

28A Division does not limit operation of information gathering powers under section 28

This Division does not limit the operation of section 28.

28B What is a general regulatory information order?

A general regulatory information order is an order made by the AER in accordance with this Division that requires a class of network service provider, or class of associate of a network service provider, to do either one or both of the following—

- (a) provide to the AER the information described in the order; or
- (b) prepare, maintain or keep information described in the notice in a manner and form specified in the order.

28C What is a regulatory information notice?

A regulatory information notice is a notice prepared and served by the AER in accordance with this Division that requires the network service provider or associate of a network service provider, named in the notice to do either one or both of the following—

- (a) provide to the AER the information described in the notice; or

- (b) prepare, maintain or keep information described in the notice in a manner and form specified in the notice.

Subdivision 2—Serving and making of regulatory information instrument

28D Service and making of regulatory information instrument

- (1) Subject to this Division, the AER, if it considers it reasonably necessary for the performance or exercise of its functions or powers under this Law or the Rules, may—
 - (a) serve a regulatory information notice on a network service provider or an associate of a network service provider; or
 - (b) make a general regulatory information order.
- (2) A general regulatory information order made under subsection (1)(b) must be published on the AER's website as soon as practicable after it is made.
- (3) Notice of the making of a general regulatory information order must be published in a newspaper circulating generally throughout Australia as soon as practicable after it is made.
- (4) A regulatory information notice must not be served, or a general regulatory information order must not be made, solely for the purpose of collecting information for the preparation of a report under Division 5.

**28E AER must consult before publishing a
general regulatory information order**

The AER, before making a general regulatory information order, must, subject to and in accordance with the Rules—

- (a) publish on its website a draft of the general regulatory information order it proposes to make; and
- (b) publish on its website, and in a newspaper circulating generally throughout Australia, notice of its proposal to make the draft order—
 - (i) specifying the class of network service provider or associate of a network service provider to whom the draft order, if made, will apply; and
 - (ii) inviting submissions from the public on that proposal by the date specified in the notice.

Note

See also section 28Y about what the AER must and may do after receiving submissions.

**28F Opportunity to be heard before
regulatory information notice is served**

- (1) The AER must, at least 7 days before serving a regulatory information notice—
 - (a) notify, in writing, the network service provider, or the associate of a network service provider, named in the notice of the AER's intention to serve the regulatory information notice; and

- (b) invite the network service provider, or the associate, to make written representations, within 7 days after receiving the notice under paragraph (a), as to whether the AER should serve the regulatory information notice on them.
- (2) A network service provider, or an associate of a network service provider, may make written representations to the AER within 7 days after receiving a notice under subsection (1)(a).
- (3) Representations under subsection (2) may include representations about—
 - (a) the content of the regulatory information notice; or
 - (b) additional costs (whether ongoing or otherwise), that the network service provider or associate may incur in complying with the regulatory information notice.
- (4) The AER must consider the written representations made under subsection (2) before making its decision to serve the regulatory information notice.

Subdivision 3—Form and content of regulatory information instruments

28G Form and content of regulatory information instrument

- (1) A regulatory information instrument—
 - (a) must describe the information required to be—
 - (i) provided to the AER; or
-

- (ii) prepared, maintained or kept in the particular manner and form specified in the instrument; and
 - (b) may specify the manner and form in which the information described in the instrument is required to be—
 - (i) provided to the AER; or
 - (ii) prepared, maintained or kept; and
 - (c) must state the reasons of the AER for requiring the information described in the instrument to be—
 - (i) provided to the AER; or
 - (ii) prepared, maintained or kept in the particular manner and form specified in the instrument; and
 - (d) in the case of an instrument requiring information to be provided to the AER, must specify when the information must be provided.
- (2) In the case of a regulatory information notice, the notice must name the network service provider or the associate of a network service provider to whom it is directed.
- (3) In the case of a general regulatory information order, the order must specify the class of network service provider, or associate of a network service provider, to whom the order applies.

28H Further provision about the information that may be described in a regulatory information instrument

Without limiting section 28G(1)(a), the information that may be required to be provided to the AER, or to be prepared, maintained or kept, may include—

- (a) historic, current and forecast information (including financial information);
- (b) information that is or may be derived from other information in the possession or control of the network service provider or the associate to whom the instrument applies;
- (c) information to enable the AER to verify whether a regulated network service provider to whom the instrument applies is or has been complying with a ring fencing requirement;
- (d) information to enable the AER to verify whether a network service provider to whom the instrument applies is or has been complying with any requirements for the allocation of costs between electricity services in accordance with—
 - (i) the Rules; or
 - (ii) a network revenue or pricing determination.

28I Further provision about manner in which information must be provided to AER or kept

Without limiting section 28G(1)(b), a regulatory information instrument may specify the information described in the instrument—

- (a) be provided to the AER, or prepared, maintained or kept, on an annual basis or some other basis, including on the occurrence of a specified event or state of affairs;
- (b) be provided to the AER, or prepared, maintained or kept, in accordance with specified Rules;
- (c) be provided to the AER, or prepared, maintained or kept, in accordance with any document, code, standard, rule, specification or method formulated, issued, prescribed or published by the AER or any person, authority or body whether—
 - (i) wholly or partially or as amended by the instrument; or
 - (ii) as formulated, issued, prescribed or published at the time the instrument is served or published or at any time before the instrument is served or published; or
 - (iii) as amended from time to time;

Example

The AER may require a network service provider to provide information in a form and manner that complies with relevant accounting standards.

- (d) be verified by way of statutory declaration by an officer of the network service provider, or of an associate of a network service provider, to whom the instrument applies;
- (e) be audited—
 - (i) by a class of person specified in the instrument before it is provided to the AER; and
 - (ii) at the expense of the network service provider or associate to whom the instrument applies.

Subdivision 4—Compliance with regulatory information instruments

28J Compliance with regulatory information notice that is served

On being served a regulatory information notice, a person named in the notice must comply with the notice.

28K Compliance with general regulatory information order

- (1) On publication of a general regulatory information order in accordance with section 28D(2), a person who is a member of the class of person to which a general regulatory information order applies must comply with the order.
- (2) Subsection (1) does not apply to a person who has been given an exemption under section 28L.

28L Exemptions from compliance with general regulatory information order

- (1) The AER may exempt a person, or a class of person, from complying with section 28K—
 - (a) unconditionally or on specified conditions; or
 - (b) wholly or to such an extent as is specified.
- (2) An exemption under this section must be in writing.

28M Assumptions where there is non-compliance with regulatory information instrument

- (1) This section applies if—
 - (a) under a regulatory information instrument the AER requires—
 - (i) a network service provider to provide information to the AER for the purpose of enabling the AER to make an AER economic regulatory decision relating to the network service provider; or
 - (ii) an associate of a network service provider to provide information to the AER that is relevant to the making of an AER economic regulatory decision relating to the network service provider; and
 - (b) the network service provider or associate—
 - (i) does not provide the information to the AER in accordance with the applicable regulatory information instrument; or

- (ii) provides information in accordance with the applicable regulatory information instrument but that information is insufficient for the AER to make its decision.
- (2) Without limiting sections 28J and 28K and despite anything to the contrary in this Law or the Rules, the AER—
 - (a) may make the AER economic regulatory decision on the basis of the information the AER has at the time it makes that decision; and
 - (b) in making that decision, may make reasonable assumptions (including assumptions adverse to the interests of the network service provider) about any aspect of that decision.

Subdivision 5—General

28N Providing AER false and misleading information

A person must not, in complying with a regulatory information instrument requiring the person to provide information to the AER, provide information to the AER that is false or misleading in a material particular.

Penalty:

- (a) in the case of a natural person—\$2000;
- (b) in the case of a body corporate—\$10 000.

28O Person cannot rely on duty of confidence to avoid compliance with regulatory information instrument

- (1) A person may not refuse to comply with a regulatory information instrument on the ground of any duty of confidence.
- (2) A person incurs, by complying with a regulatory information instrument, no liability for breach of contract, breach of confidence or any other civil wrong.

28P Legal professional privilege not affected

Nothing in a regulatory information instrument or section 28J or 28K prevents a person from refusing to provide to the AER information described in a regulatory information instrument because that information is information in respect of which the person claims legal professional privilege.

28Q Protection against self-incrimination

- (1) A natural person to whom section 28J applies is not required to comply with a regulatory information notice served on the person requiring the person to provide information to the AER if to do so might tend to incriminate the person, or make the person liable to a criminal penalty, under a law of—
 - (a) this jurisdiction; or
 - (b) another jurisdiction in Australia (whether or not that other jurisdiction is a participating jurisdiction).

- (2) A natural person to whom section 28K applies is not required to comply with a general regulatory information order made requiring the person to provide information to the AER if to do so might tend to incriminate the person, or make the person liable to a criminal penalty, under a law of—
- (a) this jurisdiction; or
 - (b) another jurisdiction in Australia (whether or not that other jurisdiction is a participating jurisdiction).

Division 5—Network service provider performance reports

28R Preparation of network service provider performance reports

- (1) The AER may prepare a report on the financial or operational performance of one or more network service providers in providing electricity network services.
- (2) A report prepared under this section may include information provided to the AER by a person in compliance with a regulatory information instrument.
- (3) The AER may publish a report prepared under this section on its website.

Division 6—Disclosure of confidential information held by AER

28S Authorised disclosure of information given to the AER in confidence

The AER is authorised to disclose information given to it in confidence in, or in connection with, the performance or exercise of its functions or powers under this Law or

the Rules subject to and in accordance
with—

- (a) this Division; or
- (b) section 140.

Note

See also section 18 of this Law and section
44AAF of the *Trade Practices Act 1974* of the
Commonwealth.

**28T Disclosure with prior written consent is
authorised**

The AER is authorised to disclose
information given to it in confidence if the
AER has the written consent to do so of—

- (a) the person who gave the information; or
- (b) the person from whom the person
referred to in paragraph (a) received
that information.

**28U Disclosure for purposes of court and
tribunal proceedings and to accord
natural justice**

The AER is authorised to disclose
information given to it in confidence—

- (a) for the purposes of civil or criminal
proceedings; or
- (b) for the purposes of a proceeding before
the Tribunal or a tribunal established by
or under a law of this jurisdiction or
another participating jurisdiction; or
- (c) for the purposes of according natural
justice to a person affected by a
decision (however described) of the
AER under this Law or the Rules.

**28V Disclosure of confidential information
authorised if detriment does not outweigh
public benefit**

- (1) The AER is authorised to disclose information given to it in confidence if—
- (a) the AER is of the opinion—
 - (i) that the disclosure of the information would not cause detriment to the person who has given it or to the person from whom that person received it; or
 - (ii) that, although the disclosure of the information would cause detriment to such a person, the public benefit in disclosing it outweighs that detriment; and
 - (b) the AER has given the person who gave the information a written notice—
 - (i) stating that the AER wishes to disclose the information, specifying the nature of the intended disclosure and setting out reasons why the AER wishes to make the disclosure; and
 - (ii) stating that the AER is of the opinion required by paragraph (a) and setting out reasons why it is of that opinion; and
 - (c) the AER is aware that the person who gave the information in turn received the information from another person and is aware of that other person's identity and address, the AER has given that other person a written notice—
-

- (i) containing the details required by paragraph (b); and
 - (ii) stating that the AER is of the opinion required by paragraph (a) in relation to that other person and setting out reasons why it is of that opinion.
- (2) For the purposes of this section, the disclosure of anything that is already in the public domain at the time the AER wishes to disclose it cannot cause detriment to any person referred to in subsection (1)(b) or (c).

28W Disclosure of information given to the AER with confidential information omitted

- (1) This section applies if—
- (a) in compliance with this Law, or the Rules, a person gives the AER information in confidence; and
 - (b) that information is contained in a document with other information; and
 - (c) the AER is of the opinion that the disclosure of the information would cause detriment to the person who has given it or to the person from whom that person received it that outweighs the public benefit in disclosing the information.
- (2) The AER may disclose the document with the information given in confidence omitted.
- (3) The AER must include a note at the place in the document from which the information given in confidence is omitted to the effect that that information has been omitted from the document.
-

28X Disclosure of information given in confidence does not identify anyone

- (1) This section applies if—
- (a) in compliance with this Law, or the Rules, a person gives the AER information in confidence; and
 - (b) the AER is of the opinion that the disclosure of the information would cause detriment to the person who has given it or to the person from whom that person received it that outweighs the public benefit in disclosing the information.
- (2) The AER is authorised to disclose the information given to it in confidence in any manner (whether combined with other information or otherwise) if that manner does not identify any person to whom that information relates.

Division 7—Miscellaneous matters

28Y Consideration by the AER of submissions or comments made to it under this Law

If, under this Law or the Rules, the AER publishes a notice inviting submissions in relation to the making of an AER economic regulatory decision, the AER, in making the decision—

- (a) must consider every submission it receives within the period specified in the notice; and
- (b) may, but need not, consider a submission it receives after the period specified in the notice expires.

28Z Use of information provided under a notice under section 28 or a regulatory information instrument

Despite anything to the contrary in Division 3 or 4, the AER may use information provided to it by a person in compliance with a notice under section 28 or a regulatory information instrument for any purpose connected with the performance or exercise of a function or power of the AER under this Law or the Rules.

28ZA AER to inform certain persons of decisions not to investigate breaches, institute proceedings or serve infringement notices

- (1) If the AER is given information by any person in relation to a breach or a possible breach of this Law, the Regulations or the Rules by a person but—
- (a) decides not to investigate that breach or possible breach; or
 - (b) following an investigation, decides not to—
 - (i) institute any proceedings in respect of that breach or possible breach under Part 6; or
 - (ii) serve an infringement notice in accordance with Division 5 of Part 6 in respect of that breach or possible breach,

the AER must notify that person of that decision in writing.

- (2) This section does not apply if the person gave the information to the AER anonymously.

20 Amendment of the NEL—New section 31 substituted

NEL—delete section 31 and substitute:

31 Confidentiality

Section 24 of the *Australian Energy Market Commission Establishment Act 2004* of South Australia has effect for the purposes of this Law, the Regulations and the Rules as if it formed part of this Law.

Note

See also section 48 and 108.

21 Amendment of section 32 of the NEL—Reference to new national electricity objective

- (1) NEL, heading to section 32—delete "market".
- (2) NEL, section 32—delete "market".

22 Amendment of section 34 of the NEL—Rule making powers

- (1) NEL, section 34(1)—delete the subsection and substitute:
 - (1) Subject to this Division, the AEMC, in accordance with this Law and the Regulations, may make Rules, to be known, collectively, as the "National Electricity Rules", for or with respect to—
 - (a) regulating—
 - (i) the operation of the national electricity market;
 - (ii) the operation of the national electricity system for the purposes of the safety, security and reliability of that system;

(ii) the activities of persons (including Registered participants) participating in the national electricity market or involved in the operation of the national electricity system;

(b) any matter or thing contemplated by this Law, or is necessary or expedient for the purposes of this Law.

Note

The procedure for the making of a Rule by the AEMC is set out in Division 3 of Part 7.

(2) NEL, section 34(3)(e)—delete the paragraph and substitute:

(e) confer a function on the AER, the AEMC, NEMMCO or a jurisdictional regulator to make, prepare, develop or issue guidelines, tests, standards, procedures or any other document (however described) in accordance with the Rules, including guidelines, tests, standards, procedures or any other document (however described) that leave any matter or thing to be determined by the AER, the AEMC, NEMMCO or jurisdictional regulator;

23 Amendment of the NEL—New section 34A inserted

NEL, section 34—after the section insert:

34A AEMC must not make Rules creating criminal offences or imposing civil or criminal penalties for breaches

The AEMC must not make a Rule that—

- (a) creates an offence for a breach of a provision of the Rules; or
 - (b) provides for a criminal or civil penalty for a breach of a provision of the Rules.
-

**24. Amendment of the NEL—New section 36
substituted and new sections 36A and 36B inserted**

NEL—delete section 36 and substitute:

**36 AEMC must not make Rules so that there
is no economic regulation of distribution
system and transmission system services**

Subject to section 36A, the AEMC must not make a Rule so that the Rules do not provide for all of the matters or things specified in items 15 to 24 and 25 to 26J of Schedule 1 to this Law.

**36A Rules must not provide for "total factor
productivity" as alternative to "building
blocks approach" unless Regulations
allow it**

- (1) Unless the Regulations otherwise provide, the AEMC must not make a Rule so that the Rules provide for, or require, the application of the methodology known as "total factor productivity" as a regulatory economic methodology for the purpose of—
 - (a) making or amending a distribution determination or transmission determination; or
 - (b) making an access determination.
- (2) However, the AEMC may make a Rule that provides for the application of the methodology known as "total factor productivity" as a regulatory economic methodology to inform and assist the AER in applying or analysing the application of the methodology known as the "building blocks approach" by the AER for the purpose of—

- (a) making or amending a distribution determination or transmission determination; or
- (b) making an access determination.

36B Rules relating to regulation of distribution system revenue or prices prohibited during new distribution determinations arrangement period

- (1) The AEMC must not, during the new distribution determinations arrangement period, make a Rule for or with respect to the regulation of—
 - (a) revenue an owner, controller or operator of a distribution system earns or may earn from the provision by that owner, controller or operator of electricity network services provided by means of a distribution system; or
 - (b) prices an owner, controller or operator of a distribution system charges or may charge for services provided by that owner, controller or operator of electricity network services provided by means of a distribution system.

- (2) In this section—

new distribution determinations arrangement period means the period—

- (a) beginning on the day on which section 44 of the *National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendment Act 2007* of South Australia comes into operation; and
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- (b) ending on the day additional
Minister initiated Rules come into
operation.

**25 Amendment of section 41 of the NEL—
Miscellaneous amendments**

- (1) NEL, section 41(1)(a)—after the paragraph insert:
 - (ab) any matter relating to any other market for
electricity; or
- (2) NEL, section 41(1)—after paragraph (c) insert:
 - or
 - (d) the effectiveness of competition in a market
for electricity for the purpose of giving
advice about whether to retain, remove or
reintroduce price controls on prices for retail
electricity services.

**26 Amendment of section 42 of the NEL—
Miscellaneous amendments**

- (1) NEL—after section 42(1) insert:
 - Example**
 - The terms of reference may require a MCE directed review
to be conducted—
 - (a) about a specific matter within a specified time; or
 - (b) whenever a specified event occurs; or
 - (c) on an annual basis.
 - (2) NEL, section 42(2)—delete "The" and substitute:
Without limiting subsection (1), the
 - (3) NEL, section 42(2)(e)—delete the paragraph and
substitute:
 - (e) require the AEMC to have specified
objectives in the conduct of a MCE directed
review which need not be limited by the
national electricity objective;
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- (ea) require the AEMC to assess a particular matter in relation to services provided in a market for electricity against specified criteria or a specified methodology;
- (eb) require the AEMC—
 - (i) to assess a particular matter in relation to services provided in a market for electricity; and
 - (ii) to develop appropriate and relevant criteria, or an appropriate and relevant methodology, for the purpose of the required assessment;

27 Amendment of section 45 of the NEL—Minor amendment

NEL, section 45(4)—delete the subsection and substitute:

- (4) At the completion of a review, the AEMC must—
 - (a) give a copy of the report to the MCE; and
 - (b) publish a report or a version of a report from which confidential information has been omitted in accordance with section 48.

28 Amendment of section 46 of the NEL—Minor amendment

(1) NEL, section 46(a)—delete "publish on its website," and substitute:

"maintain, on its website, a copy of"

(2) NEL, section 46(b)—omit "normal".

29 Amendment of section 47 of the NEL—Fees

NEL, section 47(1)—

(a) after "specified" insert:

, or a fee calculated in accordance with a
formula or methodology specified,

(b) after "Law" insert:

, the Regulations

**30 Amendment of section 48 of the NEL—Substitution
of note**

NEL, section 48(5)—delete the note at the foot of
the subsection and substitute:

Note

See also section 31 of this Law and section 24 of the
*Australian Energy Market Commission Establishment Act
2004* of South Australia.

**31 Amendment of section 49 of the NEL—Insertion of
note**

NEL, section 49(1)—after the subsection insert:

Note

NEMMCO also has responsibilities in relation to the
meeting of the administrative costs associated with the
work of the Consumer Advocacy Panel where those
costs relate to the Panel's functions relevant to
consumers of electricity. See Part 4 of the *Australian
Energy Market Commission Establishment Act 2004* of
South Australia.

**32 Amendment of section 58 of the NEL—Minor
amendment to definition of civil penalty provision**

NEL, section 58, definition of *civil penalty
provision*, in paragraph (c), after "Law" insert:

(other than an offence provision)

33 Amendment of section 62 of the NEL—Deletion of note

NEL, section 62—delete the note at the foot of the section.

34 Amendment of the NEL—New Division 2A of Part 6 inserted

NEL—after section 69 insert:

Division 2A—Proceedings before, and awards etc. of, Dispute resolution panels

69A Commercial Arbitration Acts apply to proceedings before Dispute resolution panels

- (1) The procedural Parts of the Commercial Arbitration Act of this jurisdiction apply to the hearing of a Rule dispute and decision or determination of a Dispute resolution panel—
- (a) as if—
- (i) the Rules providing for a Rule dispute were an arbitration agreement within the meaning of that Act; and
 - (ii) a reference in those Parts to an arbitrator or umpire were a reference to the Dispute resolution panel; and
 - (iii) a reference to a party to an arbitration agreement, or in an arbitration proceeding, in those Parts were a reference to a party to the Rule dispute; and

- (iv) in those Parts for "unless otherwise agreed in writing by the parties to the arbitration agreement" there were substituted "unless the Rules provide otherwise"; and
 - (v) a reference to an award of an arbitrator or umpire in those Parts were a reference to a decision or determination of a Dispute resolution panel; and
- (b) with any other alterations and modifications that are necessary.
- (2) In this section—

procedural Parts of the Commercial Arbitration Act of this jurisdiction
means—

- (a) if this Law is applied as a law of the State of New South Wales and a Rule dispute is heard and determined in that State, Parts 3, 4 and 6 of the *Commercial Arbitration Act 1984* of New South Wales;
 - (b) if this Law is applied as a law of the State of Victoria and a Rule dispute is heard and determined in that State, Parts III, IV and VI of the *Commercial Arbitration Act 1984* of Victoria;
 - (c) if this Law is applied as a law of the State of Queensland and a Rule dispute is heard and determined in that State, Parts 3, 4 and 6 of the *Commercial*
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Arbitration Act 1990 of
Queensland;

- (d) if this Law is applied as a law of the State of South Australia and a Rule dispute is heard and determined in that State, Parts 3, 4 and 6 of the *Commercial Arbitration Act 1986* of South Australia;
- (e) if this Law is applied as a law of the Australian Capital Territory and a Rule dispute is heard and determined in that Territory, Parts 3, 4 and 6 of the *Commercial Arbitration Act 1986* of the Australian Capital Territory;
- (f) if this Law is applied as a law of Tasmania and a Rule dispute is heard and determined in that State, Parts III, IV and VI of the *Commercial Arbitration Act 1986* of Tasmania;
- (g) if this Law is applied as a law of another participating jurisdiction and a Rule dispute is heard and determined in that other participating jurisdiction, the Parts of an Act of that jurisdiction or an Act of another participating jurisdiction (as the case requires) prescribed by the Regulations as corresponding to Parts 3, 4 and 6 of the *Commercial Arbitration Act 1986* of South Australia.

**35 Amendment of the NEL—New section 71
substituted**

NEL, section 71—delete the section and
substitute:

**71 Appeals on questions of law from
decisions or determinations of Dispute
resolution panels**

- (1) A person who is a party to a Rule dispute may appeal to the Court, on a question of law, against a decision or determination of a Dispute resolution panel.
- (2) The review provisions of the Commercial Arbitration Act of this jurisdiction apply to a decision or determination of a Dispute resolution panel—
 - (a) as if—
 - (i) the Rules providing for a Rule dispute were an arbitration agreement within the meaning of that Act; and
 - (ii) a reference to an arbitration in those provisions were a reference to the hearing of the Rule dispute; and
 - (iii) a reference in those provisions to an award of an arbitrator or umpire were a reference to a decision or determination of a Dispute resolution panel; and
 - (iv) a reference to a party to an arbitration agreement, or in an arbitration proceeding, in those provisions were a reference to a party to the Rule dispute; and

- (v) sections 40 and 41 were omitted;
and
 - (b) with any other alterations and
modifications that are necessary.
- (3) In this section—
- review provisions of the Commercial
Arbitration Act of this jurisdiction***
means—
- (a) if this Law is applied as a law of
the State of New South Wales and
a Rule dispute is heard and
determined in that State, Part 5 of
the *Commercial Arbitration Act
1984* of New South Wales;
 - (b) if this Law is applied as a law of
the State of Victoria and a Rule
dispute is heard and determined in
that State, Part V of the
Commercial Arbitration Act 1984
of Victoria;
 - (c) if this Law is applied as a law of
the State of Queensland and a
Rule dispute is heard and
determined in that State, Part 5 of
the *Commercial Arbitration Act
1990* of Queensland;
 - (d) if this Law is applied as a law of
the State of South Australia and a
Rule dispute is heard and
determined in that State, Part 5 of
the *Commercial Arbitration
Act 1986* of South Australia;
 - (e) if this Law is applied as a law of
the Australian Capital Territory
and a Rule dispute is heard and
determined in that Territory, Part
-

5 of the *Commercial Arbitration Act 1986* of the Australian Capital Territory;

- (f) if this Law is applied as a law of Tasmania and a Rule dispute is heard and determined in that State, Part V of the *Commercial Arbitration Act 1986* of Tasmania;
- (g) if this Law is applied as a law of another participating jurisdiction and a Rule dispute is heard and determined in that other participating jurisdiction, the Parts of an Act of that jurisdiction or an Act of another participating jurisdiction (as the case requires) prescribed by the Regulations as corresponding to Part 5 of the *Commercial Arbitration Act 1986* of South Australia.

36 Amendment of the NEL—New Divisions 3A and 3B of Part 6 inserted

NEL—after section 71 insert:

Division 3A—Merits review

71A Definitions

In this Part—

AER ring fencing decision means a decision of the AER—

- (a) made under the Rules (other than a decision whether to prepare a document referred to in paragraph (b)); or

- (b) made in accordance with a document (however described) prepared by the AER under the Rules,

that has the effect of—

- (c) requiring a regulated network service provider to comply with a ring fencing requirement;
- (d) exempting a regulated network service provider from complying with a ring fencing requirement,

applicant means a person or body referred to in section 71B(1) who has been granted leave to apply for review by the Tribunal under this Part;

average annual regulated revenue means the average of regulated revenue calculated annually;

end user means a person who acquires or proposes to acquire electricity for consumption purposes;

intervener means a person or body referred to in section 71I or 71J who has intervened in a review under this Part with the leave of the Tribunal or otherwise;

prospective user means a person who—

- (a) is a Registered participant, or is capable of becoming a Registered participant; and
- (b) seeks or wishes to be provided with an electricity service,

but does not include a network service provider;

regulated revenue means the total revenue earned or to be earned by a regulated network service provider—

- (a) under; and
- (b) during the period of operation of, a network revenue or pricing determination through the provision of the direct control network services to which that determination applies;

reviewable regulatory decision means—

- (a) a network revenue or pricing determination; or
- (b) an AER ring fencing decision; or
- (c) any other decision of the AER under the Rules that is prescribed by the Regulations to be a reviewable regulatory decision;

user means a person who—

- (a) is a Registered participant, or is capable of becoming a Registered participant; and
- (b) is provided with an electricity service,

but does not include a network service provider;

user or consumer association means an association or body (whether incorporated or unincorporated)—

- (a) the members of which include at least one user, prospective user or end user; and

- (b) that represents and promotes the interests of those members in relation to the provision of electricity services;

user or consumer interest group means an association or body (whether incorporated or unincorporated)—

- (a) that has as its object or purpose the object or purpose of representing and promoting the interests of users or prospective users or end users of electricity services; but
- (b) the members of which need not include a user, prospective user or end user;

user or consumer intervener means—

- (a) a user or consumer association; or
- (b) a user or consumer interest group, that has made a submission or comment in relation to the making of a reviewable regulatory decision following an invitation to do so by the AER under this Law or the Rules.

71B Who may apply for review?

- (1) The following persons or bodies may, with the leave of the Tribunal, apply to the Tribunal for a review of a reviewable regulatory decision—
 - (a) a regulated network service provider to whom the reviewable regulatory decision applies;

- (b) a network service provider, user, prospective user or end user whose commercial interests are materially affected by the reviewable regulatory decision;
 - (c) a user or consumer association.
- (2) An application must be made in the form and manner determined by the Tribunal.

71C By when must an application be made?

An application under section 71B(1) must be made no later than 14 days after the reviewable regulatory decision is published or notified in accordance with this Law or the Rules.

71D Tribunal must not grant leave in certain cases

Subject to section 71F, the Tribunal must not grant leave to apply under section 71B(1) unless it appears to the Tribunal that there is a serious issue to be determined and—

- (a) if the reviewable regulatory decision is about the revenue of a regulated network service provider and the issue to be determined relates to an amount specified in or derived from the decision, that amount—
 - (i) exceeds the lesser of \$5 000 000 or 2% of the average annual regulated revenue of the regulated network service provider; or
 - (ii) if that amount cannot be derived from the decision, is a material amount of the average annual regulated revenue of the regulated network service provider;

- (b) in all other cases, there is an error that, if established, would be material to the operation and effect of the decision.

71E Tribunal must refuse to grant leave if submission not made or is made late

The Tribunal must not grant leave to apply under section 71B(1) to a person or body referred to in section 71B(1)(b) or (c) if that person or body—

- (a) did not make a submission or comment in relation to the making of the decision following an invitation by the AER to do so under this Law or the Rules; or
- (b) did make a submission or comment in relation to the making of the decision following an invitation by the AER to do so under this Law or the Rules but—
 - (i) that submission or comment was not made within the time required under this Law or the Rules following that invitation; and
 - (ii) the AER chose not to take that submission or comment into account in making the decision.

71F Tribunal may refuse to grant leave to regulated network service provider in certain cases

- (1) This section applies—
 - (a) in relation to an application under section 71B(1) by a regulated network service provider for a review of a reviewable regulatory decision that applies to the operator; and
 - (b) if the Tribunal is satisfied of the matters set out in section 71D.
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- (2) Despite being satisfied of the matters set out section 71D, the Tribunal may refuse to grant leave to apply under section 71B(1) to the operator if the Tribunal is satisfied the operator—
- (a) without reasonable excuse—
 - (i) failed to comply with a request for information made by the AER under this Law or the Rules for the purpose of making the decision; or
 - (ii) failed to comply with a request or direction of the AER made under this Law or the Rules for the purpose of making the decision; or
 - (iii) conducted itself in a manner that resulted in the making of the decision of the AER being delayed; or
 - (b) by the operator's conduct, misled, or attempted to mislead, the AER when the AER was making the decision.

71G Grounds for review

- (1) An application under section 71B(1) may be made only on one or more of the following grounds—
- (a) the AER made an error of fact in its findings of facts, and that error of fact was material to the making of the decision;
 - (b) the AER made more than one error of fact in its findings of facts, and that those errors of fact, in combination, were material to the making of the decision;
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- (c) the exercise of the AER's discretion was incorrect, having regard to all the circumstances;
 - (d) the AER's decision was unreasonable, having regard to all the circumstances.
- (2) To avoid doubt, it is for the applicant to establish a ground listed in subsection (1).

71H Effect of application on operation of reviewable regulatory decisions

An application under section 71B(1)—

- (a) does not stay the operation of a network revenue or pricing determination;
- (b) stays the operation of any other reviewable regulatory decision on the granting of leave to apply by the Tribunal, unless the Tribunal otherwise orders.

71I Intervention by others in a review without leave

Only the following persons may intervene in a review under this Part without leave of the Tribunal—

- (a) a regulated network service provider to whom the reviewable regulatory decision being reviewed applies;
- (b) a Minister of a participating jurisdiction;

- (c) a person (other than a Minister of a participating jurisdiction) with a sufficient interest in the reviewable regulatory decision being reviewed who—
 - (i) has made a submission or comment in relation to the making of that decision within the time required under this Law or the Rules following an invitation by the AER to do so; or
 - (ii) has made a submission or comment in relation to the making of that decision outside the time required under this Law or the Rules following an invitation by the AER to do so but which the AER chose to take into account in making that decision.

71J Leave for user or consumer intervener

- (1) A user or consumer intervener may apply to the Tribunal for leave to intervene in a review of a reviewable regulatory decision under this Part.
 - (2) The Tribunal may grant leave to a user or consumer intervener to intervene in a review under this Part if the Tribunal is satisfied—
 - (a) the user or consumer intervener, in its application for leave to intervene, raises a matter that will not be raised by the AER or the applicant; or
 - (b) the information or material the user or consumer intervener wishes to present is, or the submissions the user or consumer intervener wishes to make, are, likely to be better presented if
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submitted by the user or consumer
intervener rather than another party to
the review; or

- (c) the interests of the user or consumer
intervener or its members are affected
by the decision being reviewed.
- (3) For the purposes of subsection (2)(c)—
- (a) the interests of a user or consumer
intervener are to be taken to be affected
if the reviewable regulatory decision
being reviewed relates to an object or
purpose of the user or consumer
intervener;
 - (b) the interests of a user or consumer
intervener are not to be taken to not be
affected only because those interests do
not coincide with the interests of the
applicant.

**71K Interveners may raise new grounds of
review**

- (1) An intervener may raise in a review under
this Part any of the grounds specified in
section 71G even if the ground that is raised
by the intervener is not raised by the
applicant.
- (2) To avoid doubt, it is for the intervener to
establish the ground referred to in
subsection (1).

71L Parties to a review under this Part

The parties to a review under this Part are—

- (a) the applicant; and
- (b) the AER; and
- (c) an intervener.

71M AER as a party not limited by grounds raised by applicant or intervener

The AER may, in a review under this Part, raise—

- (a) a matter not raised by the applicant or an intervener that relates to a ground for review, or a matter raised in support of a ground for review, raised by the applicant or an intervener;
- (b) a possible outcome or effect on the reviewable regulatory decision being reviewed that the AER considers may occur as a consequence of the Tribunal making a determination setting aside or varying the reviewable regulatory decision.

71N Tribunal must make determination

- (1) If, following an application, the Tribunal grants leave in accordance with section 71B, the Tribunal must make a determination in respect of the application.

Note

See section 71P for the time limit within which the Tribunal must make its determination.

- (2) Subject to section 71O, the determination may do any of the following—
 - (a) affirm, set aside or vary the reviewable regulatory decision;
 - (b) remit the matter back to the AER to make the decision again, in accordance with any direction or recommendation of the Tribunal.

- (3) For the purposes of making a determination of the kind in subsection (2)(a), the Tribunal may perform all the functions and exercise all the powers of the AER under this Law or the Rules.
- (4) In deciding whether to remit a matter back to the AER to make the decision again, the Tribunal must have regard to the nature and relative complexities of—
 - (a) the reviewable regulatory decision; and
 - (b) the matter the subject of the review.
- (5) A determination by the Tribunal affirming, setting aside or varying the reviewable regulatory decision is, for the purposes of this Law (other than this Part), to be taken to be a decision of the AER.

710 Further provision for determinations relating to network revenue or pricing determinations

- (1) In a review under this Part relating to a reviewable regulatory decision that is a network revenue or pricing determination, the Tribunal may only, in a determination, affirm, vary or remit the decision.
 - (2) A determination of the Tribunal that varies a network revenue or pricing determination must not—
 - (a) have retrospective operation or effect; or
 - (b) provide for, or allow, an adjustment to the regulated revenue to be earned by a regulated network service provider under the relevant network revenue and pricing determination in the remaining period that takes into account the
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regulated revenue earned, or not earned, before the making of the determination.

(3) In this section—

relevant network revenue or pricing determination means the network revenue or pricing determination being varied;

remaining period means the period beginning on the day the determination of the Tribunal takes effect and ending on the day the relevant network revenue or pricing determination ceases to have effect.

71P Target time limit for Tribunal for making a determination under this Part

- (1) The Tribunal must use its best endeavours to make a determination in respect of the application—
- (a) within 3 months after the Tribunal grants leave in accordance with section 71B (the ***standard period***); or
 - (b) if the standard period is extended under this section—that period as extended.
- (2) If the Tribunal is unable to make a determination in respect of the application within the standard period, or that period as extended, the Tribunal must, by notice in writing, extend the standard period by a specified period.
- (3) The Tribunal must give a copy of the notice to—
- (a) the applicant; and
 - (b) every other party to the review.
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- (4) The Tribunal may extend the standard period, or that period as extended, more than once.
- (5) If the Tribunal extends a period, it must publish a notice in a newspaper circulating generally throughout Australia—
 - (a) stating that it has done so; and
 - (b) specifying a date by which it must now use its best endeavours to make the determination.

71Q. Material, documents, information etc. to be considered by Tribunal in making determination

- (1) Subject to this section, the Tribunal, in reviewing a reviewable regulatory decision, must not consider any document, information or material other than the AER decision making documents and information.
- (2) The Tribunal, in reviewing a reviewable regulatory decision, must have regard to, but is not bound by, any document—
 - (a) prepared, and used, by the AER for the purpose of making the reviewable regulatory decision; and
 - (b) that the AER has made publicly available.
- (3) In addition, if in a review, the Tribunal is of the view that a ground of review has been established, the Tribunal may allow new information or material to be submitted to the Tribunal if the Tribunal is of the view that the new information or material—

- (a) would assist the Tribunal on any aspect of the determination to be made; and
 - (b) was not unreasonably withheld from the AER when it was making the reviewable regulatory decision.
- (4) For the purpose of subsection (3)(b), information or material not provided to the AER following a request for that information or material by it under this Law or the Rules is to be taken to have been unreasonably withheld.
- (5) Subsection (4) does not limit what may constitute an unreasonable withholding of information or material.
- (6) In this section—
- AER decision making documents and information*** means the documents, information and material the AER considered, or was required to consider, under this Law, the Regulations or the Rules, in making the reviewable regulatory decision and includes—
- (a) the reviewable regulatory decision; and
 - (b) in the case of a reviewable regulatory decision that is a network revenue or pricing determination, any amendments to that determination;
 - (c) any reports relied on by the AER in making the reviewable regulatory decision; and
 - (d) a draft of the reviewable regulatory decision; and
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- (e) any submissions or comments on the draft of the reviewable regulatory decision or the reviewable regulatory decision itself considered by the AER; and
- (f) the transcript (if any) of any hearing conducted by the AER for the purpose of making the reviewable regulatory decision.

71R Costs in a review

- (1) Subject to this section, the Tribunal may order that a party to a review pay all or a specified part of the costs of another party to the review.
- (2) The Tribunal must not make an order requiring the AER to pay the costs of another party to the review unless the Tribunal considers that the AER has engaged in inappropriate conduct during the review.
- (3) The Tribunal may make an order requiring a user or consumer intervener that has intervened in the review to pay all or part of the costs of another party to the review if the Tribunal considers that it has engaged in inappropriate conduct during the review.

71S Amount of costs

- (1) If the Tribunal makes an order for costs in a review, the Tribunal must, unless there are exceptional circumstances, fix the amount of costs payable by a party to the review on an indemnity basis.

- (2) If the Tribunal considers there are exceptional circumstances, the Tribunal may in an order for costs, fix the amount of costs payable by a party to the review on—
- (a) a party and party basis; or
 - (b) a solicitor and client basis; or
 - (c) any other basis as the Tribunal may decide.

71T Review of Division

- (1) The MCE must cause a review of this Division to be undertaken within 7 years after the commencement of this Division by a person nominated by the MCE.
- (2) The MCE must specify the matters to be addressed in the review.
- (3) The person undertaking the review must, during the review, invite public comment and submissions about the matters to be addressed in the review.
- (4) The person undertaking the review must report, in writing, to the MCE on the outcome of the review by the date specified by the MCE.

Division 3B—Enforcement of access determinations

71U Enforcement of access determinations

- (1) If the Court is satisfied, on the application of a party to an access determination, that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination, the Court

may make all or any of the following orders—

- (a) an order granting an injunction on such terms as the Court thinks appropriate—
 - (i) restraining the other party from engaging in the conduct; or
 - (ii) if the conduct involves refusing or failing to do something—
requiring the other party to do that thing;
 - (b) an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention;
 - (c) any other order that the Court thinks appropriate.
- (2) The revocation of an access determination does not affect any remedy under subsection (1) in respect of a contravention of the determination that occurred when the determination was in force.
- (3) If the Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.
- (4) A reference in this section to a person involved in the contravention is a reference to a person who has:
- (a) aided, abetted, counselled or procured the contravention; or
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- (b) induced the contravention, whether through threats or promises or otherwise; or
- (c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or
- (d) conspired with others to effect the contravention.

71V Consent injunctions

On an application for an injunction under section 71U, the Court may grant an injunction by consent of all of the parties to the proceedings, whether or not the Court is satisfied that the section applies.

71W Interim injunctions

The Court may grant an interim injunction pending determination of an application under section 71U.

71X Factors relevant to granting a restraining injunction

The power of the Court to grant an injunction under section 71U restraining a person from engaging in conduct may be exercised whether or not—

- (a) it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
- (b) the person has previously engaged in conduct of that kind; or
- (c) there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

71Y Factors relevant to granting a mandatory injunction

The power of the Court to grant an injunction under section 71U requiring a person to do a thing may be exercised whether or not—

- (a) it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that thing; or
- (b) the person has previously refused or failed to do that thing; or
- (c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

71Z Discharge or variation of injunction or other order

The Court may discharge or vary an injunction or order granted under this Division.

37 Amendment of section 74 of the NEL—Time within which infringement notice may be served

- (1) NEL, section 74(1)—delete "The" and substitute:

Subject to this section, the

- (2) NEL—after section 74(1) insert:

- (1a) The AER must, however, serve an infringement notice not later than 12 months after the date on which the AER forms a belief that there has been a breach of a civil penalty provision.

38 Amendment of NEL—Deletion of section 84

NEL, section 84—delete the section.

39 Amendment of section 85 of the NEL—Deletion of definition

NEL—section 85(4)—delete the subsection.

40 Amendment of the NEL—New Subdivision heading inserted into Division 1 of Part 7

NEL—before section 87 insert:

Subdivision 1—Interpretation

41 Amendment of the NEL—Amendment of definition of interested person or body in section 87

NEL, section 87, definition of *interested person or body*—delete "has made" and substitute:

proposes to make

42 Amendment of the NEL—New Subdivision 2 of Division 1 of Part 7 inserted

NEL, section 88—delete the section and substitute:

Subdivision 2—Rule making tests and other matters

88 Application of national electricity objective

- (1) The AEMC may only make a Rule if it is satisfied that the Rule will or is likely to contribute to the achievement of the national electricity objective.

- (2) For the purposes of subsection (1), the AEMC may give such weight to any aspect of the national electricity objective as it considers appropriate in all the circumstances, having regard to any relevant MCE statement of policy principles.

88A Form of regulation factors must be taken into account when making certain Rules

In addition to complying with section 88 and 88B, the AEMC must take into account the form of regulation factors and any other matter the AEMC considers relevant—

- (a) in making a Rule that declares or specifies, or confers a function or power on the AER to specify under a distribution determination or transmission determination, a network electricity service to be—
- (i) a direct control network service;
or
 - (ii) a negotiated network service; or
- (b) in revoking a Rule that has been made or is in force that declares or specifies, or confers a function or power on the AER to specify under a distribution determination or transmission determination, a network electricity service as—
- (i) a direct control network service;
or
 - (ii) a negotiated network service.

88B Revenue and pricing principles to be taken into account in certain cases

In addition to complying with 88 and 88A, the AEMC must take into account the revenue and pricing principles in making a Rule for or with respect to any matter or thing specified in items 15 to 24 and 25 to 26H of Schedule 1 to this Law.

43 Amendment of the NEL—New heading to Division 2 of Part 7

NEL—delete the heading to Division 2 of Part 7 and substitute:

Division 2—Minister initiated National Electricity Rules

44 Amendment of the NEL—New section 90A inserted

NEL—after section 90 insert:

90A South Australian Minister to make further Rules relating to distribution determinations and consumer advocacy matters

- (1) The Minister in right of the Crown of South Australia administering Part 2 of the *National Electricity (South Australia) Act 1996* of South Australia may make Rules—
 - (a) for or with respect to any matter or thing referred to in—
 - (i) items 25 to 26H of Schedule 1 to this Law; and

- (ii) items 25I and 25J of Schedule 1 to this Law as they relate to distribution determinations and access determinations relating to access disputes about access to electricity network services provided by means of a distribution system;
 - (b) for or with respect to any matter or thing contemplated by, or is necessary or expedient for the purposes of—
 - (i) items 25 to 26J of Schedule 1 to this Law; and
 - (ii) items 25I and 25J of Schedule 1 to this Law as they relate to distribution determinations and access determinations relating to access disputes about access to electricity network services provided by means of a distribution system;
 - (c) that revoke or amend a Rule as a consequence of the enactment of the *Australian Energy Market Commission Establishment (Consumer Advocacy Panel) Amendment Act 2007* of South Australia.
- (2) Despite anything to the contrary in this Law, the Minister referred to in subsection (1) may make a Rule under this section that is a derogation without a request from any person.
- (3) Section 34(3) applies to the making of Rules under subsection (1) as if the Rules being made under subsection (1) were Rules being made by the AEMC.
-

- (4) As soon as practicable after making Rules under subsection (1), the Minister referred to in that subsection must—
 - (a) publish notice of the making of the Rules in the *South Australian Government Gazette*; and
 - (b) make the Rules publicly available.
- (5) The notice referred to in subsection (4)(a) must state the date on which the Rules commence operation.
- (6) The Rules made under subsection (1) may only be made on the recommendation of the MCE.
- (7) If the Minister referred to in subsection (1) makes Rules under that subsection, the Minister cannot make another Rule under that subsection.

45 Amendment of the NEL—New section 91A inserted

NEL—after section 91 insert:

91A AEMC may make rules that are necessary or consequential to a Rule request

- (1) Despite section 91(2), the AEMC may, having regard to a request to make a Rule under section 91(1), make a Rule that is necessary or consequential to the Rule that is to be made on that request.
- (2) For the purposes of this Division, the AEMC must treat a Rule it may make under subsection (1) as if it were part of the Rule to be made on that request.

46 Amendment of the NEL—New section 93 substituted

93 Consolidation of more than one Rule request

- (1) If the AEMC considers it necessary or desirable that 2 or more requests for the making of a Rule should be dealt with together, the AEMC may treat those requests as one request for the purposes of this Division (a *consolidated Rule request*).
- (2) For the purposes of this Division, a consolidated Rule request must be treated as being received by the AEMC on the day the AEMC received the last of the Rule requests forming part of the consolidated Rule request.

47 Amendment of section 94 of the NEL—Rule requests with insufficient supporting information

- (1) NEL, section 94(1)—delete "As" and substitute:
Subject to this Part, as
- (2) NEL, section 94(4)—
 - (a) delete "If" and substitute:
Subject to this Part, if
 - (b) delete "give" and substitute:
publish

48 Amendment of the NEL—New section 94A inserted

NEL—after section 94 insert:

94A AEMC may request further information from Rule proponent in certain cases

- (1) This section applies if the AEMC—
 - (a) receives a request for the making of a Rule; and

- (b) considers, having regard to the nature of the request, that further information is required from the person or body that has made the request to assist the public to understand the purpose or content of the request.
- (2) The AEMC may, by notice in writing, request the person or body that made the request under section 91 to provide the AEMC further information.
- (3) A notice under subsection (2) must specify the kind of information the AEMC requires from the person or body.
- (4) A person or body given a notice under this section may comply with a notice under this section.
- (5) The AEMC is not obliged to publish a notice under section 95 in respect of a request for the making of a Rule to which this section applies—
 - (a) before it receives the further information it has requested; or
 - (b) before the day that is 2 months after the date it requests the further information,whichever occurs first.

**49 Amendment of section 95 of the NEL—
Miscellaneous amendments**

- (1) NEL, section 95(1)—delete the subsection and substitute:
 - (1) This section applies if the AEMC—
 - (a) considers that it should take action under this Division in respect of a request for the making of a Rule; or

- (b) forms an intention to make an AEMC initiated Rule.
- (1a) The AEMC must publish—
 - (a) notice of the request or intention (as the case requires); and
 - (b) a draft of the proposed Rule; and
 - (c) any other document prescribed by the Regulations.
- (2) NEL, section 95(2)(a)—delete "after" and substitute:
 - from
- (3) NEL—after section 95(2) insert:
 - (3) Nothing in this Division is to be taken as requiring the AEMC to publish notices under this section in the same order as it—
 - (a) considers that it should take action under this Division in respect of a request for the making of a Rule; or
 - (b) forms an intention to make an AEMC initiated Rule.

50 Amendment of section 96 of the NEL—Publication of non-controversial or urgent final Rule determination

NEL, section 96(1)—delete "4 weeks" and substitute:

6 weeks

51 Amendment of NEL—Heading to section 98

NEL, section 98, heading—delete "public hearings" and substitute:

hearing

52 Amendment of section 99 of the NEL—Draft Rule determinations

- (1) NEL, section 99(1)—delete the subsection and substitute:
- (1) The AEMC must make a draft Rule determination before making a final Rule determination in relation to the proposed Rule.
 - (1a) Subject to this Part, the AEMC must, within 10 weeks after the date specified in a notice under section 95, publish—
 - (a) the draft Rule determination; and
 - (b) notice of the making of the draft Rule determination.
- (2) NEL, section 99(2)(a)—delete "market".
- (3) NEL—after section 99(2)(a)(i) insert:
- (ia) if required to take into account the form of regulation factors or the revenue and pricing principles, the reasons of the AEMC taking those factors or principles (as the case requires) into account; and
- (4) NEL, section 99(4)—delete "of the draft Rule determination" and substitute:
- referred to in subsection (1A)

53 Amendment of section 101 of the NEL—Pre-final Rule determination hearings

- NEL—after section 101(2) insert:
- (2a) Without limiting the reasons why the AEMC may decide not to hold a hearing in relation to a draft Rule determination, the AEMC may decide not to hold a hearing if—

- (a) an interested person or body requests the AEMC to hold a hearing; and
- (b) the interested person or body does not make written submission or comment in accordance with section 100; and
- (c) no other person or body requests the AEMC to hold a hearing.

54 Amendment of section 102 of the NEL—Final Rule determinations

- (1) NEL, section 102(1)—delete the subsection and substitute:
 - (1) The AEMC must make a final Rule determination as to whether to make a proposed Rule.
 - (1a) Subject to this Part, the AEMC must, within 6 weeks after the period for written submissions or comments in relation to the draft Rule determination ends, publish—
 - (a) the final Rule determination; and
 - (b) notice of the making of the final Rule determination.
 - (2) NEL, section 102(2)(a)—delete "market".
 - (3) NEL—after section 102(2)(i) insert:
 - (ia) if required to take into account the form of regulation factors or the revenue and pricing principles, the reasons of the AEMC taking those factors or principles (as the case requires) into account; and
 - (4) NEL, section 102(3)—delete "of the draft Rule determination" and substitute:

referred to in subsection (1A)
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55 Amendment of section 107 of the NEL—Extensions of periods of time in Rule making procedure

- (1) NEL, section 107(1)—delete "in the public interest" and substitute:

necessary

- (2) NEL—after section 107(2) insert:

- (2a) A notice under subsection (1) may be published at the same time as a notice under section 95.

56 Amendment of the NEL—New section 107A inserted

NEL—after section 107 insert:

107A AEMC may extend period of time for making of final Rule determination for further consultation on new issues raised

- (1) This section applies if—
- (a) a person or body raises an issue in—
 - (i) a submission or comment in relation to a draft Rule determination; or
 - (ii) a hearing held under section 98 or 101; and
 - (b) the AEMC considers the issue raised by the person or body requires further public consultation in relation to the proposed Rule or draft Rule determination.
- (2) Despite anything to the contrary in this Part, the AEMC may, by notice, extend the period of time specified in section 102 within which it must make a final Rule determination.
-

- (3) A notice under subsection (2) must—
- (a) be published; and
 - (b) specify a new period of time to apply in the place of the period of time specified in section 102; and
 - (c) specify the issue on which the AEMC requires further public submissions and comments; and
 - (d) invite written submissions and comments from any person or body by the date specified in the notice.
- (4) The new period of time must not have the effect of extending the relevant period of the time specified in section 102 by more than 4 weeks.
- (5) The AEMC may only extend the period of time under this section before the expiry of the time specified in section 102.
- (6) Any person or body, within the period specified in a notice under subsection (2) may make a written submission or comment in relation to the issue specified in the notice.

57 Amendment of section 108 of the NEL—New note substituted

NEL, section 108(3)—delete the note at the foot of the subsection and substitute:

Note

See also section 31 of this Law and section 24 of the *Australian Energy Market Commission Establishment Act 2004* of South Australia.

**58 Amendment of the NEL—New Parts 10 and 11
inserted**

NEL—after section 121 insert:

PART 10—ACCESS DISPUTES

Division 1—Notification of access dispute

122 Notification of access dispute

- (1) Subject to this section, if a prospective network service user or network service user is unable to agree with a network service provider about one or more aspects of access to an electricity network service provided by means of, or in connection with a distribution system or transmission system owned, controlled or operated by that network service provider, the prospective network service user, network service user or network service provider may notify the AER, in writing, that an access dispute exists.
- (2) A notification must be accompanied by the fee (if any) prescribed by the Regulations.
- (3) On receiving a notification under subsection (1), the AER must notify, in writing, of the access dispute—
 - (a) the network service provider, if a prospective network service user or network service user (as the case requires) notified the AER of the access dispute under subsection (1);
 - (b) the prospective network service user or network service user (as the case requires), if the network service

provider notified the AER of the access dispute under subsection (1).

123 Withdrawal of notification

- (1) The person who notified the AER of an access dispute under section 122(1) may withdraw that notification at any time before the AER makes an access determination in respect of that access dispute.
- (2) The notification must be withdrawn by notice in writing.
- (3) Subject to section 141, if the notification is withdrawn, it is taken for the purposes of this Part never to have been given.

124 Parties to an access dispute

The parties to an access dispute are—

- (a) the person notifying the AER of an access dispute under section 122(1);
and
- (b) a person notified by the AER under section 122(3).

Division 2—Access determinations

125 Determination of access dispute

- (1) Unless the AER terminates an access dispute under section 126, the AER must, subject to this Part and the Rules, make a determination on access by (as the case requires) the prospective network service user or network service user.

Note

A delegate of the AER may make the access determination. See section 17 of this Law and section 44AAH of the *Trade Practices Act 1974* of the Commonwealth.

- (2) In making an access determination the AER must comply with this Part and the Rules.
- (3) An access determination must—
 - (a) be in writing; and
 - (b) include a statement of reasons for making the determination; and
 - (b) be given to the parties without delay.
- (4) An access determination has effect on and from the date specified in the determination.

126 AER may terminate access dispute in certain cases

- (1) The AER may at any time terminate an access dispute (without making an access determination) if the AER considers that—
 - (a) the notification of the access dispute was vexatious; or
 - (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (c) the party who notified the access dispute had, but did not avail itself of, an opportunity to engage in negotiations in good faith with the other party before that notification; or
 - (d) a specified dispute termination circumstance has occurred.
 - (2) Subject to section 128, the AER may also terminate an access dispute (without making an access determination) if the AER considers that the aspect of access about which there is a dispute is expressly or impliedly dealt with under an agreement between, as the case requires—
-

- (a) the prospective network service user and network service provider;
 - (b) the network service user and network service provider.
- (3) In this section—
- specified dispute termination circumstance* means a circumstance specified by the Rules as being a circumstance, the occurrence of which, entitles the AER to terminate an access dispute (without making an access determination).

127 AER must terminate access dispute if there is genuine competition

- (1) This section applies if an access dispute is about the refusal by a network service provider to provide an electricity network service to a network service user or prospective network service user.
- (2) Despite anything to the contrary in this Part, the AER must terminate an access dispute (without making an access determination) if the AER considers that the electricity network service the subject of the dispute could be provided on a genuinely competitive basis by a person other than the network service provider or an associate of the provider.

128 Restrictions on access determinations

- (1) The AER must not make an access determination that—
 - (a) would have the effect of preventing a network service user obtaining a sufficient amount of an electricity network service to be able to meet the network service user's reasonably
-

anticipated requirements, measured at the time the access dispute was notified; or

(b) subject to subsection (2), is inconsistent with a connection agreement between the parties to the access dispute.

(2) The AER may make an access determination that is inconsistent with a connection agreement between the parties to the access dispute if the AER is of the opinion the connection agreement affects the quality and security of electricity network service being provided to another person.

(3) In this section—

connection agreement means an agreement between a network service provider and—

(a) an owner, controller or operator of a generating system about the connection of that system to a transmission system or distribution system owned, controlled or operated by the network service provider; or

(b) a person who purchases electricity supplied through a transmission system or distribution system owned, controlled or operated by the network service provider about the connection of that person's loads to that transmission system or distribution system; or

- (c) another network service provider about the connection of transmission systems or distribution systems (as the case requires) owned, controlled or operated by the providers.

Division 3—Variation of access determinations

129 Variation of access determinations

- (1) The AER may vary an access determination on the application of any party to the determination. However, it cannot vary the final determination if any other party objects.

Note: If the parties cannot agree on a variation, a new access dispute can be notified under section 122.

- (2) Section 128 applies to a variation under this section as if—
 - (a) an access dispute arising out of the access determination had been notified when the application was made to the AER for the variation of the determination; and
 - (b) the variation were the making of an access determination in the terms of the varied determination.

Division 4—Compliance with access determinations

130 Compliance with access determination

A party to an access dispute in respect of which an access determination is made must comply with the access determination.

Division 5—Procedure

131 Hearing to be in private

- (1) Subject to subsection (2), a dispute hearing is to be in private.
- (2) If the parties agree, a dispute hearing or part of a dispute hearing may be conducted in public.
- (3) The AER may give written directions as to the persons who may be present at a dispute hearing that is conducted in private.
- (4) In giving directions under subsection (3), the AER must have regard to the wishes of the parties and the need for commercial confidentiality.

132 Right to representation

In a dispute hearing a party may appear in person or be represented by another person.

133 Procedure of AER

- (1) In a dispute hearing the AER—
 - (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) must act as speedily as a proper consideration of the access dispute allows, having regard to the need carefully and quickly to inquire into and investigate the access dispute and all matters affecting the merits, and fair settlement, of the access dispute; and
 - (c) may inform itself about any matter relevant to the access dispute in any way it thinks appropriate.
-

- (2) The AER may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties in the dispute hearing, and may require that the cases be presented within those periods.
- (3) The AER may require evidence or argument to be presented in writing, and may decide the matters on which the AER will hear oral evidence or argument.
- (4) The AER may determine that a dispute hearing is to be conducted by—
 - (a) telephone; or
 - (b) closed circuit television; or
 - (c) any other means of communication.
- (5) The Rules may make further provision about the procedure for the conduct of dispute hearings.

134 Particular powers of AER in a hearing

- (1) The AER may do any of the following things for the purpose of determining an access dispute—
 - (a) give a direction in the course of, or for the purpose of, a dispute hearing;
 - (b) hear and determine the access dispute in the absence of a party who has been given notice of the dispute hearing;
 - (c) sit at any place;
 - (d) adjourn to any time and place;
 - (e) refer any matter to an independent expert and accept the expert's report as evidence.
-

- (2) The AER may make an interim determination.

135 Disclosure of information

- (1) The AER may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an access dispute unless the person has the AER's permission.
- (2) A person must not, without reasonable excuse, refuse or fail to comply with an order under subsection (1).

Penalty:

- (a) in the case of a natural person—\$2 000;
- (b) in the case of a body corporate—
\$10 000.

136 Power to take evidence on oath or affirmation

- (1) The AER may take evidence on oath or affirmation and for that purpose the AER may administer an oath or affirmation.
- (2) The AER may summon a person to appear before the AER to—
- (a) give evidence; or
- (b) produce such documents (if any) as are referred to in the summons; or
- (c) give evidence and produce such documents (if any) as are referred to in the summons.
- (3) The powers in this section may be exercised only for the purposes of hearing and determining an access dispute.
-

137 Failing to attend as a witness

A person who is served, as prescribed by the Regulations, with a summons to appear as a witness before the AER must not, without reasonable excuse—

- (a) fail to attend as required by the summons; or
- (b) fail to appear and report himself or herself from day to day unless excused, or released from further attendance, by the AER.

Penalty: \$2 000.

138 Failing to answer questions etc.

- (1) A person appearing as a witness before the AER must not, without reasonable excuse—
 - (a) refuse or fail to be sworn or to make an affirmation; or
 - (b) refuse or fail to answer a question that the person is required to answer by the AER; or
 - (c) refuse or fail to produce a document that he or she is required to produce by a summons under this Part served on him or her as prescribed by the Regulations.

Penalty: \$2 000.

- (2) It is a reasonable excuse for the purposes of subsection (1) for a natural person to refuse or fail to answer a question or produce a document on the ground that the answer or the production of the document might—
 - (a) tend to incriminate the person; or
 - (b) expose the person to a criminal penalty.

- (3) Subsection (2) does not limit what is a reasonable excuse for the purposes of subsection (1).

139 Intimidation etc.

A person must not—

- (a) threaten, intimidate or coerce another person; or
- (b) cause or procure damage, loss or disadvantage to another person,

because that other person—

- (c) proposes to produce, or has produced, documents to the AER ; or
- (d) proposes to appear, or has appeared, as a witness before the AER.

Penalty: \$2000.

140 Party may request AER to treat material as confidential

- (1) A party in a dispute hearing may—
 - (a) inform the AER that, in the party's opinion, a specified part of a document contains confidential information; and
 - (b) request the AER not to give a copy of that part to another party.
 - (2) On receiving a request, the AER must—
 - (a) inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates; and
 - (b) ask the other party or parties whether there is any objection to the AER complying with the request.
-

- (3) If there is an objection to the AER complying with the request, the party objecting may inform the AER of the objection and of the reasons for it.
- (4) After considering—
- (a) a request; and
 - (b) any objection; and
 - (c) any further submissions that any party has made in relation to the request,
- the AER may decide—
- (d) not to give the other party or parties a copy of so much of the document as contains confidential information that the AER thinks should not be given; or
 - (e) to give the other party or another specified party a copy of the whole, or part, of the part of the document that contains confidential information subject to a condition that the party give an undertaking not to disclose the information to another person except to the extent specified by the AER and subject to such other conditions as the AER determines.

141 Costs

- (1) Each party is to bear its own costs in a dispute hearing.
- (2) At any time, the AER may order that a party pay all or a specified part of the costs of another party in a dispute hearing.

- (3) The AER may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
- (a) whether a party has conducted the dispute hearing in a way that unnecessarily disadvantaged another party by conduct such as—
 - (i) failing to comply with an order or direction of the AER without reasonable excuse;
 - (ii) failing to comply with this Law, the Regulations or the Rules;
 - (iii) asking for an adjournment as a result of (i) or (ii);
 - (iv) causing an adjournment;
 - (v) attempting to deceive another party or the AER;
 - (vi) vexatiously conducting an access dispute;
 - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the dispute hearing;
 - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
 - (d) the nature and complexity of the access dispute;
 - (e) any other matter the AER considers relevant.
- (4) A party to whom an order made under subsection (2) is directed must comply with the order.
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- (5) If the AER considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3)(a) or (b), the AER may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.
- (6) Before making an order under subsection (5), the AER must give the representative a reasonable opportunity to be heard.
- (7) A representative of a party to whom an order made under subsection (5) is directed must comply with the order.
- (8) If the AER makes an order for costs before the end of an access dispute, the AER may require that the order be complied with before it continues with the proceeding.
- (9) If the AER makes an order for costs, the AER may fix the amount of costs itself.

142 Outstanding costs are a debt due to party awarded the costs

Costs that are payable under an order under section 141(4) or (7)—

- (a) are a debt due to the party to whom the AER has ordered that they be paid; and
- (b) may be recovered by that party in a court of competent jurisdiction.

Division 6—Miscellaneous matters

143 Correction of access determinations for clerical mistakes etc

If an access determination contains—

- (a) a clerical mistake; or

- (b) an error arising from an accidental slip or omission; or
- (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination; or
- (d) a defect in form,

the AER may correct the access determination.

144 Subsequent network service provider bound by access determinations

- (1) An access determination applies to every subsequent network service provider as if that subsequent network service provider were a party to the access dispute in respect of which the access determination was made.
- (2) In this section—

subsequent network service provider means a network service provider (other than the network service provider to whom the access determination applies) who provides electricity network services by means of, or in connection with, the distribution system or transmission system used to provide the electricity network services—

- (a) the subject of the access dispute; and
- (b) in respect of which the access determination was made.

**145 Regulations about the charges to be paid
by parties to access dispute for AER's
costs in dispute hearing**

The Regulations may provide for the AER
to—

- (a) charge the parties to an access dispute
for its costs in the access dispute; and
- (b) apportion those costs between the
parties.

PART 11—GENERAL

**146 Failure to make a decision under this Law
or the Rules within time does not
invalidate the decision**

- (1) A decision (however described) made under
this Law or the Rules by the AER, AEMC or
NEMMCO after the expiry of the period of
time specified by this Law or Rules for the
making of that decision is not to be taken to
be an invalid decision only because the
decision is not made within the specified
period of time.
- (2) A decision to which subsection (1) applies
takes effect on and from—
 - (a) the day it is made; or
 - (b) if it specifies a date for operation or
effect that is after the day it is made,
that specified date.

**147 AER must report to MCE if it does not
make network revenue or pricing
determination within time**

- (1) If the AER does not make a network revenue or pricing determination within the period of time specified by this Law or Rules for the making of that determination, the AER must give a report to the MCE that—
 - (a) describes the AER's handling of the matter; and
 - (b) gives the reasons of the AER for not making the determination within the specified period; and
 - (c) specifies a date by when the AER considers the determination will be made.
- (2) A report under subsection (1)—
 - (a) must be given to the MCE as soon as practicable after the expiry of the specified period; and
 - (b) must be published on the AER's website as soon as practicable after it is given to the MCE in accordance with paragraph (a).

**59 Amendment of Schedule 1 to the NEL—Rule
making powers**

- (1) Schedule 1 to the NEL, item 16—delete ", and the methodology for the determination of those prices".
- (2) Schedule 1 to the NEL, item 17—after "power" insert:

relating to the making of a transmission
determination

- (3) Schedule 1 to the NEL—delete items 19 and 20 and substitute:
- 19 The economic framework, mechanisms or methodologies to be applied by the AER for the purposes of item 18.
 - 20 The economic framework, mechanisms or methodologies to be applied or determined by the AER for the purposes of items 15 and 16 including (without limitation) the economic framework, mechanisms or methodologies to be applied or determined by the AER for the derivation of the maximum allowable revenue or prices to be applied by the AER in making a transmission determination.
- (4) Schedule 1 to the NEL—after item 22(b) insert:
- (ba) if the regulated transmission system operator is a corporation, the income tax payable by corporations; and
- (5) Schedule 1 to the NEL, item 23—after "decisions" insert:
- including, where applicable, service performance incentive schemes
- (6) Schedule 1 to the NEL—before item 24(a) insert:
- (aa) the submission to the AER, by a regulated transmission system operator, of a proposal relating to the revenues or prices to be regulated by a transmission determination applying to the operator; and
- (7) Schedule 1 to the NEL, item 24(b)—delete "and by affected Registered participants (within the meaning of section 16(3))".
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(8) Schedule 1 to the NEL, items 25 and 26—delete the items and substitute:

- 25 The regulation of revenues earned or that may be earned by owners, controllers or operators of distribution systems from the provision by them of services that are the subject of a distribution determination..
 - 26 The regulation of prices charged or that may be charged by owners, controllers or operators of distribution systems for the provision by them of services that are the subject of a distribution determination..
 - 26A Principles to be applied, and procedures to be followed, by the AER in exercising or performing an AER economic regulatory function or power relating to the making of distribution determination..
 - 26B The assessment, or treatment, by the AER, of investment in distribution systems for the purposes of making a distribution determination..
 - 26C The economic framework, mechanisms or methodologies to be applied by the AER for the purposes of item 26B..
 - 26D The economic framework, mechanisms or methodologies to be applied or determined by the AER for the purposes of items 25 and 26 including (without limitation) the economic framework, mechanisms or methodologies to be applied or determined by the AER for the derivation of the maximum allowable revenue or prices to be applied by the AER in making a distribution determination..
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- 26E The valuation, for the purposes of making a distribution determination, of assets forming part of a distribution system owned, controlled or operated by a regulated distribution system operator, and of proposed new assets to form part of a distribution system owned, controlled or operated by a regulated distribution system operator, that are, or are to be, used in the provision of services that are the subject of a distribution determination..
- 26F The determination by the AER, for the purpose of making a distribution determination with respect to services that are the subject of such a determination, of—
- (a) a depreciation allowance for a regulated distribution system operator; and
 - (b) operating costs of a regulated distribution system operator; and
 - (c) if the regulated distribution system operator is a corporation, the income tax payable by corporations; and
 - (d) an allowable rate of return on assets forming part of a distribution system owned, controlled or operated by a regulated distribution system operator.
- 26G Incentives for regulated distribution system operators to make efficient operating and investment decisions including, where applicable, service performance incentive schemes..

- 26H The procedure for the making of a distribution determination by the AER, including—
- (a) the submission to the AER, by a regulated distribution system operator, of a proposal relating to the revenues or prices to be regulated by a distribution determination applying to the operator; and
 - (b) the publication of notices by the AER; and
 - (c) the making of submissions, including by the regulated distribution system operator to whom the distribution determination will apply; and
 - (d) the publication of draft and final determinations and the giving of reasons; and
 - (e) the holding of pre-determination conferences.

Regulatory economic methodologies

- 26I The regulatory economic methodologies (including the use of the methodology known as the "building block approach") to be applied by the AER in—
- (a) making a distribution determination or transmission determination; or
 - (b) amending a distribution determination or transmission determination; or
 - (c) making an access determination.

26J The methodology known as "total factor productivity"—

(a) as a regulatory economic methodology to be applied by the AER for the purpose of—

(i) making a distribution determination or transmission determination; or

(ii) amending a distribution determination or transmission determination; or

(iii) making an access determination;

Note

Under section 36A, the AEMC must not make a Rule under item 10(a) unless the Regulations provide otherwise.

(b) as an economic regulatory tool to inform and assist the AER in applying, or analysing the application of the regulatory economic methodology known as the "building block approach" by the AER for the purpose of—

(i) making a distribution determination or transmission determination; or

(ii) amending a distribution determination or transmission determination; or

(iii) making an access determination.

(9) Schedule 1 to the NEL—after item 30 insert:

Access disputes

30A Specification of disputes as access disputes for the purposes of Part 10.

- 30B Notification of access disputes for the purposes of Part 10.
- 30C Matters or things to be considered by the AER in making an access determination.
- 30D Procedure for the hearing of an access dispute under Part 10.
- (10) Schedule 1 to the NEL—after item 34 insert:
 - 34A Declaration or specification of electricity network services as direct control network services or negotiated network services.
 - 34B Reporting and disclosing information to the AER.

60 Amendment of Schedule 2 to the NEL—Clause 2

Schedule 2 to the NEL—delete clause 2(2) to (5) and substitute:

- (2) If a provision of this Law, or the application of a provision of this Law to a person, subject matter or circumstance, would, but for this clause, be construed as being in excess of the legislative power of the Legislature of this jurisdiction—
 - (a) it is a valid provision to the extent to which it is not in excess of the power; and
 - (b) the remainder of this Law, and the application of the provision to other persons, subject matters or circumstances, is not affected.

- (3) Without limiting subclause (2), this Law is not to be construed as imposing any duty on the Australian Competition Tribunal or AER to perform a function or exercise a power if the imposition of the duty would be in excess of the legislative power of the Legislature of this jurisdiction.

Note

The term "function" is defined in clause 10 to include "duty".

- (4) In particular, if a provision of this Law appears to impose a duty on the Australian Competition Tribunal or AER to perform a function or exercise a power in matters or circumstances in which the assumption of the duty cannot be validly authorised under the law of the Commonwealth, or is otherwise ineffective, the provision is to be construed as if its operation were expressly confined to—
- (a) acts or omissions of corporations to which section 51(xx) of the *Constitution of the Commonwealth* applies; or
 - (b) acts or omissions taking place in the course of, or in relation to, trade or commerce between this jurisdiction and places outside this jurisdiction (whether within or outside Australia); or
 - (c) acts or omissions taking place outside Australia, or in relation to things outside Australia.
- (5) This clause does not limit the effect that a provision of this Law would validly have apart from this clause.
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61 Amendment of Schedule 2 to the NEL—Examples not part of this Law

Schedule 2 to the NEL—after clause 4(4) insert:

- (5) An example (being an example at the foot of a provision of this Law under the heading "Example" or "Examples") does not form part of this Law.

62. Amendment of Schedule 2 to the NEL—Extrinsic material for the purposes of interpretation

- (1) Schedule 2 to the NEL, clause 8(1), definition of "extrinsic material"—

(a) after "this Law" insert:

or the Rules

(b) after paragraph (e) insert:

(ea) draft Rule determinations and final Rule determinations; and

63 Amendment of Schedule 2 to the NEL—Terms and references

- (1) Schedule 2 to the NEL, clause 10, definition of *business day*, paragraph (b) of the definition—after "jurisdictions" insert:

(except the Commonwealth)

- (2) Schedule 2 to the NEL, clause 10, definition of *make*—delete the definition and substitute:

make includes—

(a) issue or grant; and

(b) revoke and substitute;

64 Amendment of Schedule 2 to the NEL—Certain provisions to apply to the National Electricity Rules

- (1) Schedule 2 to the NEL, clause 19—after "this Law" (wherever occurring) insert:

or the Rules
 - (2) Schedule 2 to the NEL, clause 23(1)—delete "this Law authorises or requires" and substitute:

or the Rules authorise or require
 - (3) Schedule 2 to the NEL, clause 24(1)—
 - (a) delete "authorises" and substitute:

or the Rules authorise
 - (b) delete "this Law" (where secondly occurring) and substitute:

, as the case requires, this Law or the Rules
 - (4) Schedule 2 to the NEL, clause 24(8)(b)—delete "this Law" and substitute:

as the case requires, this Law or the Rules
 - (5) Schedule 2 to the NEL, clause 24(10)—after "this Law authorises" and substitute:

or the Rules authorise
 - (6) Schedule 2 to the NEL, clause 25(1)—delete "this Law authorises or requires" and substitute:

this Law or the Rules authorise or require
 - (7) Schedule 2 to the NEL, clause 25(2)—delete "this Law provides" and substitute:

, as the case requires, this Law or the Rules provide
 - (8) Schedule 2 to the NEL, clause 26(1)—
 - (a) delete "authorises" and substitute:

or the Rules authorise
-

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Miscellaneous Amendments) Amendment Bill
Exposure Draft

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- (b) delete "this Law" (where secondly occurring) and substitute:
- , as the case requires, this Law or the Rules
- (9) Schedule 2 to the NEL, clause 26(8)—delete "this Law" and substitute:
- , as the case requires, this Law or the Rules
- (10) Schedule 2 to the NEL—after clause 27(3) insert:
- (3a) If a provision of the Rules (the "empowering provision") that does not commence on its making would, had it commenced, confer a power—
- (a) to make an appointment; or
 - (b) to make a statutory instrument of an administrative character; or
 - (c) to do another thing,
- then—
- (d) the power may be exercised; and
 - (e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect,
- before the empowering provision commences.
- (11) Schedule 2 to the NEL, clause 27(4), (5) and (6)—delete "or (2)" (wherever occurring) and substitute:
- , (2) or (3a)

**65 Amendment of Schedule 2 to the NEL—New Parts
6A and 6B of Schedule 2 inserted**

Schedule 2 to the NEL—after clause 30 insert:

PART 6A—EVIDENTIARY MATTERS

Division 1—Publication on websites

31AA Definition

In this Division—

relevant AER decision means a decision
(however described) or determination
(however described) of the AER under
this Law or the Rules.

**31AB Publication of relevant AER decisions on
websites**

- (1) For the purposes of this Law, a relevant AER decision that is required by this Law to be published on a website is to be taken to be published on the website if—
 - (a) the relevant AER decision is made accessible in full on the website; or
 - (b) notice of the making or publication of the AER relevant decision is made accessible on that website and the relevant AER decision is made accessible separately in full on that website or in any other identified location.
 - (2) The date on which the relevant AER decision is published on the website is the date notified by the AER on the website as the date of the relevant AER decision's publication (being not earlier than the date on which it was first made so accessible).
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Division 2—Evidentiary certificates

31AC Definitions

In this Division—

acting SES employee has the same meaning as in section 17AA of the *Acts Interpretation Act 1901* of the Commonwealth;

AEMC chief executive means the chief executive of the AEMC appointed under section 16 of the *Australian Energy Market Commission Establishment Act 2004* of South Australia;

AEMC Commissioner means a Commissioner within the meaning of the *Australian Energy Market Commission Establishment Act 2004* of South Australia;

AER member has the same meaning as in the *Trade Practices Act 1974* of the Commonwealth;

SES employee has the same meaning as in section 17AA of the *Acts Interpretation Act 1901* of the Commonwealth.

31AD Evidentiary certificates—AER

In any proceedings under this Law, a certificate signed or purported to be signed by an AER member, or an SES employee or acting SES employee assisting the AER as mentioned in section 44AAC of the *Trade Practices Act 1974* of the Commonwealth, stating any of the following matters is evidence of the matter—

- (a) a stated document is one of the following things made, issued, developed, prepared, promulgated, served, sent, delivered or given under this Law or the Rules—
 - (i) a decision (however described) or determination (however described);
 - (ii) an authorisation under section 20;
 - (iii) a general regulatory information order;
 - (iv) a notice, notification, direction or requirement;
 - (b) a stated document is a copy of a thing referred to in paragraph (a);
 - (c) on a stated day, a person was or was not—
 - (i) given a decision (however described), or determination (however described);
 - (ii) authorised as an authorised person (within the meaning of section 19);
 - (iii) served a notice under section 28 or a regulatory information notice;
 - (iv) notified under section 28F;
 - (d) on a stated day any of the following were published on the AER's website—
 - (i) a decision (however described) or determination (however described);
 - (ii) a general regulatory information order.
-

31AE Evidentiary certificates—AEMC

In any proceedings under this Law, a certificate signed or purported to be signed by a Commissioner or the AEMC chief executive, stating any of the following matters is evidence of the matter—

- (a) a stated document is one of the following things made, issued, developed, prepared, promulgated, served, sent, delivered or given under this Law or the Rules—
 - (i) a decision (however described); or
 - (ii) a determination (however described);
- (b) a stated document is a copy of a thing referred to in paragraph (a).

31AF Evidentiary certificates—NEMMCO

In any proceedings under this Law, a certificate signed or purported to be signed by the chief executive officer of NEMMO, stating any of the following matters is evidence of the matter—

- (a) a stated document is one of the following things made, issued, developed, prepared, promulgated, served, sent, delivered or given under this Law or the Rules—
 - (i) a decision (however described); or
 - (ii) a determination (however described);

- (b) a stated document is a copy of a thing referred to in paragraph (a).

Note

There is no clause 31AG.

**PART 6B—COMMENCEMENT OF THIS LAW
AND STATUTORY INSTRUMENTS**

**31AH Time of commencement of this Law or a
provision of this Law**

If a provision of an Act of South Australia provides that this Law or a provision of this Law shall commence, or be deemed to have commenced, on a particular day, it shall commence, or be deemed to have commenced, at the beginning of that day.

31AI Time of commencement of a Rule

- (1) If a Rule provides that the Rule shall commence, or be deemed to have commenced, on a particular day, it shall commence, or be deemed to have commenced, at the beginning of that day.
- (2) If a notice published in the *South Australian Government Gazette* under section 104 provides that a Rule shall commence on a particular day, the Rule shall commence at the beginning of that day.

66 Amendment of Schedule 2 to the NEL—Double jeopardy

Schedule 2 to the NEL—delete clause 39(3) and substitute:

- (3) The Court must not make a declaration that a person is in breach of a provision of this Law, the Regulations or the Rules that is not an offence provision if the person has been convicted of an offence constituted by
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- conduct that is substantially the same as the conduct constituting the breach.
- (4) Proceedings for a declaration referred to in subclause (3) are stayed if—
- (a) criminal proceedings are commenced or have already been commenced against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the breach.
- (5) The proceedings for the declaration referred to in subclause (3) may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the declaration must be dismissed.
- (6) In this clause—
civil penalty provision has the same meaning as in section 58.

67 Amendment of Schedule 2 to the NEL—Clause 42

Schedule 2 to the NEL—delete clause 42(2) to (5) and substitute:

- (2) If a provision of the National Electricity Rules, or the application of a provision of the National Electricity Rules to a person, subject matter or circumstance, would, but for this clause, be construed as being in excess of the legislative power of the Legislature of this jurisdiction or the power conferred by this Law under which it is made—
- (a) it is a valid provision to the extent to which it is not in excess of the power; and

- (b) the remainder of the National Electricity Rules, and the application of the provision to other persons, subject matters or circumstances, is not affected.
- (3) Without limiting subclause (2), the National Electricity Rules are not to be construed as imposing any duty on the Australian Competition Tribunal or AER to perform a function or exercise a power if the imposition of the duty would be in excess of the legislative power of the Legislature of this jurisdiction.

Note

The term "function" is defined in clause 10 to include "duty".

- (4) In particular, if a provision of the National Electricity Rules appears to impose a duty on the Australian Competition Tribunal or AER to perform a function or exercise a power in matters or circumstances in which the assumption of the duty cannot be validly authorised under the law of the Commonwealth, or is otherwise ineffective, the provision is to be construed as if its operation were expressly confined to—
 - (a) acts or omissions of corporations to which section 51(xx) of the *Constitution of the Commonwealth* applies; or
 - (b) acts or omissions taking place in the course of, or in relation to, trade or commerce between this jurisdiction and places outside this jurisdiction (whether within or outside Australia); or

- (c) acts or omissions taking place outside Australia, or in relation to things outside Australia.
- (5) This clause does not limit the effect that a provision of the National Electricity Rules, or the provision of this Law under which it is made, would validly have apart from this clause.

68 Amendment of Schedule 3 to the NEL—New definition inserted into clause 1

Schedule 3 to the NEL, clause 1—after the definition of "NECA" insert:

new commencement day means the day on which section 35 of the *National Electricity (South Australia) (National Electricity Law Miscellaneous Amendments) Act 2007* of South Australia comes into operation.

69 Amendment of Schedule 3 to the NEL—New clauses 10A and 10B inserted

Schedule 3 to the NEL—after clause 10 insert:

10A AER may conduct investigations into breaches or possible breaches of NEL not investigated by NECA

- (1) Despite anything to the contrary in this Schedule, the AER may, on and from the new commencement day, conduct an investigation into a breach or possible breach of the National Electricity Code.
 - (2) In conducting an investigation referred to in subclause (1), the AER has all the functions, and may exercise all the powers, NECA had under the old National Electricity Law and National Electricity Code to conduct an investigation into a breach or possible breach of the National Electricity Code.
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10B AER may bring proceedings in relation to breaches of National Electricity Code in the Court

(1) In this clause—

AER breach investigation means an investigation conducted and completed by the AER in accordance with clause 10 or 10A.

(2) On and from the new commencement day, the AER may bring proceedings in the Court in respect of an AER breach investigation.

(3) Despite anything to the contrary in clause 2, for the purposes this clause, sections 17(1)(b) and 44 of the old National Electricity Law apply to a proceeding under this clause as if—

(a) a reference to the Tribunal were a reference to the Court; and

(b) a reference to NECA were a reference to the AER.

70 Amendment of Schedule 3 to the NEL—New clause 18 inserted

Schedule 3 to the NEL—after clause 17 insert:

18 Operation and effect of Rule 6A.21.2 of the National Electricity Rules

Rule 6A.21.2 of the National Electricity Rules is deemed to have the same force and effect as it would have had if, at the time the Rule was made, section 34(3)(e) (as amended by section 22 of the *National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendment Act 2007* of South Australia) were in force.

ENDNOTES