

**DATED 2<sup>ND</sup> DAY OF OCTOBER 2011**

**NOTICE OF AMENDMENT TO THE  
AUSTRALIAN ENERGY MARKET AGREEMENT**

**BETWEEN**

**THE COMMONWEALTH OF AUSTRALIA  
THE STATE OF NEW SOUTH WALES  
THE STATE OF VICTORIA  
THE STATE OF QUEENSLAND  
THE STATE OF WESTERN AUSTRALIA  
THE STATE OF SOUTH AUSTRALIA  
THE STATE OF TASMANIA  
THE AUSTRALIAN CAPITAL TERRITORY  
THE NORTHERN TERRITORY OF AUSTRALIA**

**(THE PARTIES)**

# NOTICE OF AMENDMENT TO THE AUSTRALIAN ENERGY MARKET AGREEMENT

## **RECITALS:**

- A. On 30 June 2004, the Parties entered into the Australian Energy Market Agreement (The Agreement).
- B. On 2 June 2006 and 2 July 2009, the Parties amended the Agreement.
- C. The Parties have now agreed as set out in this notice to further amend the Agreement so that it is in the form set out in the Schedule, in accordance with clause 3.3 of the Agreement.

## **OPERATIVE PROVISIONS:**

### **1. NOTICE OF AMENDMENT**

- 1.1 By this notice the Parties agree to amend the Australian Energy Market Agreement (the Agreement), with effect from when this notice is executed by all Parties to the Agreement, as follows:
  - (a) Delete the Table of Contents and insert the Table of Contents as it appears in the Schedule
  - (b) Delete clauses 1.6, 1.7, 4.4, 4.9, 5.1, 6.2, 6.3, 7.3, 8.1, 8.4, 9.1, 9.4, 9.5, 9.6, 13.10, 13.12, 14.1, 14.2, 14.9, 14.11 and 14.15 and insert clauses 1.6, 1.7, 4.4, 4.10, 5.1, 6.2, 6.3, 7.3, 8.1, 8.5, 9.1, 9.5, 9.6, 9.7, 13.10, 13.12, 14.1, 14.2, 14.9, 14.11 and 14.15 as they appear in the Schedule; and
  - (c) Insert new clauses 1.8, 4.9, 6.8, 6.9, 8.4, 9.4, 9.4A, 9.8, 9.9 and 14.1A as they appear in the Schedule.
- 1.2 The Parties agree that the amendments in clause 1.1 have been correctly incorporated into the Agreement in the Schedule to this notice.

**EXECUTED AS NOTICE OF AMENDMENT**

**SIGNED by** 

The Honourable Julia Gillard MP )  
Prime Minister of Australia ) On the 2 Day of Oct 2011

The Honourable Barry O'Farrell MP )  
Premier of the State of New South Wales ) On the Day of 2011

The Honourable Ted Baillieu MP )  
Premier of the State of Victoria ) On the Day of 2011

The Honourable Anna Bligh MP )  
Premier of the State of Queensland ) On the Day of 2011

The Honourable Colin Barnett MLA )  
Premier of the State of Western Australia ) On the Day of 2011

The Honourable Mike Rann MP )  
Premier of the State of South Australia ) On the Day of 2011

The Honourable Lara Giddings MP )  
Premier of the State of Tasmania ) On the Day of 2011

Ms Katy Gallagher MLA )  
Chief Minister of the Australian Capital Territory ) On the Day of 2011

The Honourable Paul Henderson MLA )  
Chief Minister of the Northern Territory of Australia ) On the Day of 2011

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**SIGNED by**

The Honourable Julia Gillard MP )  
Prime Minister of Australia ) On the Day of 2011



The Honourable Barry O'Farrell MP )  
Premier of the State of New South Wales ) On the 21 Day of June 2011

The Honourable Ted Baillieu MP )  
Premier of the State of Victoria ) On the Day of 2011

The Honourable Anna Bligh MP )  
Premier of the State of Queensland ) On the Day of 2011

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Premier of the State of Victoria ) On the Day of 2011

  
The Honourable Anna Bligh MP )  
Premier of the State of Queensland ) On the 22 Day of 8 2011

The Honourable Colin Barnett MLA )  
Premier of the State of Western Australia ) On the Day of 2011

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Premier of the State of Western Australia ) On the Day of 2011

The Honourable Mike Rann MP )  
Premier of the State of South Australia ) On the 18 Day of 2011  


The Honourable Lara Giddings MP )  
Premier of the State of Tasmania ) On the Day of 2011

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Premier of the State of Western Australia ) On the Day of 2011

The Honourable Mike Rann MP )  
Premier of the State of South Australia ) On the Day of 2011

The Honourable Lara Giddings MP )   
Premier of the State of Tasmania ) On the 19 Day of May 2011

Mr Jon Stanhope MLA )  
Chief Minister of the Australian Capital Territory ) On the Day of 2011

The Honourable Paul Henderson MLA )  
Chief Minister of the Northern Territory of Australia ) On the Day of 2011

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Premier of the State of Tasmania ) On the Day of 2011

  
Ms Katy Gallagher MLA )  
Chief Minister of the Australian Capital Territory ) On the 23 Day of 6 2011

The Honourable Paul Henderson MLA )  
Chief Minister of the Northern Territory of Australia ) On the Day of 2011

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Premier of the State of Tasmania ) On the Day of 2011

Mr Jon Stanhope MLA )  
Chief Minister of the Australian Capital Territory ) On the Day of 2011

  
The Honourable Paul Henderson MLA )  
Chief Minister of the Northern Territory of Australia ) On the Day of 2011

**SCHEDULE**

**AUSTRALIAN ENERGY MARKET AGREEMENT**

**(AS AMENDED)**

**BETWEEN**

**THE COMMONWEALTH OF AUSTRALIA  
THE STATE OF NEW SOUTH WALES  
THE STATE OF VICTORIA  
THE STATE OF QUEENSLAND  
THE STATE OF WESTERN AUSTRALIA  
THE STATE OF SOUTH AUSTRALIA  
THE STATE OF TASMANIA  
THE NORTHERN TERRITORY OF AUSTRALIA  
THE AUSTRALIAN CAPITAL TERRITORY**

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**THIS AGREEMENT** is made the 30<sup>th</sup> day of June 2004.

**BETWEEN:**

**THE COMMONWEALTH OF AUSTRALIA**

**THE STATE OF NEW SOUTH WALES**

**THE STATE OF VICTORIA**

**THE STATE OF QUEENSLAND**

**THE STATE OF WESTERN AUSTRALIA**

**THE STATE OF SOUTH AUSTRALIA**

**THE STATE OF TASMANIA**

**THE NORTHERN TERRITORY OF AUSTRALIA**

**THE AUSTRALIAN CAPITAL TERRITORY**

**RECITALS:**

- A. In June 2001, the Council of Australian Governments (COAG) recognised that effective operation of an open and competitive national energy market will contribute to improved economic and environmental performance and deliver benefits to households, small business and industry, including in regional areas, and:
- (a) established the Ministerial Council on Energy (MCE) to provide national oversight and coordination of energy policy development and to provide national leadership so that consideration of broader convergence issues and environmental impacts are effectively integrated into energy sector decision-making;
  - (b) set up an independent review of energy market directions (COAG Review) so that further energy market development could be focussed on areas likely to generate significant benefits; and
-

- (c) established a national energy policy framework to guide future energy policy decision-making by jurisdictions and to provide increased policy certainty for energy users and for the energy sector.
- B. As a substantial response to the COAG Review and other matters, the MCE provided a report to COAG, the *Reform of Energy Markets*, on 11 December 2003.
- C. On 30 June 2004, the Parties entered into the Australian Energy Market Agreement 2004 to give effect to the recommendations in the MCE report.
- D. The Parties have by written notice under clause 3.3 agreed to amend the Australian Energy Market Agreement 2004.

**OPERATIVE PROVISIONS:**

1. **PRELIMINARY**

- 1.1 This agreement may be referred to as the Australian Energy Market Agreement 2004 as amended.
  - 1.2 This agreement includes the attached annexures.
  - 1.3 The Parties agree that:
    - (a) this agreement overrides and replaces the National Electricity Market Legislation Agreement of 9 May 1996; and
    - (b) this agreement prevails to the extent of any inconsistency with the Natural Gas Pipelines Access Agreement of 7 November 1997 and overrides and replaces that agreement on the commencement of the National Gas Law other than the obligations from that agreement set out in Annexure 4.
  - 1.4 The Parties have each endorsed the MCE Report on *Reform of Energy Markets* of 11 December 2003 and have agreed to the recommendations in the MCE Report to
-



provide the basis for the development of a truly national and efficient energy market as amended by this agreement. This report is summarised in Annexure 1.

1.5 For the avoidance of doubt, this agreement is not intended to give rise to legal obligations among the Parties.

(a) Nothing in this Agreement affects the right of any of the Parties to develop, implement and/or maintain (whether through legislation, regulation, administrative initiatives or otherwise) policies relating to environmental (including greenhouse), energy efficiency (including demand management) and planning issues within their own jurisdictions

1.6 In this agreement, unless the contrary intention appears:

(a) **“ACCC”** means the Australian Competition and Consumer Commission established by section 6A of the *Competition and Consumer Act 2010* (Cth);

(b) **“AEMC”** means the Australian Energy Market Commission established by section 5 of the *Australian Energy Market Commission Establishment Act 2004* (SA) pursuant to this agreement;

(c) **“AEMO”** means Australian Energy Market Operator Limited A.C.N. 072 010 327;

(d) **“AER”** means the Australian Energy Regulator established by section 44AE of the *Competition and Consumer Act 2010* (Cth) pursuant to this agreement;

(e) **“Australian Energy Market Legislation”** means:

(i) the *Australian Energy Market Commission Establishment Act 2004* (SA) and Part IIIAA of the *Competition and Consumer Act 2010* (Cth);

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- (ii) the Electricity Legislation and the Gas Legislation as amended by the Implementing Legislation;
- (iii) the Implementing Legislation;
- (iv) the Retail Energy Legislation as enacted by the Implementing Legislation;

and, for the avoidance of doubt, includes the National Electricity Law, National Electricity Rules, National Gas Law, National Gas Rules, the National Energy Retail Law, the National Energy Retail Rules and the *National Gas Access (WA) Act 2009* (WA) as amended from time to time.

- (f) “**certify**”, “**certified**” or “**certification**” means attaining a positive decision under paragraph 44N(1)(a) of the *Competition and Consumer Act 2010* (Cth) in relation to the effectiveness of an access regime. An effective access regime is no longer considered certified if it has been substantially modified according to subsection 44H(6) of the *Competition and Consumer Act 2010* (Cth);
  - (g) “**COAG**” means the Council of Australian Governments;
  - (h) “**Code Registrar**” means a person appointed to or acting in the position of Code Registrar and appointed under the *Gas Pipelines Access (South Australia) Act 1997* of South Australia;
  - (i) “**Commonwealth AER Member**” means the AER member appointed by the Chair of the ACCC in accordance with clause 7.3 and Part IIIAA of the *Competition and Consumer Act 2010* (Cth);
  - (j) “**Economic Regulation Authority**” means the authority established by section 4 of the *Economic Regulation Authority Act 2003* (WA);
-

- (k) **“Electricity Legislation”** means existing legislation giving effect to the National Electricity Market, including the *National Electricity (South Australia) Act 1996*, the *National Electricity (South Australia) Regulations*, the legislation of the other jurisdictions participating in the NEM that applies the NEL, the Regulations and the National Electricity Rules including any associated regulations;
- (l) **“Gas Legislation”** means the *National Gas (South Australia) Act 2008*, the *National Gas (South Australia) Regulations*, the legislation of the other jurisdictions that applies the National Gas Law, the Regulations and the National Gas Rules including any associated regulations;
- (m) **“Implementing Legislation”** means legislation:
- (i) amending the Electricity Legislation and the Gas Legislation required to give effect to this agreement;
  - (ii) enacting, or amending, the Retail Energy Legislation as required to give effect to this agreement;
  - (iii) conferring functions and powers on the AEMC and the AER in accordance with this agreement;
  - (iv) subjecting each Party to the jurisdiction of the AER and the AEMC in accordance with the relevant anticipated timetables in clauses 8, 9 and 14;
- and, for the avoidance of doubt, does not include any law the primary object or purpose of which is not the subject of this agreement (including those whose object is to give effect to State and Territory Distribution and Retail Regulatory Functions);
- (n) **“legislation”** includes regulations;
-

- (o) **“Ministerial Council on Energy”** or **“MCE”** means the body established on 8 June 2001, being the Council of Ministers with primary carriage of energy matters at national level comprising Ministers representing the Commonwealth and each of the States and Territories;
  - (p) **“MCE Minister”** means the Minister of the Crown in right of a Party appointed to represent that Party for the purposes of this agreement, and includes any delegate of that Minister;
  - (q) **“National Distribution and Retail Regulatory Function”** means a function described in Annexure 2 as ‘National’;
  - (r) **“National Electricity Law”** or **“NEL”** means the law set out in the Schedule to the *National Electricity (South Australia) Act 1996*;
  - (s) **“National Electricity Rules”** means the initial National Electricity Rules made under the NEL and any subsequent rules made by the AEMC under the NEL (including amendments to the initial rules);
  - (t) **“National Energy Retail Law”** means the law set out in the Schedule to the *National Energy Retail (South Australia) Act 2011*;
  - (u) **“National Energy Retail Regulations”** means the National Regulations made under the National Energy Retail Law;
  - (v) **“National Energy Retail Rules”** means the initial National Energy Retail Rules made under the National Energy Retail Law and any subsequent rules made by the AEMC under the National Energy Retail Law (including amendments to the initial rules);
-

- (w) **“National Gas Law”** means the law set out in the Schedule to the *National Gas (South Australia) Act 2008*;
  - (x) **“National Gas Rules”** means the initial National Gas Rules made under the National Gas Law and any subsequent rules made by the AEMC under the National Gas Law (including amendments to the initial rules);
  - (y) **“NCC”** means the National Competition Council established by section 29A of the *Competition and Consumer Act 2010 (Cth)*;
  - (z) **“NECA”** means the National Electricity Code Administrator Limited A.C.N. 073 942 775;
  - (aa) **“NEM”** means the national electricity market governed by the NEL and the National Electricity Rules;
  - (bb) **“NEM jurisdiction”** means a jurisdiction that has in force legislation applying the NEL as a law of that jurisdiction;
  - (cc) **“NET”** means the National Electricity Tribunal established under Part 3 of the *National Electricity (South Australia) Act 1996* before the commencement of the repeal of Part 3 by the *National Electricity (South Australia) (New National Electricity Law) Amendment Act 2005*;
  - (dd) **“Natural Gas Pipelines Access Agreement”** means the Natural Gas Pipelines Access Agreement dated 7 November 1997 as amended being the intergovernmental agreement by which the Parties agreed to implement a uniform national legislative framework governing access to natural gas transmission and distribution pipelines between and within jurisdictions;
-

- (ee) **“NGPAC”** means the National Gas Pipelines Advisory Committee established under the Natural Gas Pipelines Access Agreement (which terms have the meaning given in the Gas Pipelines Access Law made under the *Gas Pipelines Access (South Australia) Act 1997* and applied as a law of South Australia);
- (ff) **“Parties”** means the parties to this agreement and **“Party”** means any one of them;
- (gg) **“Retail Energy Legislation”** means the *National Energy Retail (South Australia) Act 2011*, the National Energy Retail Regulations, the legislation of the other jurisdictions that applies, implements or otherwise gives effect to the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules including any associated regulations;
- (hh) **“Retail Energy Markets”** means the electricity and gas retail markets regulated by the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules;
- (ii) **“State and Territory AER Members”** means the AER members appointed by the States and Territories in accordance with clause 7.3 and Part IIIAA of the *Competition and Consumer Act 2010 (Cth)*; and
- (jj) **“State and Territory Distribution and Retail Regulatory Function”** means a function remaining with States and Territories in accordance with clause 14.7.

1.7 For the avoidance of doubt, this agreement is intended to be the Australian Energy Market Agreement as amended from time to time referred to in section 44AI of the *Competition and Consumer Act 2010 (Cth)*.

1.8 For the avoidance of doubt, where this agreement contains a reference to the *Competition and Consumer Act 2010 (Cth)*, the reference shall be construed as a

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reference to that Act as amended from time to time, including any amendments to the short title of that Act.

## 2. **OBJECTIVES**

2.1 The objectives of this agreement are:

- (a) the promotion of the long term interests of consumers with regard to the price, quality and reliability of electricity and gas services; and
  - (b) the establishment of a framework for further reform to:
    - (i) strengthen the quality, timeliness and national character of governance of the energy markets, to improve the climate of investment;
    - (ii) streamline and improve the quality of economic regulation across energy markets to lower the cost and complexity of regulation facing investors, enhance regulatory certainty, and lower barriers to competition;
    - (iii) improve the planning and development of electricity transmission networks, to create a stable framework for efficient investment in new (including distributed) generation and transmission capacity;
    - (iv) enhance the participation of energy users in the markets including through demand side management and the further introduction of retail competition, to increase the value of energy services to households and businesses;
    - (v) further increase the penetration of natural gas, to lower energy costs and improve energy services, particularly to regional Australia, and reduce greenhouse emissions; and
    - (vi) address greenhouse emissions from the energy sector, in light of the concerns about climate change and the need for a stable long-term framework for investment in energy supplies.
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3. **OPERATION OF AGREEMENT**

- 3.1 This agreement is effective when executed by all Parties.
- 3.2 The Parties will use all reasonable measures to comply with the dates in this agreement but acknowledge that any date may be altered by the unanimous agreement of the MCE Ministers.
- 3.3 This agreement may be amended upon unanimous agreement of the Parties by a notice signed by all Parties setting out the terms of the amendment and the date on which the amendment will come into force.

4. **MINISTERIAL COUNCIL ON ENERGY**

**Role of the MCE**

- 4.1 The Parties agree that the MCE is the national policy and governance body for the Australian energy market including for electricity and gas.
- 4.2 The MCE will report to COAG on the operation of this agreement and any proposed amendments.
- 4.3 The Parties agree that the MCE has responsibility for:
- (a) the national energy policy framework;
  - (b) policy oversight of, and future strategic directions for the Australian energy market;
  - (c) governance and institutional arrangements for the Australian energy market;
  - (d) the legislative and regulatory framework within which the market operates and natural monopolies are regulated;
-



- (e) longer-term, systemic and structural energy issues that affect the public interest; and
- (f) such other energy related responsibilities as are conferred by Commonwealth, State or Territory legislation and unanimously agreed by the MCE consistent with this agreement.

4.4 The Parties agree that the MCE has:

- (a) power to issue statements of policy principles to the AEMC with respect to rule-making or electricity, gas or retail market reviews;
- (b) power to recommend appointments of commissioners to the AEMC in accordance with this agreement and the *Australian Energy Market Commission Establishment Act 2004* (SA);
- (c) power to recommend certain appointments of members to the AER in accordance with this agreement and the *Competition and Consumer Act 2010* (Cth); and
- (d) any other energy related power conferred on it by agreement between the Parties or by legislation.

4.5 The Parties agree that the MCE will not be engaged directly in the day-to-day operation of the energy markets or the conduct of regulators.

### **Operation and Voting**

4.6 Except as provided for in this agreement, the Parties agree that the MCE may establish such rules concerning its operation as it considers appropriate, including rules concerning frequency of meetings, chairing, and making of decisions.

4.7 The Parties agree that:

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- (a) decisions of the MCE concerning the NEM will be made by agreement of the MCE Ministers representing Parties that are NEM jurisdictions; and
- (b) Western Australia and the Northern Territory of Australia can participate as observers in decision-making relating to the NEM.

4.8 For the avoidance of doubt, the Parties agree that all Parties can participate in decision-making relating to the operations, powers and functions of the relevant regulator under the National Gas Law, including the National Gas Rules, as appropriate.

4.9 The Parties also agree that:

- (a) decisions of the MCE concerning the Retail Energy Markets will be made by agreement of the MCE Ministers representing those Parties that are jurisdictions which apply, or have committed to apply, the National Energy Retail Law; and
- (b) any other Party can participate as an observer in decision-making relating to the Retail Energy Markets.

4.10 For the avoidance of doubt, “decision” in this clause includes a decision, resolution, direction, recommendation, appointment or other matter to be determined by the MCE.

## 5. **AUSTRALIAN ENERGY MARKET INSTITUTIONS**

5.1 The Parties agree that the Australian energy market institutions will comprise:

- (a) The AEMC, responsible for rule-making and energy market development at a national level, including in respect of the National Electricity Rules, the National Gas Rules and the National Energy Retail Rules.
  - (b) The AER, responsible for regulation and compliance at a national level, including in respect of the Australian Energy Market Legislation.
-

- (c) AEMO, responsible for the day-to-day operation and administration of both the power system and electricity wholesale spot market in the NEM, the retail electricity markets, the retail and wholesale gas markets and other support activities.

5.2 The Parties have agreed to the establishment of the AEMC and AER through this agreement and agree the conferral of functions and powers and the imposition of duties in accordance with this agreement.

## 6. **AUSTRALIAN ENERGY MARKET LEGISLATION**

6.1 The obligations of each of the Parties under this clause 6 are to be read subject to any qualifications relevant to the participation of jurisdictions under this agreement.

6.2 The Parties note that revisions to the national legislative and regulatory framework have been introduced in the NEM in the form of various amendments to the Electricity Legislation, including the establishment of the AER and AEMC. The Parties also note the enactment of the National Gas Law and the National Gas Rules, replacing the Gas Pipelines Access Law and the National Gas Code, and the enactment of the *National Gas Access (WA) Act 2009* in Western Australia. The Parties also note the transfer of functions, powers and duties of NGPAC and the Code Registrar to the AER and the AEMC and the disestablishment of NGPAC, the Code Registrar and the NET.

6.3 Each of the Parties agrees to further develop and implement a national legislative framework for the energy market, comprising the Australian Energy Market Legislation, with consistent application and effect within each Party's jurisdiction. To this end, the Parties agree to the following:

### **Commonwealth, New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory**

- (a) The Commonwealth of Australia and each of the States of New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory will submit to its Parliament Implementing Legislation with the effect of conferring functions
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and powers in respect of electricity and natural gas on the AEMC and on the AER in accordance with the terms of this agreement, and enabling the AEMC and the AER to exercise those functions and powers within their respective jurisdictions.

### **South Australia**

- (b) The State of South Australia will submit to its Parliament Implementing Legislation with the effect of:
- (i) enacting the Retail Energy Legislation to create the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules, amending the Electricity Legislation and Gas Legislation as necessary, conferring functions and powers on the AEMC and the AER in accordance with this agreement and the direction of the MCE;
  - (ii) applying the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules within South Australia and making transitional and consequential amendments to relevant State legislative instruments; and
  - (iii) making other consequential amendments to the Electricity Legislation and the Gas Legislation as may be necessary on the request of the MCE.

### **Western Australia**

- (c) The State of Western Australia will submit to its Parliament:
- (i) Implementing Legislation conferring functions and powers on the AEMC in respect of natural gas pipeline access only and enabling the AEMC to exercise its functions and powers in Western Australia's jurisdiction in accordance with this agreement;
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- (ii) if the State of Western Australia at its discretion and in consultation with the MCE elects to become subject to the jurisdiction of the AEMC and the AER in respect of electricity, of the AER in respect of natural gas or the AEMC in respect of natural gas distribution (other than gas pipeline access) and retail, such legislation as may be necessary to confer the relevant functions and powers on those bodies and for those bodies to exercise those functions and powers in Western Australia; and
- (iii) if the State of Western Australian at its discretion elects to adopt aspects of the national framework for distribution and retail regulation, such legislation as may be necessary to adopt these.

### **Northern Territory**

- (d) The Northern Territory of Australia will submit to its Parliament Implementing Legislation with the effect of:
  - (i) conferring functions and powers in respect of natural gas only on the AEMC and on the AER in accordance with the terms of this agreement, and enabling the AEMC and the AER to exercise those functions and powers in the jurisdiction of the Northern Territory of Australia; and
  - (ii) if the Northern Territory at its discretion and in consultation with the MCE elects to become subject to the jurisdiction of the AEMC and the AER in respect of electricity and the national framework for retail regulation, conferring functions and powers in respect of these matters on those bodies and enacting such legislation as may be necessary to exercise those functions and powers in the Northern Territory.

### **All Parties**

- 6.4 Each Party will submit its proposed Implementing Legislation for unanimous approval by MCE Ministers and take all reasonable measures to ensure its legislation is enacted and proclaimed expeditiously and in the form approved.
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6.5 Each Party will take all steps reasonably necessary to, in accordance with the extent of their participation under this agreement, repeal or amend (to the extent necessary to ensure consistency) any legislation which is inconsistent with, or would alter the effect, scope or operation of the Australian Energy Market Legislation or this agreement.

### **Amending Legislation and Regulations**

6.6 Australian Energy Market Legislation may only be amended, and regulations may only be made pursuant to the Australian Energy Market Legislation as amended from time to time, with the agreement of the MCE. The Party or Parties that are required to legislate to give effect to any amending legislation or to enact regulations will take all reasonable measures to secure the relevant enactment in accordance with a timetable agreed by the MCE.

6.7 A Party will not take any action that would limit, vary or alter the effect, scope or operation of the Australian Energy Market Legislation without the agreement of the MCE.

6.8 A regulation, rule, order, declaration or other instrument which confers functions or powers or imposes duties on the AER may only be made or amended under the legislation of a Party that applies, implements or otherwise gives effect to the Australian Energy Market Legislation with the unanimous agreement of the MCE.

6.9 A regulation, rule, order, declaration or other instrument which confers functions or powers or imposes duties on the AER is designated for the purposes of subsection 44AI(4) of the *Competition and Consumer Act 2010* (Cth), if it is made or amended in accordance with the requirements of clause 6.8 of this agreement.

## **7. APPOINTMENTS TO THE AEMC AND THE AER**

### **AEMC Appointments**

7.1 The appointment of Commissioners to the AEMC will be in accordance with the *Australian Energy Market Commission Establishment Act 2004* (SA) and this

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agreement. Commissioners will be appointed for a term of five years. Appointments to the AEMC will be made by the Governor-in-Council of South Australia on the recommendation of the relevant MCE Ministers, through the Minister responsible for the South Australian AEMC establishment legislation.

- 7.2 One of the State and Territory AEMC Commissioners is also to be recommended for appointment as Chair of the AEMC by agreement of at least six (6) of the States and Territories for an initial term of five years.

### **AER Appointments**

- 7.3 The appointment of Commissioners to the AER will be in accordance with the terms of Part IIIAA of the *Competition and Consumer Act 2010* (Cth) and the terms of this agreement. The AER will consist of 3 members, two of whom are to be recommended for appointment by agreement of at least five (5) of the MCE Ministers representing each of the States and Territories that have elected to be subject to the jurisdiction of the AER (“State and Territory AER Members”) and the third to be recommended for appointment by the Chair of the ACCC (“Commonwealth AER Member”). Provision may be made for the appointment of acting Members on the same basis.
- 7.4 Should Western Australia elect to become subject to the jurisdiction of the AER, the two State and Territory AER Members (including acting appointments) are to be recommended for appointment by agreement of at least six (6) of the MCE Ministers representing each of the States and Territories.
- 7.5 Members will be appointed for a term of up to five years. Appointments to the AER will be made by the Governor-General-in-Council on the recommendation of the relevant MCE Ministers, through the Minister responsible for the Commonwealth AER legislation.
- 7.6 A Member will be recommended for appointment as Chair of the AER by agreement of the Commonwealth MCE Minister and a simple majority of the MCE Ministers representing Parties that are subject to the jurisdiction of the AER. The first Chair will be appointed for a term of three years with an option for extension.
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8. **FUNCTIONS OF THE AEMC**

8.1 The AEMC has or will be given the following functions:

- (a) all rule-making and market development functions in respect of the NEM electricity wholesale market, distribution and transmission networks, including undertaking changes to the National Electricity Rules and initiating rule changes of a minor administrative nature;
  - (b) all rule-making and market development functions in respect of the natural gas wholesale markets, distribution and transmission networks, as regulated by the National Gas Law, including undertaking changes to the National Gas Rules and initiating rule changes of a minor administrative nature;
  - (c) rule-making and market development functions conferred by jurisdictions in respect of the Retail Energy Markets in accordance with clauses 6 and 14, including undertaking changes to the National Energy Retail Rules and initiating rule changes of a minor administrative nature;
  - (d) undertaking electricity, gas and retail energy market reviews;
  - (e) complying with statements of policy principles issued by the MCE provided that these statements of policy principles are:
    - (i) consistent with the provisions in the *Australian Energy Market Commission Establishment Act 2004* (SA), National Electricity Law, National Energy Retail Law and the National Gas Law;
    - (ii) given in writing;
    - (iii) made in respect of either proposed rule-making or electricity, gas or retail energy market reviews;
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- (iv) where made in respect of the NEM are made by agreement of the MCE Ministers representing the Parties that are NEM jurisdictions;
  - (v) where made in respect of the Retail Energy Markets are made by agreement of the MCE Ministers representing the Parties that are jurisdictions which apply, or have committed to apply, the National Energy Retail Law; and
  - (vi) where made in respect of natural gas are made by agreement of MCE Ministers; and
- (f) such other functions as may from time to time be agreed unanimously by the MCE Ministers and are conferred by legislation.

8.2 The Parties agree that the AEMC's functions in relation to electricity as described in this clause will be contained in the NEL, the National Electricity Rules and the function of providing advice to the MCE in section 6 of the *Australian Energy Market Commission Establishment Act (SA)*.

8.3 The Parties agree that the AEMC's functions in relation to natural gas as described in this clause will be contained in the National Gas Law, the National Gas Rules and the function of providing advice to the MCE in section 6 of the *Australian Energy Market Commission Establishment Act (SA)*.

8.4 The Parties agree that the AEMC's functions in relation to the Retail Energy Markets as described in this clause will be contained in the National Energy Retail Law and the National Energy Retail Rules and the function of providing advice to the MCE in section 6 of the *Australian Energy Market Commission Establishment Act (SA)*.

8.5 The Parties agree that active participation of both energy users and suppliers is important to achieve effective competition and maximise the benefits of market reform. To assist in achieving this:

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- (a) the structured and transparent rule change process to be followed by the AEMC set out in the NEL is incorporated, as appropriate, in the National Gas Law and the National Energy Retail Law;
- (b) end-user and industry consultation in developing rule changes is strengthened in the National Gas Law as has occurred in the NEL; and
- (c) the AEMC will be required to consider the long term interests of consumers in making rule change decisions in the National Gas Law and the National Energy Retail Law as in the NEL.

## 9. **FUNCTIONS OF THE AER**

9.1 The AER has or will be given the following functions:

- (a) economic regulation of the NEM, including:
    - (i) electricity transmission regulatory functions;
    - (ii) monitoring and reporting on compliance with the NEL and the National Electricity Rules; and
    - (iii) enforcing the NEL and the National Electricity Rules;
  - (b) no later than 1 January 2007, economic regulation of gas transmission networks and distribution networks covered by the Gas Legislation for all Parties subject to the jurisdiction of the AER, and in particular enforcing the National Gas Law and National Gas Rules;
  - (c) economic regulation of NEM electricity distribution networks for the Parties that are NEM jurisdictions in accordance with clauses 6 and 14;
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- (d) further regulatory functions related to natural gas distribution networks in accordance with clause 14 for the Parties subject to the jurisdiction of the AER other than those distribution functions transferred by clause 9.1(b);
- (e) regulation of the Retail Energy Markets including:
  - (i) exercising regulatory functions or powers under the National Energy Retail Law and the National Energy Retail Rules;
  - (ii) monitoring and reporting on compliance with the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules; and
  - (iii) enforcing the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules; and
- (f) such other functions as may from time to time be agreed unanimously by the MCE Ministers representing the Parties that have elected to be subject to the jurisdiction of the AER and are conferred by legislation.

9.2 The Parties agree that the AER's functions in relation to electricity as described in this clause will be contained in the NEL and the National Electricity Rules.

9.3 The Parties agree that the AER's functions in relation to natural gas as described in this clause will be contained in the National Gas Law and the National Gas Rules.

9.4 The Parties agree that the AER's functions in relation to the Retail Energy Markets as described in this clause will be contained in the National Energy Retail Law and the National Energy Retail Rules.

9.4A Nothing in clauses 9.2, 9.3 or 9.4 of this agreement is taken to limit any other conferral of functions or powers or imposition of duties on the AER under this agreement.

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9.5 The AER is a constituent part of the ACCC but is a separate legal entity located separately from the ACCC and:

- (a) an appointment to the position of the State and Territory AER Member will also operate as an appointment of that person as an Associate Member of the ACCC which role will be advisory only;
- (b) the appointment process identified in the Conduct Code Agreement of April 1995 will not apply to the appointment of the State and Territory AER Members as Associate Members of the ACCC;
- (c) the staff required by the AER will be engaged by the ACCC and made available to the AER under arrangements agreed by the AER and ACCC; and
- (d) the CEO of the AER will be chosen by the AER Members following agreement with the ACCC.

9.6 All decisions at meetings of the AER will be made as follows:

- (a) decisions at meetings of the AER will require the unanimous agreement of the members present and voting. However, it is intended that the AER voting rule will change to a requirement for simple majority decisions when the AER assumes responsibility for national regulation of distribution and retailing as provided in clauses 9.1(c) and (d);
  - (b) a quorum for AER meetings is constituted by 2 members and must include the Chair and the Commonwealth AER Member; and
  - (c) provision will be made for AER resolutions and decisions to be taken without a meeting if all three (3) members agree to the resolution or decision in writing and sign the document.
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9.7 The Parties agree that for the purpose of Part IIIAA of the *Competition and Consumer Act 2010* (Cth):

- (a) each State and Territory may, through its Australian Energy Market Legislation (as amended from time to time), confer functions and powers, and impose duties on the AER; and
- (b) these functions, powers and duties shall be performed and exercised by the AER in accordance with the Australian Energy Market Legislation (as amended from time to time).

9.8 For the avoidance of doubt, for the purpose of Part IIIAA of the *Competition and Consumer Act 2010* (Cth), the Parties agree that the AER, in performing any of its functions or exercising any of its powers conferred under the National Energy Retail Law and the National Energy Retail Rules or under any other Australian Energy Market Legislation, may perform those functions and exercise those powers to the full extent necessary and is not constrained by any limitation imposed under clause 14.7 or any other clause of this agreement.

9.9 For the purposes of clauses 9.7 and 9.8 of this agreement, a reference to ‘Australian Energy Market Legislation’ is taken to include any regulation, rule, order, declaration or other instrument that is made or has effect under the legislation of a Party that applies, implements or otherwise gives effect to the Australian Energy Market Legislation and which is made or amended in accordance with the requirements of clause 6.8 of this agreement.

## 10. **FUNDING ARRANGEMENTS**

10.1 The Commonwealth of Australia agrees to fully fund the AER, including in relation to all energy distribution and retail regulatory functions transferred to the AER, in accordance with the terms of this agreement.

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10.2 The States and Territories that are Parties to this agreement agree to fully fund the AEMC, including in relation to its rule-making and market development functions for both electricity and natural gas, on the basis of the cost sharing arrangements agreed to by States and Territories and embodied in a funding agreement between these jurisdictions.

11. **DISSOLUTION OF NGPAC, THE CODE REGISTRAR, NECA AND THE NET**

11.1 The Implementing Legislation will effect the transfer of functions, powers and duties of NGPAC and the Code Registrar to the AER and the AEMC on dates to be agreed between the Parties and consistent with the timetables in clauses 8 and 9 for commencement of the exercise of relevant functions by the AER and the AEMC.

11.2 Upon completion of the transfer of the functions, powers and duties of NGPAC to the AEMC, the Parties will take all steps necessary to disestablish the NGPAC and the Code Registrar in accordance with this agreement.

11.3 Upon resolution of the MCE Ministers representing Parties that are NEM jurisdictions, the Parties will take all necessary steps to wind up NECA in accordance with the *Corporations Act 2001* (Cth) and to disestablish the NET.

12. **REVIEW OF MINISTERIAL, AEMC AND AER DECISIONS**

12.1 The Implementing Legislation will have effect that, on a date or dates to be agreed between the Parties:

(a) decisions of the AEMC will be subject to judicial review principally by the Supreme Court of each of the States and Territories (without affecting the inherent jurisdiction of those Courts to hear judicial review proceedings); and

(b) decisions of the AER will be subject to judicial review by the Federal Court.

12.2 By 1 January 2007, the Parties agree that the MCE will consult with interested parties, decide on the extent (if any) to which decisions of Ministers in relation to coverage in

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the Gas Legislation, the AEMC and the AER should be subject to merits review and have in place Implementing Legislation giving effect to the MCE decision.

13. **NATIONAL APPROACH TO ENERGY ACCESS**

13.1 The Parties note that third parties have legal rights for access to energy infrastructure services at transmission and distribution levels on reasonable terms and conditions that promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.

13.2 The Parties confirm their commitment to a national approach to energy access whereby:

- (a) there is national consistency within the gas access regime and within the NEM access regime, in accordance with this agreement; and
- (b) to the extent feasible and where effective regulation is not impeded, there should be consistency and harmonisation between electricity and gas access regimes such that investment in, and use of, energy is not distorted by differing regulatory regimes.

13.3 The Parties agree to take all reasonable measures in accordance with each Party's participation under clause 6 to ensure that the energy access regimes embodied in the Australian Energy Market Legislation are certified as effective access regimes and remain certified.

13.4 The Parties agree that the relevant Parties will make coordinated and concurrent applications for certification of the current NEM access regimes by 1 January 2007 and for the gas access regimes by 1 July 2007.

13.5 The Parties agree that there will be consultation with the NCC on substantial modifications to gas and electricity access regimes.

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13.6 The Parties agree to limit the introduction of new derogations varying the gas access or NEM access regimes to ensure national consistency as described in clause 13.2 is achieved. However, the Parties agree that any new variation of the access related parts of the Australian Energy Market Legislation will be:

- (a) contained within, and be consistent with the objectives in the Australian Energy Market Legislation; and
- (b) where varying from the operation of the National Electricity Rules or National Gas Rules, subject to the rule making process managed by the AEMC as currently provided for in sections 88 and 89 of the NEL or the equivalent sections to be contained in the National Gas Law as appropriate; or
- (c) where varying the effect, scope or operation of an obligation in the NEL or National Gas Law, subject to the prior unanimous agreement of MCE Ministers.

13.7 In relation to existing derogations varying the gas access or NEM access regimes, the Parties agree the MCE will:

- (a) request advice from the AEMC on whether the existing derogations are consistent with the test in section 88 of the NEL and the matters set out in section 89 of the NEL, or the equivalent sections in the National Gas Law, as appropriate; and
- (b) prior to seeking certification under this agreement, review those derogations which the AEMC advises are inconsistent and agree as to whether they continue, are phased out or are time-limited, as appropriate;

and the Parties agree to take all reasonable measures to implement the outcome of this clause 13.7 by appropriate legislative amendments or rule change applications.

13.8 Western Australia's gas institutional regulatory arrangements will be subject to independent review in the event that a significant inter-state pipeline is to be constructed

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to or from another jurisdiction or five years from the date Western Australia signs this agreement, whichever is the earlier and will not be reviewed under clause 13.7.

13.9 Western Australia will take all reasonable measures to ensure its electricity access regime embodied in the *Electricity Networks Access Code 2004* developed under the *Electricity Industry (Western Australia) Act 2004* is certified as an effective access regime and continues to remain certified.

13.10 The Parties agree that if the access regimes for all the natural gas and electricity services which are potentially subject to declaration under section 44H of the *Competition and Consumer Act 2010* (Cth) are not certified by 1 January 2008 the MCE will report to COAG on the steps necessary to achieve certification.

13.11 The Commonwealth agrees to repeal regulation 4 of the Australian Energy Market Regulations 2005 upon the certification of all NEM electricity access regimes.

13.12 Nothing in this agreement is intended to affect the proper exercise of statutory powers under Part IIIA of the *Competition and Consumer Act 2010* (Cth).

#### 14. **THE NATIONAL FRAMEWORK FOR DISTRIBUTION AND RETAIL**

14.1 The Parties agree that the national framework for the regulation of distribution and retail activities, including the passage of the Retail Energy Legislation and the necessary amendments to the Electricity Legislation and Gas Legislation to transfer the National Distribution and Retail Regulatory Functions, as set out in Annexure 2, to the AEMC and AER, covering both electricity and natural gas, will occur in accordance with the terms of this agreement.

14.1A The Parties agree that the passage of the Retail Energy Legislation and the necessary amendments to the Electricity Legislation and Gas Legislation (either at once or progressively) will occur at a date no later than 30 June 2013 or as agreed by the MCE.

14.2 The Parties agree that the initial rules governing the performance by the AEMC and AER of the National Distribution and Retail Regulatory Functions will be:

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- (a) developed by the MCE and AEMC, as appropriate, in consultation with interested parties;
- (b) developed consistent with the rule making criteria currently in the NEL, the National Gas Law and the equivalent criteria to be included in the National Energy Retail Law; and
- (c) made by Ministerial orders (either at once or progressively) as agreed by the MCE, but will then be subject to the AEMC rule change process.

14.3 The Parties agree that the economic regulation of distribution networks will be transferred to the AER on 1 January 2007. All electricity and gas distribution revenue reviews that begin following that date will be determined by the AER according to national rules, on the expiry of the current determinations. The current determinations will be enforced under the existing rules.

- (a) Notwithstanding the above, a Party may elect to transfer to the AER an electricity revenue determination process already underway on 1 January 2007, with the agreement of the Commonwealth MCE Minister.

14.4 The parties agree that the AEMC and AER will have a local presence in each State and Territory in which they have jurisdiction which will include the following minimum obligations:

- (a) that consultation on major distribution and retail regulatory decisions by the AER and AEMC includes an opportunity for interested parties in the affected State or Territory to seek information and make representations to AER members and AEMC commissioners in that State or Territory.
  - (b) that the AER and AEMC meet in each State and Territory in which they have jurisdiction at least once every eighteen months.
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- (c) that the AER establish and maintain an office in each State and Territory in which they have jurisdiction (unless otherwise agreed by the relevant State or Territory MCE Minister).

14.5 In order to ensure national consistency, the Parties agree, to the extent possible and where effective regulation is not impeded, that the initial rules will:

- (a) provide common regulatory arrangements for the electricity and natural gas sectors;
- (b) improve the transparency of the regulatory arrangements;
- (c) provide an appropriate level of regulatory certainty;
- (d) reduce overlap between energy specific and generic regulation; and
- (e) minimise the regulatory compliance burden and associated cost.

14.6 The Parties agree that the implementation of the National Distribution and Retail Regulatory Functions will also include:

- (a) mechanisms for account to be taken of the impact of State and Territory Distribution and Retail functions on the National Distribution and Retail Regulatory Functions where appropriate;
  - (b) the removal of all redundant State and Territory levies, fees and other charges associated with these functions when these functions are transferred;
  - (c) at the discretion of each Party, State or Territory levies to pay for the costs of the AEMC;
  - (d) jurisdictional derogations related to the National Distribution and Retail Regulatory Functions to be clearly specified, with provision for phasing out as appropriate according to identified timelines; and
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- (e) defined and time-limited transitional arrangements where necessary including those to enable Queensland and Tasmania to implement full retail contestability through jurisdictionally determined retail rules.

14.7 The Parties agree that the following State and Territory Distribution and Retail Regulatory Functions remain the responsibility of each State or Territory:

- (a) community service obligations (such as those imposed on retailers and distributors) which are to be clearly specified and transparently publicly funded;
- (b) measures to maintain existing distribution tariff equalisation schemes that do not impede competition such that retailers are unable to remove the effect of those measures;
- (c) land use, planning and environmental approvals or policies; and
- (d) those described as 'State and Territory' in Annexure 2.

14.8 The Parties agree that each Party may transfer any State or Territory Distribution and Retail Regulatory Function in Annexure 2 to the AER (with the agreement of the Commonwealth) and/or AEMC so long as they are governed by harmonised rules for all those Parties who have transferred each function.

14.9 In accordance with each Party's participation in clause 6, each Party agrees to use all reasonable measures to secure passage of the necessary legislative amendments to transfer the National Distribution and Retail Regulatory Functions according to the time frames in clauses 14.1, 14.1A, 14.2 and 14.3.

- (a) The MCE will consider the content of all distribution and Retail Energy Legislation required by clause 14 and agree on a timeframe for its implementation in accordance with the terms of this agreement.
  - (b) Each Party will submit its proposed Implementing Legislation for approval by MCE and take all reasonable measures to ensure its legislation is enacted and proclaimed expeditiously and in the form approved.
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- (c) Each Party will use all reasonable measures to repeal or amend (to the extent necessary to ensure national uniformity) any legislation, codes or other guidelines which are inconsistent with, or would limit, vary or alter the effect, scope or operation of the National Distribution and Retail Regulatory Functions.

### **Retail Price Regulation**

14.10 The Parties reaffirm their commitment to full retail contestability in accordance with the National Competition Policy Agreements.

14.11 All Parties agree to phase out the exercise of retail price regulation for electricity and natural gas where effective retail competition can be demonstrated and that:

- (a) the AEMC will assess the effectiveness of competition for the purpose of retention, removal or reintroduction of retail energy price controls, whereby:
- (i) the criteria for assessing the effectiveness of competition will be developed by the MCE in consultation with the AEMC and other interested parties based on the principles set out in Annexure 3 and will be formalised in a Statement of Approach to be approved by the MCE;
  - (ii) the assessment process will commence from 1 January 2007 starting with those jurisdictions most likely to have effective competition; and
  - (iii) reviews will be conducted according to a schedule determined by the MCE, which must be published and may be amended by the MCE;
  - (iv) reviews will be repeated, except in respect of Parties which have phased out retail price regulation, according to the schedule determined by the MCE and until all retail energy price controls are phased out; and
  - (v) the AEMC may conduct a review within a jurisdiction that has phased out retail price regulation at the request of the relevant Party;
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- (b) social welfare and equity objectives will be met through clearly specified and transparently funded State or Territory community service obligations that do not materially impede competition; and
- (c) the AEMC will publicly report on its assessments of effective competition in which it will provide advice to each jurisdiction on their compliance with clauses 14.10 – 14.14 and on:
  - (i) ways to phase out the exercise of retail price regulation if competition is determined to be effective and an appropriate timeframe; or
  - (ii) ways to promote the growth of effective competition for those users or areas of a jurisdiction which do not enjoy effective competition.

14.12 The Parties agree that where competition is not yet effective for a market, group of users or a region:

- (a) retail energy price controls (including those furthering social welfare and regional equity objectives) can be imposed by the relevant State or Territory but should, to the extent possible, not hinder further development of competition and ensure that the benefits outweigh the costs, and costs are minimised; and
- (b) retail energy price control will be retained under the existing arrangements or be transferred to the AER and the AEMC at the discretion of each jurisdiction (such a transfer would not include the funding of community service obligations).

14.13 Where competition has been found to be effective under clause 14.11, the Parties agree to implement the phase out of the exercise of retail price regulation in accordance with clauses 14.14 and 14.15

14.14 The Parties agree that the phase out of the exercise of retail price regulation under clause 14.13:

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- (a) need not include the removal of ‘obligation to supply’ arrangements;
- (b) may involve a period of price monitoring and/or price agreements with retailers under appropriate oversight arrangements; and
- (c) does not prevent the exercise of a reserve price regulation power by the State or Territory where effective competition for categories of users ceases, provided that the power is only exercised in accordance with a regulatory methodology promulgated by the AEMC, and is subject to review by the AEMC of the effectiveness of competition in accordance with clause 14.11.

14.15 The Parties further agree that, for the purposes of the phase out of the exercise of retail price regulation under clause 14.13, Parties are to provide a public response to advice from the AEMC under clause 14.11(c)(i) within 6 months of receiving the advice.

14.16 The functions and powers conferred on the AEMC by clauses 14.11, 14.14 and 14.15 are taken to be conferred on the Economic Regulation Authority for the State of Western Australia until such time as Western Australia elects to join the NEM or the Economic Regulation Authority is disestablished. The Economic Regulation Authority will conduct these functions and powers in consultation with the AEMC and in accordance with the national consistent methodology developed by the AEMC.

14.17 The Parties agree that, where retail prices are regulated, energy cost increases associated with the Carbon Pollution Reduction Scheme and the Renewable Energy Target shall be passed through to end-use consumers.

15. **MOU BETWEEN AER, AEMC AND ACCC AND MOU BETWEEN AEMC AND NCC**

15.1 The Parties acknowledge a Memorandum of Understanding between the AER, the AEMC and the ACCC that addresses consultation, co-operation, rule change processes and staffing arrangements will be provided to the MCE for consideration and endorsement.

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15.2 The MCE will not endorse the Memorandum of Understanding if it does not address consultation between the AEMC and the ACCC on competition issues during rule-making and on access issues until certification of all energy access regimes as effective.

15.3 The Parties acknowledge a Memorandum of Understanding between the AEMC and the NCC that addresses consultation on rules relevant to certification will also be provided to the MCE for consideration and endorsement.

16. **WITHDRAWAL OF PARTIES**

16.1 If a Party does not comply with any one or more of its obligations under this agreement that Party will withdraw from this agreement if all of the other Parties give written notice requiring it to do so.

16.2 A Party may withdraw from this agreement by giving 12 months notice in writing to each of the other Parties of its intention to do so, and all of the Parties will then negotiate in good faith in relation to the terms of withdrawal of the Party that has given notice, including the date on which the Party will cease to be a Party, and any legislative changes and other arrangements that may be necessary as a consequence of the withdrawal.

16.3 If a Party withdraws, this agreement will continue in force between all of the remaining Parties.

16.4 A Party may rejoin as a Party to this agreement with the unanimous agreement of the other Parties, if it has first indicated that it is prepared to adhere to the obligations in this agreement.

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## ANNEXURE 1

### MCE REPORT TO COAG – SUMMARY OF RECOMMENDATIONS

The MCE recommends the following reform package to COAG:

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| <b>Governance<br/>of Energy<br/>Markets</b>            | <ul style="list-style-type: none"><li>• The Ministerial Council on Energy to subsume the NEM Ministers Forum on 1 July 2004, establishing a single energy market governance body. Transition measures to include:<ul style="list-style-type: none"><li>- Commonwealth and Tasmania to immediately join the NEMMF as full members;</li><li>- WA and NT to participate in the NEMMF as observers.</li></ul></li><li>• A national legislative framework to be agreed, and developed on a collaborative basis between the Commonwealth, States and Territories, under a new inter-governmental agreement.</li></ul>  |
| <b>Economic<br/>Regulation<br/>And Rule<br/>Making</b> | <ul style="list-style-type: none"><li>• Two new statutory commissions to be established on 1 July 2004, funded by industry levy:<ul style="list-style-type: none"><li>– Australian Energy Market Commission (AEMC), with responsibility for rule-making and market development;</li><li>– Australian Energy Regulator (AER), with responsibility for market regulation.</li></ul></li><li>• The AER to be a constituent part of the ACCC but operate as a separate legal entity. State jurisdictions to appoint two AER Members, with the third drawn from the ACCC. Chair to be agreed by both the Commonwealth and majority of states/territories.</li><li>• The AEMC to also be a separate legal entity, accountable to and subject to the power of policy direction from the MCE. The AEMC to comprise three Members, with two (including the Chair) appointed by the states.</li><li>• The new bodies to initially be responsible for electricity wholesale and transmission in the connected (NEM) jurisdictions, extended in 2005 to include gas transmission for all other than WA (in accordance with the <i>COAG Natural Gas Pipeline Access Agreement of 1997</i>). Provision to be made for WA and NT to join for electricity, and WA for gas under the AER, by agreement. NECA to be abolished after establishment of AER and AEMC.</li></ul> |
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- The ACCC to retain responsibility for competition regulation under Part IV of the *Trade Practices Act*, for competition-related code-change authorisations under Part VII, and for industry access code approvals under Part IIIA.
- The new regulatory arrangements to provide for consultation and cooperation between the AEMC, AER and ACCC. The code change and authorisation process to be streamlined, to avoid duplication. The AEMC and AER to have specific consultation obligations. End-user and industry consultation in developing code changes to be strengthened.
- Agreement in-principle to development of a national approach to energy access under the *TPA*, covering electricity and gas transmission and distribution, to be considered by the MCE in 2004. Streamlined procedures for ACCC approvals and acceptance of access-related code changes under Part IIIA of the *TPA* to be developed and agreed by the MCE.
- Agreement that the AER will be responsible for the regulation of distribution and retailing (other than retail pricing), following development of an agreed national framework. Work will commence on the national framework in 2004, and the MCE will consider the outcome in 2005. Following MCE agreement on the framework, the AER will assume responsibility for national regulation of distribution and retailing (other than retail pricing) by 2006. Any jurisdiction may, at their discretion, opt to transfer responsibility for retail pricing to the AER once it has assumed distribution and retail responsibilities.

**Electricity  
Transmission**

- A new NEM transmission planning function to be developed, including an Annual National Transmission Statement (commencing in 2004) and a last resort power to direct that a project be subjected to the regulatory test.
  - A new regulatory test for transmission to include the full economic benefits of increased competition, to be implemented in July 2004.
  - A new process to be developed for assessing wholesale market regional boundaries, while maintaining jurisdictional boundaries for retail customer pricing. Initial report in June 2004.
  - Improvements to inter-regional financial trading arrangements, to be evaluated in conjunction with future arrangements for regional boundaries.
  - Market-based incentives for transmission performance to be developed, by July 2004.
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- Conclude the review of transmission pricing arrangements, for implementation in 2004.
- Removal of existing biases in favour of unregulated transmission investment, in mid 2004. The code changes to recognise and protect the rights of existing investors in market transmission services.

**User  
Participation**

- In all jurisdictions where full retail competition is operating, each jurisdiction to align their retail price caps with costs, and periodically review the need for price caps.
- The MCE to examine options for a demand-side response pool in the NEM, and consider the costs and benefits of introducing interval metering.

**Natural Gas  
Penetration**

- The MCE welcomes the Productivity Commission review of the National Gas Access Regime, and will be responding to the recommendations in 2004.
- The MCE notes the direction of the COAG review to preclude future state exemptions from joint marketing provisions. Proponents of future arrangements for the joint marketing of gas, which raise competition concerns, may seek authorisation by the ACCC on a case by case basis. The Ministerial Council on Mineral and Petroleum Resources (MCMPR) is considering this issue.
- The MCE notes that the MCMPR is also considering the appropriate treatment of unproduced areas in existing production licences that are due for renewal, and to review the gas industry's principles for third party access to upstream facilities, and to advise the MCE of its conclusions.

**Greenhouse  
Emissions**

- The MCE to work closely with the COAG High Level Group on Greenhouse to address greenhouse gas emissions from the energy sector on a national basis.
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## ANNEXURE 2

### DISTRIBUTION AND RETAIL FUNCTIONAL ALLOCATION

#### National Functions

This list sets out the activities which will form part of the national distribution and retail regulatory framework for electricity and gas, which is to be developed by the MCE in accordance with this agreement. The regulatory framework will be regulated through the AEMC and the AER.

1. **Distribution economic regulation** - services to be regulated, the form of regulation and tariff setting.
  2. **Service performance incentive scheme** – for network service performance standards (as set by the jurisdiction where elected), and customer service performance standards, linked to economic regulation.
  3. **Information disclosure** - information requirements for the AER to undertake its regulatory functions.
  4. **Connection and capital contribution requirements** - new connections charges and capital works contributions.
  5. **Distribution network expansion** - determining when extensions are part of a regulated service and how charges are levied.
  6. **Distributor connection service obligations** - provision of connection and related services to users and the contractual relationship with retailer and customer.
  7. **Distributor small customer disconnection/reconnection** - allowable disconnections or reconnections of small customers including those arranged by retailers.
  8. **Distributor interface with other market participants** - determining the nature of distributor-retailer and distributor-embedded generator relationships including use of system.
  9. **Metering** - obligations to install, maintain and read meters.
  10. **Retailer obligation to supply to small customers** - obligation on retailers to supply customers at a default tariff with minimum terms and conditions.
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11. **Retailer failure arrangements** - arrangements to ensure customer supply continuity and wholesale market financial integrity.
12. **Retailer - small customer market contracts** - minimum contract terms and conditions.
13. **Retailer - small customer marketing** - marketing conduct obligations.
14. **Balancing regime, settlements, customer transfer** - balancing, settlement and contestable customer churn arrangements to ensure accurate financial reconciliation would be retained by independent market administrators.
15. **Distributor and retailer general business authorisations** – where necessary for matters other than technical capability and safety.

**State and Territory Functions (current responsibility retained)**

16. **Distributor technical/safety business authorisation** - licensing and authorisation schemes that require demonstration of technical capability.
  17. **Small customer dispute resolution** - obligation for distributors and retailers to have internal dispute resolution schemes and participate in independent dispute resolution (Ombudsman) schemes.
  18. **Load shedding and curtailment** - customer supply reduction sequence to maintain system security.
  19. **Service reliability standards** – standards to ensure network security and reliability.
  20. **Metering** – policies on the type of meters required for specific customer classes, accredited service provider arrangements, and load profile arrangements.
  21. **Distribution and retail service areas** – specification of geographical areas in which responsibilities/obligations apply.
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### ANNEXURE 3

## INDICATORS OF COMPETITION IN RETAIL ENERGY MARKETS

1. **Customer experiences** – for competition to be effective, customers must be aware of different retailers and perceive that they can make price comparisons – data compiled from customer surveys.
  2. **Customer switching** – transfer rates can indicate customer interest and activity in the competitive market – available from market data.
  3. **Price and non-price offers** – evidence that suppliers are actively competing by offering innovative products that meet customer needs – compiled from retailer surveys and ‘mystery shopper’ surveys.
  4. **Entry and exit of suppliers** – numbers of competing suppliers and changes in the numbers of suppliers can indicate the degree of competition – available from market data.
  5. **Market shares** – market shares and changes in market shares are an indicator of market structure and dynamics – available from market data.
  6. **Barriers to entry** – the threat of new entry creates pressures to reduce prices and improve service – to be ascertained by analysis.
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**ANNEXURE 4**  
**CONTINUING OBLIGATIONS FROM THE NATURAL GAS**  
**PIPELINES ACCESS AGREEMENT 1997**

The Parties agree that the following obligations from the Natural Gas Pipelines Access Agreement will still be operative after the commencement of the National Gas Law.

**13. FRANCHISING PRINCIPLES**

“Clause 13.1 Each Party agrees to conform to the Franchising Principles contained in Annex E and put in place arrangements at the time its Access Legislation is enacted to remove, phase out or reform existing exclusive franchise arrangements by 1 September 2001 (except in the case of Kalgoorlie-Boulder in Western Australia in relation to which a ten year non-renewable franchise for the distribution system and a ten year non-renewable franchise for the trading of gas on the system, have been awarded under a competitive tender process and which need not be removed, phased out or reformed until the end of the ten year term).”

**14. LICENSING PRINCIPLES**

“Clause 14.1 Each Party agrees to conform to the Licensing Principles contained in Annex F and put in place arrangements at the time its Access Legislation is enacted to remove, phase out or reform existing licensing arrangements incompatible with the Licensing Principles or the Gas Pipelines Access Law (including the Access Code) by 1 September 2001 (or 1 July 2002 in the case of Western Australia).”

**ANNEX E**

**FRANCHISING PRINCIPLES**

“The following are the Franchising Principles:

1. By-pass to, and interconnection in order to supply gas to, contestable customers should be allowed if the operator has the necessary operating licences and can meet the requirements of the relevant network operating procedures (contestable customers being customers who are able to choose their supplier of gas from any appropriately licensed retailer or other supplier in accordance with the phase in timetable as contained in Annex H).

2. No new exclusive franchises should be granted for the sale of gas in a geographic area or through a specific facility except for a prospective natural gas pipeline service which meets all of the following criteria:

(a) a franchise for the sale of gas must be limited to significant "greenfields" projects (infill and extensions to existing networks would be excluded) where there is evidence that investment in pipelines would not otherwise occur, or the services provided to some customer classes would be severely limited, and the franchise has been justified on the balance of public interest;

(b) any retail franchise applies to specific small use customer classes and is limited in duration and non-renewable:

- limited to customer classes that normally fall into a consumption range of no more than 1 terajoule per year;
- limited to a period from the grant of the franchise of normally no more than 5 years, consistent with the maximum period for grant of a franchise for provision of Gas Pipeline services (but in any event no more than 10 years);

(c) the pipeline service operator is selected through a competitive tender process, Prospective Users are consulted, where possible, in determining the conditions of the franchise, and any other conditions that are considered necessary to protect the public interest are met;

(d) consideration is given to the longer term benefits and feasibility of encouraging market structures which enhance competition by splitting the franchise into smaller or multiple franchise areas to be allocated to competing bidders; and

(e) there is prices oversight, by an independent body, for franchise customers over the duration of any proposed franchise.

3. No new exclusive franchises should be granted for provision of natural gas pipeline services in a geographic area or through a specific facility except for a prospective natural gas pipeline service which meets all of the following criteria:

(a) the pipeline service will be provided through an integrated pipeline network which will require systematic development over a significant period in order to achieve the lowest expected long term cost;

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(b) there is a strong likelihood that in the absence of an exclusive franchise the pipeline network will not be developed in line with the lowest expected long term cost;

(c) the pipeline service operator is selected through a competitive public tender process, prospective users are consulted in determining the conditions of the franchise, and any other conditions that are considered necessary to protect the public interest are met; and

(d) the exclusive franchise is limited to a period of not more than 5 years, and is non-renewable.”

## **ANNEX F**

### **LICENSING PRINCIPLES**

“The licensing requirements and conditions will be consistent with the requirements of CoAG agreements in relation to free and fair trade in gas (for example, the agreement to remove legislative or regulatory barriers to both inter- and intra-jurisdictional trade in gas).

Specifically, the Parties agree to the following Licensing Principles:

1. Licences to operate natural gas pipelines to be unbundled from any other type of licence and open to all appropriately qualified pipeline service operators;
  2. Licensing will not be used to restrict the construction or operation of pipelines that could deliver gas to the same market as a licensed pipeline;
  3. A licence will not limit the services an operator may provide;
  4. By-pass to, and inter-connection in order to supply gas to, contestable customers should be allowed if the operator has the necessary operating licences and can meet the requirements of the relevant network operating procedures (contestable customers being customers who are able to choose their supplier of gas from any appropriately licensed retailer or other supplier in accordance with the phase in timetable as contained in Annex H);
  5. Licence conditions may include an obligation to connect customers onto the natural gas pipeline network. This may include an obligation to undertake minor or infill extensions to the geographic range of the network;
  6. There will be full transparency in decision-making on licensing through public notification and accountability for decisions.”
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