

Independent Panel questions to the AER

Date of correspondence: 8 August 2018

Correspondence between: Natalia Southern (Chair of Panel), and Rate of Return team–AER

*Please note the Panel's requests/comments are in **black** text and the AER's responses in **blue**.*

1. Binding rate of return instrument

- The AER provided the panel with the following update.
 - The [bill to implement a binding rate of return instrument](#) within the National Electricity Law (NEL) and National Gas Law (NGL) has now been tabled in South Australia's Parliament. Amongst other things, this bill specifies the transitional requirements for the ongoing review of the rate of return guideline that will apply if the bill is passed in South Australia.
 - While the NEL and National Gas Law NGL are State/Territory legislation, they are uniform in each State/Territory. South Australia is the "lead legislature", meaning that changes to the NEL or NGL are first made in the South Australian parliament and are then adopted by other states and territories. This occurs automatically under the other State's or Territory's law in the jurisdictions we regulate.
 - In each State/Territory the NEL or NGL is a schedule to an act of parliament in that State/Territory. For example, in South Australia the NEL is a schedule to the National Electricity (South Australia) Act 1996 and the NGL is a schedule to the National Gas (South Australia) Act 2008.
 - The implementation of a binding rate of return instrument will also require consequential changes to the National Electricity Rules (NER) and National Gas Rules (NGR). These consequential changes are currently under development.

Attachment 1: Binding Instrument

South Australia

Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Bill 2018

A BILL FOR

An Act to amend the *National Electricity (South Australia) Act 1996* and the *National Gas (South Australia) Act 2008*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *National Electricity Law*

- 4 Amendment of section 2—Definitions
- 5 Amendment of section 15—Functions and powers of AER
- 6 Insertion of Part 3 Division 1B
 - Division 1B—Rate of return instrument
 - Subdivision 1—Preliminary
 - 18F Definitions
 - 18G Rate of return instrument has force of law
 - 18H Rate of return instrument is binding on AER and network service providers
 - Subdivision 2—Requirement to make rate of return instrument
 - 18I AER to make rate of return instrument
 - 18J Content of rate of return instrument
 - Subdivision 3—Consultation requirements
 - 18K Process for making rate of return instrument
 - 18L Other matters AER must have regard to in making instrument
 - 18M Requirements before publishing draft instrument
 - 18N Consumer reference group
 - 18O Publication of draft instrument and other information
 - 18P Report about draft instrument by independent panel
 - 18Q Publication of explanatory information
 - 18R Failure to comply does not affect validity
 - Subdivision 4—Publication, review and other matters
 - 18S Publication of rate of return instrument
 - 18T Commencement and duration of instrument
 - 18U Review and replacement of instrument
 - 18V Application of instrument
 - 18W Rate of return instrument may apply for this Law and the National Gas Law

	Subdivision 5—Confidentiality of information
18X	Confidentiality
18Y	Disclosure of information given in confidence
7	Amendment of section 28J—Opportunity to be heard before regulatory information notice is served
8	Amendment of section 28Q—Assumptions where there is non-compliance with regulatory information instrument
9	Insertion of section 90BA
90BA	South Australian Minister may make consequential Rules relating to rate of return instrument
10	Amendment of Schedule 1—Subject matter for the National Electricity Rules
11	Amendment of Schedule 2—Miscellaneous provisions relating to interpretation
12	Amendment of Schedule 3—Savings and transitional
	Part 15—Transitional provisions for rate of return instrument
28	Definitions
29	Making first rate of return instrument if review not completed before commencement
30	Making first rate of return instrument if review completed before commencement
31	Application of this Law to particular decisions
	Part 3—Amendment of <i>National Gas Law</i>
13	Amendment of section 2—Definitions
14	Amendment of section 27—Functions and powers of the AER
15	Insertion of Chapter 2 Part 1 Division 1A
	Division 1A—Rate of return instrument
	Subdivision 1—Preliminary
30A	Definitions
30B	Rate of return instrument has force of law
30C	Rate of return instrument is binding on AER and covered pipeline service providers
	Subdivision 2—Requirement to make rate of return instrument
30D	AER to make rate of return instrument
30E	Content of rate of return instrument
	Subdivision 3—Consultation requirements
30F	Process for making rate of return instrument
30G	Other matters AER must have regard to in making instrument
30H	Requirements before publishing draft instrument

30I	Consumer reference group
30J	Publication of draft instrument and other information
30K	Report about draft instrument by independent panel
30L	Publication of explanatory information
30M	Failure to comply does not affect validity
	Subdivision 4—Publication, review and other matters
30N	Publication of rate of return instrument
30O	Commencement and duration of instrument
30P	Review and replacement of instrument
30Q	Application of instrument
30R	Rate of return instrument may apply for this Law and the National Electricity Law
	Subdivision 5—Confidentiality of information
30S	Confidentiality
30T	Disclosure of information given in confidence
16	Amendment of section 52—Opportunity to be heard before regulatory information notice is served
17	Amendment of section 59—Assumptions where there is non-compliance with regulatory information instrument
18	Insertion of section 294CA
	294CA South Australian Minister may make consequential Rules relating to rate of return instrument
19	Amendment of Schedule 1—Subject matter for the National Gas Rules
20	Amendment of Schedule 2—Miscellaneous provisions relating to interpretation
21	Amendment of Schedule 3—Savings and transitional
	Part 15—Transitional provisions for rate of return instrument
90	Definitions
91	Making first rate of return instrument if review not completed before commencement
92	Making first rate of return instrument if review completed before commencement
93	Application of this Law to particular decisions

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Act 2018*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act—

- 10
- (a) a provision in Part 2 amends the *National Electricity Law* set out in the Schedule to the *National Electricity (South Australia) Act 1996*; and
 - (b) a provision in Part 3 amends the *National Gas Law* set out in the Schedule to the *National Gas (South Australia) Act 2008*.

Part 2—Amendment of *National Electricity Law*

4—Amendment of section 2—Definitions

- 15
- (1) Section 2(1), definition of *AER economic regulatory function or power*—after "Rules" insert:

(other than making a rate of return instrument)

Note—

20 The following Note will be inserted into section 2(1) at the foot of the definition of *AER economic regulatory function or power*:

"Note—

The application of a rate of return instrument under this Law is an AER economic regulatory function or power. See section 18V(2)."

- 25
- (2) Section 2(1)—after the definition of *protected information* insert:
rate of return instrument—see section 18I(2);

5—Amendment of section 15—Functions and powers of AER

Section 15(1)—after paragraph (ec) insert:

- (ed) to make a rate of return instrument; and

6—Insertion of Part 3 Division 1B

Part 3—after Division 1A insert:

Division 1B—Rate of return instrument

Subdivision 1—Preliminary

18F—Definitions

In this Division—

consumer reference group, for making a rate of return instrument, see section 18M(1)(a);

explanatory information, for a rate of return instrument, means information about the content of the instrument, including (but not limited to) information explaining—

- (a) the reasons for the rate of return on capital or the value of imputation credits under the instrument; and
- (b) how the stated value, or the way to calculate the rate or value, was decided; and
- (c) if the instrument replaces another instrument—
 - (i) the differences (if any) between the instrument and the replaced instrument; and
 - (ii) the reasons for any differences; and
- (d) why the AER is satisfied the instrument will, or is most likely to, contribute to the achievement of the national electricity objective to the greatest degree; and
- (e) how the AER had regard to the following in making the instrument:
 - (i) the revenue and pricing principles;
 - (ii) the matters mentioned in section 18L;
 - (iii) estimation methods, financial models, market data and other evidence relevant to making the instrument;
 - (iv) prevailing conditions in the market for equity funds;
 - (v) the interrelationships between financial parameters used, or to be used, in relation to deciding the rate or value.

18G—Rate of return instrument has force of law

- (1) A rate of return instrument has the force of law in this jurisdiction.
- (2) An Act of this jurisdiction regulating the making of subordinate legislation does not apply to a rate of return instrument.

18H—Rate of return instrument is binding on AER and network service providers

A rate of return instrument is binding on—

- 5
- (a) the AER in relation to the performance or exercise of an AER economic regulatory function or power; and
 - (b) each network service provider in relation to a matter relevant to the performance or exercise of an AER economic regulatory function or power.

Subdivision 2—Requirement to make rate of return instrument

18I—AER to make rate of return instrument

- 10
- 15
- 20
- 25
- (1) This section applies if a rate of return on capital or the value of imputation credits is required for performing or exercising an AER economic regulatory function or power.
 - (2) The AER must make an instrument (a *rate of return instrument*) stating—
 - (a) for a rate of return on capital—the way to calculate the rate; and
 - (b) for the value of imputation credits—the value or the way to calculate the value.
 - (3) The AER may make an instrument only if satisfied the instrument will, or is most likely to, contribute to the achievement of the national electricity objective to the greatest degree.
 - (4) Subject to subsection (3), the way to calculate a rate of return on capital must include a weighted average of an allowed return on equity and an allowed return on debt.
 - (5) In making an instrument, the AER must have regard to—
 - (a) the revenue and pricing principles; and
 - (b) other information the AER considers appropriate.

18J—Content of rate of return instrument

- 30
- 35
- (1) If a rate of return instrument states the value of imputation credits, the instrument must state a single value to apply in relation to all regulated network service providers.
 - (2) If a rate of return instrument states a way to calculate the rate of return on capital or the value of imputation credits, the instrument must—
 - (a) provide for the same methodology to apply in relation to all regulated network service providers in calculating the rate or value; and

- (b) provide for the methodology to apply automatically without the exercise of any discretion by the AER.

Example for paragraph (b)—

The instrument can not include different methodologies or a band of values from which the AER could choose in applying the instrument.

- (3) Subject to subsections (1) and (2), the instrument may include other matters the AER considers appropriate.

Example—

Matters to help a regulated network service provider calculate a rate of return or the value of imputation credits.

Subdivision 3—Consultation requirements

18K—Process for making rate of return instrument

Subject to this Division, the AER may make a rate of return instrument in the way it considers appropriate.

18L—Other matters AER must have regard to in making instrument

In making a rate of return instrument, the AER must also have regard to the following:

- (a) advice, recommendations or submissions given by a consumer reference group;
- (b) submissions made, and the report published, under section 18M;
- (c) submissions made under section 18O;
- (d) the report given by the independent panel under section 18P.

18M—Requirements before publishing draft instrument

- (1) Before publishing a draft rate of return instrument under this Subdivision, the AER must—
- (a) establish a reference group to help the AER implement an effective consumer consultation process for making the proposed instrument (a *consumer reference group*); and
 - (b) publish a notice on its website—
 - (i) inviting persons to make a written submission to the AER about the proposed instrument; and
 - (ii) stating the period, not less than 28 days, within which a submission must be made; and
 - (c) seek concurrent expert opinions or evidence about the proposed instrument.

(2) A person may make a submission after the stated period only with the written approval of the AER.

(3) Subject to subsections (4) and (5), the AER may seek the expert opinions or evidence in the way it considers appropriate.

5 **Example—**

The AER might convene a conference of experts to identify key issues, and areas of dispute and agreement among the experts, about the content of the proposed instrument.

10 (4) The AER must call for nominations of eligible experts but may seek the expert opinions or evidence from any eligible expert.

(5) If practicable, the AER must seek the expert opinions or evidence from at least 3 eligible experts.

(6) The AER must publish on its website—

15 (a) submissions made under this section; and

(b) a report on the outcomes of seeking the expert opinions or evidence.

(7) In this section—

20 *eligible expert* means a person with qualifications or experience in a field the AER considers relevant to making a rate of return instrument.

Examples of relevant fields—

Finance, economics, law, consumer affairs, institutional investment.

18N—Consumer reference group

25 (1) A consumer reference group for making a rate of return instrument—

(a) is to consist of the members appointed by the AER; and

(b) may carry out its activities, including giving advice or recommendations to the AER about the instrument, in the way it considers appropriate.

30 (2) Without limiting subsection (1)(b), the consumer reference group may—

(a) consult with consumers of electricity; and

(b) facilitate consumer engagement in the process for making the instrument; and

35 (c) make written submissions to the AER about the content of the instrument and the process for making it.

(3) The AER must publish on its website any written advice, recommendations or submissions given to it by the consumer reference group.

18O—Publication of draft instrument and other information

- (1) The AER must, at least 6 months before making a rate of return instrument, publish on its website—
- (a) a draft of the proposed instrument and the explanatory information for the instrument; and
 - (b) a notice—
 - (i) inviting persons to make a written submission to the AER about the proposed instrument; and
 - (ii) stating the period, not less than 28 days, within which a submission must be made.
- (2) A person may make a submission after the stated period only with the written approval of the AER.
- (3) The AER must publish submissions made under this section on its website.

18P—Report about draft instrument by independent panel

- (1) The AER must, as soon as practicable after publishing the draft instrument, establish an independent panel to give the AER a written report about the instrument.
- (2) The panel—
- (a) may carry out its activities, including giving the report, in the way it considers appropriate; but
 - (b) must seek to give the report by consensus.
- (3) The panel must—
- (a) consist of at least 3 members, appointed by the AER, who have qualifications or experience in a field the AER considers relevant to making a rate of return instrument; and
- Examples of relevant fields—**
- Finance, economics, law, consumer affairs, institutional investment.
- (b) give the report to the AER before the AER makes the instrument.
- (4) The AER must take reasonable steps to minimise and manage any conflicts of interest a panel member may have in relation to making the instrument.
- (5) The report must—
- (a) include the panel’s assessment of the evidence and reasons supporting the rate of return on capital or the value of imputation credits under the instrument; and
 - (b) state whether the report is given by consensus.

- (6) The AER must publish the report on its website.

18Q—Publication of explanatory information

The AER must publish explanatory information for a rate of return instrument on its website when the instrument is published under section 18S.

18R—Failure to comply does not affect validity

Failure to comply with this Subdivision does not invalidate or otherwise affect a rate of return instrument.

Subdivision 4—Publication, review and other matters

18S—Publication of rate of return instrument

After making a rate of return instrument, the AER must publish the instrument on its website.

Note—

See section 18Q for the requirement to publish explanatory information for the instrument.

18T—Commencement and duration of instrument

A rate of return instrument—

- (a) commences on the day after it is published on the AER’s website; and
- (b) remains in force until the end of the day it is replaced under section 18U.

18U—Review and replacement of instrument

- (1) The AER must—

- (a) review each rate of return instrument; and
- (b) make a new rate of return instrument under this Division to replace the reviewed instrument.

- (2) The AER must replace the reviewed instrument by publishing the new instrument on its website on the day that is—

- (a) the fourth anniversary of the day the reviewed instrument was published; or
- (b) if the day mentioned in paragraph (a) is not a business day—the first business day after that day.

18V—Application of instrument

- (1) A rate of return instrument—

- (a) applies for the purposes of an AER economic regulatory decision made after the commencement of the instrument; and

(b) does not affect an AER economic regulatory decision made before the commencement of the instrument.

(2) To remove any doubt, it is declared that the application of the instrument under this Law, including, for example, in making a distribution determination or transmission determination, is an AER economic regulatory function or power.

18W—Rate of return instrument may apply for this Law and the National Gas Law

(1) The AER may make 1 rate of return instrument for the purposes of this Law and the National Gas Law.

(2) If the AER acts under subsection (1)—

(a) the process for making the instrument under Chapter 2, Part 1, Division 1A of the National Gas Law is taken to have been complied with for the instrument; and

(b) the instrument is taken to be the rate of return instrument for the purposes of the National Gas Law.

Note—

See also section 30R of the National Gas Law.

(3) To remove any doubt, it is declared that the instrument may include different ways to calculate the rate of return on capital and the value of imputation credits for the purposes of this Law and the National Gas Law.

Subdivision 5—Confidentiality of information

18X—Confidentiality

(1) If a person wishes to give information to the AER for the purposes of this Division in confidence—

(a) the person must give the AER written notice that the person claims the information is confidential; and

(b) give reasons to support the claim, including—

(i) information about the detriment that might be caused to the person if the information were disclosed by the AER; and

(ii) information that—

(A) is reasonably within the person's knowledge and capacity to give; and

(B) may be relevant to the AER's consideration under section 28ZB about whether the public benefit in disclosing the information outweighs the detriment.

- (2) In giving reasons to support a claim under subsection (1) about information received from another person (a third party), a person may include information that—
- (a) is reasonably within the person's knowledge and capacity to give; and
 - (b) is about the detriment that might be caused to the third party if the information were disclosed by the AER; and
 - (c) may be relevant to the AER's consideration under section 28ZB about whether the public benefit in disclosing the information outweighs the detriment.
- (3) In acting under subsection (1), a person must specifically identify the information in relation to which the claim is made.
- (4) Information given to the AER for the purposes of this Division is not to be regarded as being given in confidence, or to be confidential in any way, unless the information is subject to an express claim of confidentiality made under this section.

18Y—Disclosure of information given in confidence

- (1) Division 6 applies in relation to publishing information given to the AER in confidence under this Division.
- (2) In this section—
information includes advice, recommendations, submissions and reports.

7—Amendment of section 28J—Opportunity to be heard before regulatory information notice is served

- (1) Section 28J(3)(b)—after "decision" insert:
or a rate of return instrument
- (2) Section 28J(3)(c), after "decision" insert:
or rate of return instrument

8—Amendment of section 28Q—Assumptions where there is non-compliance with regulatory information instrument

- (1) Section 28Q(1)(a)(i)—delete "provider; or" and substitute:
provider or to make a rate of return instrument; or
- (2) Section 28Q(1)(a)(ii)—delete "provider; and" and substitute:
provider or the making of a rate of return instrument; and
- (3) Section 28Q(2)(a)—delete paragraph (a) and substitute:
 - (a) may make the AER economic regulatory decision or the rate of return instrument on the basis of the information the AER has at the time it makes that decision or instrument; and

(4) Section 28Q(2)(b)—after "decision" insert:

or instrument

9—Insertion of section 90BA

Part 7 Division 2—after section 90B insert:

90BA—South Australian Minister may make consequential Rules relating to rate of return instrument

- (1) The South Australian Minister may make Rules that revoke or amend a Rule if the revocation or amendment is consequential on the enactment of the *Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Act 2018*.
- (2) Without limiting subsection (1), the South Australian Minister may make a rule providing that the rate of return on capital under a rate of return instrument in force at the start of a regulatory period applies throughout the period.
- (3) Section 34(3) applies to Rules made under this section in the same way it applies to Rules made by the AEMC.
- (4) As soon as practicable after making Rules under this section, the South Australian Minister 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—
 - (a) the date on which the Rules commence operation; and
 - (b) if different Rules will commence operation on different dates, those dates.
- (6) Rules may only be made under this section on the recommendation of the MCE.
- (7) Once the first Rules have been made under subsection (1), no further Rules can be made under that subsection.
- (8) In this section—

regulatory period means the period specified in a network revenue or pricing determination to be the regulatory period.

South Australian Minister means the Minister in right of the Crown of South Australia administering Part 2 of the *National Electricity (South Australia) Act 1996* of South Australia.

10—Amendment of Schedule 1—Subject matter for the National Electricity Rules

- (1) Schedule 1, item 22(d)—delete paragraph (d)

- (2) Schedule 1, item 26F(d)—delete paragraph (d)

11—Amendment of Schedule 2—Miscellaneous provisions relating to interpretation

- (1) Schedule 2, clause 31AD—after paragraph (b) insert:

5 (ba) a stated document is a copy of a rate of return instrument;

- (2) Schedule 2, clause 41(3), definition of *statutory instrument*—delete "or the Rules" and substitute:

, the rate of return instrument or the Rules

- (3) Schedule 2—after clause 41 insert:

10 **41A—Rate of return instrument construed not to exceed the legislative power of the Legislature of this jurisdiction or the powers conferred by this Law**

- (1) A rate of return instrument is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the
15 Legislature of this jurisdiction or the power conferred by this Law under which it is made.

- (2) If a provision of the rate of return instrument, or the application of a provision of the instrument to a person, subject matter or
20 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

25 (b) the remainder of the instrument, and the application of the provision to other persons, subject matters or circumstances, is not affected.

- (4) Schedule 2—after clause 43 insert:

43A—Invalid rate of return instrument

30 (1) This clause applies if the Court orders (by declaration or otherwise) that a rate of return instrument is invalid.

(2) The AER must make a new rate of return instrument under this Law to replace the invalid instrument.

35 (3) Until the invalid instrument is replaced, the rate of return on capital and the value of imputation credits under the invalid instrument continue to apply for the purposes of this Law.

(4) However, the AER must deal with any affected determination to apply the new rate of return instrument to the determination as if the new instrument had applied from the start of the determination.

(5) Subclause (4) applies despite section 18V(1).

(6) In this clause—

affected determination means a distribution determination or transmission determination to which the invalid instrument applied or continued to apply;

deal with, an affected determination, means to do either of the following the AER considers appropriate in the circumstances—

- (a) revoke the determination and substitute a new determination;
- (b) vary the determination.

12—Amendment of Schedule 3—Savings and transitional

Schedule 3—after Part 14 insert:

Part 15—Transitional provisions for rate of return instrument

28—Definitions

In this Part—

2013 non-binding guideline means the guideline about determining the rate of return on capital issued by the AER in 2013;

review, of the 2013 non-binding guideline, means the review of the guideline started by the AER in 2017;

stakeholders means—

- (a) regulated network service providers and consumer organisations; or
- (b) network service users and prospective network service users; or
- (c) any of the following persons the AER considers appropriate to give the AER advice or comment about the review of the 2013 non-binding guideline—
 - (i) persons engaged by a regulated network service provider, a consumer organisation or another entity to give the advice or comment;
 - (ii) other persons the AER considers have the qualifications or experience appropriate to give the advice or comment;
- (d) other persons the AER considers have an interest in the review of the 2013 non-binding guideline.

29—Making first rate of return instrument if review not completed before commencement

- (1) This clause applies if—
- (a) the review of the 2013 non-binding guideline is not completed before the commencement of this clause; and
 - (b) the AER has sought advice or comment from stakeholders in relation to the review; and
 - (c) at least 3 months before making the first rate of return instrument, the AER has published on its website a draft of the proposed first rate of return instrument or proposed new non-binding guideline under the Rules; and
 - (d) the draft instrument or guideline has been reviewed by an independent panel consisting of at least 3 members with qualifications or experience the AER considers appropriate to conduct the review.
- (2) Part 3 Division 1B Subdivision 3 does not apply in relation to making the first rate of return instrument.
- (3) The independent panel mentioned in subclause (1)(d) must seek to give the AER a consensus report on the panel’s review.
- (4) However, a failure to give the AER a consensus report does not affect the making of the first rate of return instrument.

30—Making first rate of return instrument if review completed before commencement

- (1) This clause applies if, before the commencement of this clause—
- (a) the review of the 2013 non-binding guideline was completed and a new non-binding guideline is in force under the Rules; and
 - (b) the AER sought advice or comment from stakeholders in relation to the review; and
 - (c) at least 3 months before making the new non-binding guideline, the AER published on its website a draft of the proposed new non-binding guideline; and
 - (d) the draft was reviewed by an independent panel consisting of at least 3 members with qualifications or experience the AER considered appropriate to conduct the review; and
 - (e) the independent panel gave the AER a report on the panel’s review.
- (2) The new non-binding guideline is taken to be the first rate of return instrument on the commencement.
- (3) For section 18U, the instrument is taken to have been published on the AER’s website on the commencement.

- (4) The report mentioned in subclause (1)(e) need not be a consensus report on the panel’s review.

31—Application of this Law to particular decisions

- 5 (1) The amended Law applies in relation to an AER economic regulatory decision made after the commencement even if any action or process for making the decision started before the commencement.

- (2) However, subclause (1) does not apply in relation to an AER economic regulatory decision made before the commencement that has been remitted back to the AER to make the decision again.

- 10 (3) In this clause—

amended Law means this Law as amended by the *Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Act 2018*;

commencement means the commencement of Part 3 Division 1B.

Part 3—Amendment of *National Gas Law*

13—Amendment of section 2—Definitions

- (1) Section 2(1), definition of *AER economic regulatory function or power*—after "Rules" insert:

(other than making a rate of return instrument)

Note—

The following Note will be inserted into section 2(1) at the foot of the definition of *AER economic regulatory function or power*:

"Note—

The application of a rate of return instrument under this Law is an AER economic regulatory function or power. See section 30Q(2)."

- (2) Section 2(1)—after the definition of *queuing requirements* insert:

rate of return instrument—see section 30D(2);

14—Amendment of section 27—Functions and powers of the AER

Section 27(1)—after paragraph (d) insert:

(da) to make a rate of return instrument; and

15—Insertion of Chapter 2 Part 1 Division 1A

Chapter 2, Part 1—after Division 1 insert:

Division 1A—Rate of return instrument

Subdivision 1—Preliminary

30A—Definitions

In this Division—

consumer reference group, for making a rate of return instrument, see section 30H(1)(a);

explanatory information, for a rate of return instrument, means information about the content of the instrument, including (but not limited to) information explaining—

- (a) the reasons for the rate of return on capital or the value of imputation credits under the instrument; and
- (b) how the stated value, or the way to calculate the rate or value, was decided; and
- (c) if the instrument replaces another instrument—
 - (i) the differences (if any) between the instrument and the replaced instrument; and

- (ii) the reasons for any differences; and,
- (d) why the AER is satisfied the instrument will, or is most likely to, contribute to the achievement of the national gas objective to the greatest degree; and
- (e) how the AER had regard to the following in making the instrument:
 - (i) the revenue and pricing principles;
 - (ii) the matters mentioned in section 30G;
 - (iii) estimation methods, financial models, market data and other evidence relevant to making the instrument;
 - (iv) prevailing conditions in the market for equity funds;
 - (v) the interrelationships between financial parameters used, or to be used, in relation to deciding the rate or value.

30B—Rate of return instrument has force of law

- (1) A rate of return instrument has the force of law in this jurisdiction.
- (2) An Act of this jurisdiction regulating the making of subordinate legislation does not apply to a rate of return instrument.

30C—Rate of return instrument is binding on AER and covered pipeline service providers

A rate of return instrument is binding on—

- (a) the AER in relation to the performance or exercise of an AER economic regulatory function or power; and
- (b) each covered pipeline service provider in relation to a matter relevant to the performance or exercise of an AER economic regulatory function or power.

Subdivision 2—Requirement to make rate of return instrument

30D—AER to make rate of return instrument

- (1) This section applies if a rate of return on capital or the value of imputation credits is required for performing or exercising an AER economic regulatory function or power.
- (2) The AER must make an instrument (a *rate of return instrument*) stating—
 - (a) for a rate of return on capital—the way to calculate the rate; and
 - (b) for the value of imputation credits—the value or the way to calculate the value.

- (3) The AER may make an instrument only if satisfied the instrument will, or is most likely to, contribute to the achievement of the national gas objective to the greatest degree.
- (4) Subject to subsection (3), the way to calculate a rate of return on capital must include a weighted average of an allowed return on equity and an allowed return on debt.
- (5) In making an instrument, the AER must have regard to—
 - (a) the revenue and pricing principles; and
 - (b) other information the AER considers appropriate.

30E—Content of rate of return instrument

- (1) If a rate of return instrument states the value of imputation credits, the instrument must state a single value to apply in relation to all covered pipeline service providers.
- (2) If a rate of return instrument states a way to calculate the rate of return on capital or the value of imputation credits, the instrument must—
 - (a) provide for the same methodology to apply in relation to all covered pipeline service providers in calculating the rate or value; and
 - (b) provide for the methodology to apply automatically without the exercise of any discretion by the AER.

Example for paragraph (b)—

The instrument can not include different methodologies or a band of values from which the AER could choose in applying the instrument.

- (3) Subject to subsections (1) and (2), the instrument may include other matters the AER considers appropriate.

Example—

Matters to help a covered pipeline service provider calculate a rate of return or the value of imputation credits.

Subdivision 3—Consultation requirements

30F—Process for making rate of return instrument

Subject to this Division, the AER may make a rate of return instrument in the way it considers appropriate.

30G—Other matters AER must have regard to in making instrument

In making a rate of return instrument, the AER must also have regard to the following—

- (a) advice, recommendations or submissions given by a consumer reference group;

- (b) submissions made, and the report published, under section 30H;
- (c) submissions made under section 30J;
- (d) the report given by the independent panel under section 30K.

30H—Requirements before publishing draft instrument

- (1) Before publishing a draft rate of return instrument under this Subdivision, the AER must—
 - (a) establish a reference group to help the AER implement an effective consumer consultation process for making the proposed instrument (a *consumer reference group*); and
 - (b) publish a notice on its website—
 - (i) inviting persons to make a written submission to the AER about the proposed instrument; and
 - (ii) stating the period, not less than 28 days, within which a submission must be made; and
 - (c) seek concurrent expert opinions or evidence about the proposed instrument.
- (2) A person may make a submission after the stated period only with the written approval of the AER.
- (3) Subject to subsections (4) and (5), the AER may seek the expert opinions or evidence in the way it considers appropriate.

Example—

The AER might convene a conference of experts to identify key issues, and areas of dispute and agreement among the experts, about the content of the proposed instrument.

- (4) The AER must call for nominations of eligible experts but may seek the expert opinions or evidence from any eligible expert.
- (5) If practicable, the AER must seek the expert opinions or evidence from at least 3 eligible experts.
- (6) The AER must publish on its website—
 - (a) submissions made under this section; and
 - (b) a report on the outcomes of seeking the expert opinions or evidence.
- (7) In this section—

eligible expert means a person with qualifications or experience in a field the AER considers relevant to making a rate of return instrument.

Examples of relevant fields—

Finance, economics, law, consumer affairs, institutional investment.

30I—Consumer reference group

- (1) A consumer reference group for making a rate of return instrument—
 - (a) is to consist of the members appointed by the AER; and
 - (b) may carry out its activities, including giving advice or recommendations to the AER about the instrument, in the way it considers appropriate.
- (2) Without limiting subsection (1)(b), the consumer reference group may—
 - (a) consult with consumers of natural gas; and
 - (b) facilitate consumer engagement in the process for making the instrument; and
 - (c) make written submissions to the AER about the content of the instrument and the process for making it.
- (3) The AER must publish on its website any written advice, recommendations or submissions given to it by the consumer reference group.

30J—Publication of draft instrument and other information

- (1) The AER must, at least 6 months before making a rate of return instrument, publish on its website—
 - (a) a draft of the proposed instrument and the explanatory information for the instrument; and
 - (b) a notice—
 - (i) inviting persons to make a written submission to the AER about the proposed instrument; and
 - (ii) stating the period, not less than 28 days, within which a submission must be made.
- (2) A person may make a submission after the stated period only with the written approval of the AER.
- (3) The AER must publish submissions made under this section on its website.

30K—Report about draft instrument by independent panel

- (1) The AER must, as soon as practicable after publishing the draft instrument, establish an independent panel to give the AER a written report about the instrument.
- (2) The panel—
 - (a) may carry out its activities, including giving the report, in the way it considers appropriate; but
 - (b) must seek to give the report by consensus.

- (3) The panel must—
- (a) consist of at least 3 members, appointed by the AER, who have qualifications or experience in a field the AER considers relevant to making a rate of return instrument; and
- Examples of relevant fields—**
- Finance, economics, law, consumer affairs, institutional investment.
- (b) give the report to the AER before the AER makes the instrument.
- (4) The AER must take reasonable steps to minimise and manage any conflicts of interest a panel member may have in relation to making the instrument.
- (5) The report must—
- (a) include the panel’s assessment of the evidence and reasons supporting the rate of return on capital or the value of imputation credits under the instrument; and
 - (b) state whether the report is given by consensus.
- (6) The AER must publish the report on its website.

30L—Publication of explanatory information

The AER must publish explanatory information for a rate of return instrument on its website when the instrument is published under section 30N.

30M—Failure to comply does not affect validity

Failure to comply with this Subdivision does not invalidate or otherwise affect a rate of return instrument.

Subdivision 4—Publication, review and other matters

30N—Publication of rate of return instrument

After making a rate of return instrument, the AER must publish the instrument on its website.

Note—

See section 30L for the requirement to publish explanatory information for the instrument.

30O—Commencement and duration of instrument

A rate of return instrument—

- (a) commences on the day after it is published on the AER’s website; and
- (b) remains in force until the end of the day it is replaced under section 30P.

30P—Review and replacement of instrument

- (1) The AER must—
 - (a) review each rate of return instrument; and
 - (b) make a new rate of return instrument under this Division to replace the reviewed instrument.
- (2) The AER must replace the reviewed instrument by publishing the new instrument on its website on the day that is—
 - (a) the fourth anniversary of the day the reviewed instrument was published; or
 - (b) if the day mentioned in paragraph (a) is not a business day—the first business day after that day.

30Q—Application of instrument

- (1) A rate of return instrument—
 - (a) applies for the purposes of an AER economic regulatory decision made after the commencement of the instrument; and
 - (b) does not affect an AER economic regulatory decision made before the commencement of the instrument.
- (2) To remove any doubt, it is declared that the application of the instrument under this Law, including, for example, in making a full access arrangement decision, is an AER economic regulatory function or power.

30R—Rate of return instrument may apply for this Law and the National Electricity Law

- (1) The AER may make 1 rate of return instrument for the purposes of this Law and the National Electricity Law.
- (2) If the AER acts under subsection (1)—
 - (a) the process for making the instrument under Part 3 Division 1B of the National Electricity Law is taken to have been complied with for the instrument; and
 - (b) the instrument is taken to be the rate of return instrument for the purposes of the National Electricity Law.

Note—

See also section 18W of the National Electricity Law.

- (3) To remove any doubt, it is declared that the instrument may include different ways to calculate the rate of return on capital and the value of imputation credits for the purposes of this Law and the National Electricity Law.

Subdivision 5—Confidentiality of information**30S—Confidentiality**

- (1) If a person wishes to give information to the AER for the purposes of this Division in confidence—
 - (a) the person must give the AER written notice that the person claims the information is confidential; and
 - (b) give reasons to support the claim, including—
 - (i) information about the detriment that might be caused to the person if the information were disclosed by the AER; and
 - (ii) information that—
 - (A) is reasonably within the person’s knowledge and capacity to give; and
 - (B) may be relevant to the AER’s consideration under section 329 about whether the public benefit in disclosing the information outweighs the detriment.
- (2) In giving reasons to support a claim under subsection (1) about information received from another person (a *third party*), a person may include information that—
 - (a) is reasonably within the person’s knowledge and capacity to give; and
 - (b) is about the detriment that might be caused to the third party if the information were disclosed by the AER; and
 - (c) may be relevant to the AER’s consideration under section 329 about whether the public benefit in disclosing the information outweighs the detriment.
- (3) In acting under subsection (1), a person must specifically identify the information in relation to which the claim is made.
- (4) Information given to the AER for the purposes of this Division is not to be regarded as being given in confidence, or to be confidential in any way, unless the information is subject to an express claim of confidentiality made under this section.

30T—Disclosure of information given in confidence

- (1) Chapter 10 Part 2 Division 1 applies in relation to publishing information given to the AER in confidence under this Division.
- (2) In this section—

information includes advice, recommendations, submissions and reports.

16—Amendment of section 52—Opportunity to be heard before regulatory information notice is served

- (1) Section 52(3)(b)—after "decision" insert:
or a rate of return instrument
- (2) Section 52(3)(c)—after "decision" insert:
or rate of return instrument

17—Amendment of section 59—Assumptions where there is non-compliance with regulatory information instrument

- (1) Section 59(1)(a)(i)—delete "provider; or" and substitute:
provider or to make a rate of return instrument; or
- (2) Section 59(1)(a)(ii)—delete "provider; and" and substitute:
provider or the making of a rate of return instrument; and
- (3) Section 59(2)(a)—delete paragraph (a) and substitute:
 - (a) may make the AER economic regulatory decision or the rate of return instrument on the basis of the information the AER has at the time it makes that decision or instrument; and
- (4) Section 59(2)(b)—after "decision" insert:
or instrument

18—Insertion of section 294CA

After section 294C insert:

294CA—South Australian Minister may make consequential Rules relating to rate of return instrument

- (1) The South Australian Minister may make Rules that revoke or amend a Rule if the revocation or amendment is consequential on the enactment of the *Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Act 2018*.
- (2) Without limiting subsection (1), the South Australian Minister may make a rule providing that the rate of return on capital under a rate of return instrument in force at the start of a regulatory period applies throughout the period.
- (3) Section 74(3) applies to Rules made under this section in the same way it applies to Rules made by the AEMC.
- (4) As soon as practicable after making Rules under this section, the South Australian Minister 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—
- (a) the date on which the Rules commence operation; and
 - (b) if different Rules will commence operation on different dates, those dates.

(6) Rules may only be made under this section on the recommendation of the MCE.

(7) Once the first Rules have been made under subsection (1), no further Rules can be made under that subsection.

(8) In this section—

regulatory period means the period specified in an applicable access arrangement to be the regulatory period;

South Australian Minister means the Minister in right of the Crown of South Australia administering Part 2 of the *National Gas (South Australia) Act 2008* of South Australia.

19—Amendment of Schedule 1—Subject matter for the National Gas Rules

Schedule 1, item 41(g)—delete paragraph (g)

20—Amendment of Schedule 2—Miscellaneous provisions relating to interpretation

(1) Schedule 2, clause 34—after paragraph (b) insert:

(ba) a stated document is a copy of a rate of return instrument;

(2) Schedule 2, clause 51, definition of ***statutory instrument***—delete "the Rules" and substitute:

the rate of return instrument, the Rules

(3) Schedule 2—after clause 51 insert:

51A—Rate of return instrument construed not to exceed the legislative power of the Legislature of this jurisdiction or the powers conferred by this Law

- (1) A rate of return instrument is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Legislature of this jurisdiction or the power conferred by this Law under which it is made.
- (2) If a provision of the rate of return instrument, or the application of a provision of the instrument 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 instrument, and the application of the provision to other persons, subject matters or circumstances, is not affected.

- (4) Schedule 2—after clause 53 insert:

53A—Invalid rate of return instrument

- (1) This clause applies if the Court orders (by declaration or otherwise) that a rate of return instrument is invalid.
- (2) The AER must make a new rate of return instrument under this Law to replace the invalid instrument.
- (3) Until the invalid instrument is replaced, the rate of return on capital and the value of imputation credits under the invalid instrument continue to apply for the purposes of this Law.
- (4) However, the AER must deal with any affected access arrangement decision to apply the new rate of return instrument to the decision as if the new instrument had applied from the start of the decision.
- (5) Subclause (4) applies despite section 30Q(1).
- (6) In this clause—

affected access arrangement decision means a full access arrangement decision to which the invalid instrument applied or continued to apply;

deal with, an affected access arrangement decision, means to do either of the following the AER considers appropriate in the circumstances—

- (a) revoke the decision and substitute a new decision;
- (b) vary the decision.

21—Amendment of Schedule 3—Savings and transitional

Schedule 3—after Part 14 insert:

Part 15—Transitional provisions for rate of return instrument

90—Definitions

In this Part—

2013 non-binding guideline means the guideline about determining the rate of return on capital issued by the AER in 2013;

review, of the 2013 non-binding guideline, means the review of the guideline started by the AER in 2017;

stakeholders means—

- (a) service providers and consumer organisations; or
- (b) end users and prospective end users; or

-
- (c) any of the following persons the AER considers appropriate to give the AER advice or comment about the review of the 2013 non-binding guideline—
 - (i) persons engaged by a covered pipeline service provider, a consumer organisation or another entity to give the advice or comment;
 - (ii) other persons the AER considers have the qualifications or experience appropriate to give the advice or comment; or
 - (d) other persons the AER considers have an interest in the review of the 2013 non-binding guideline.

91—Making first rate of return instrument if review not completed before commencement

- (1) This clause applies if—
 - (a) the review of the 2013 non-binding guideline was not completed before the commencement of this clause; and
 - (b) the AER has sought advice or comment from stakeholders in relation to the review; and
 - (c) at least 3 months before making the first rate of return instrument, the AER has published on its website a draft of the proposed first rate of return instrument or proposed new non-binding guideline under the Rules; and
 - (d) the draft instrument or guideline has been reviewed by an independent panel consisting of at least 3 members with qualifications or experience the AER considers appropriate to conduct the review.
- (2) Chapter 2 Part 1 Division 1A Subdivision 3 does not apply in relation to making the first rate of return instrument.
- (3) The independent panel mentioned in subclause (1)(d) must seek to give the AER a consensus report on the panel’s review.
- (4) However, a failure to give the AER a consensus report does not affect the making of the first rate of return instrument.

92—Making first rate of return instrument if review completed before commencement

- (1) This clause applies if, before the commencement of this clause—
 - (a) the review of the 2013 non-binding guideline was completed and a new non-binding guideline is in force under the Rules; and
 - (b) the AER sought advice or comment from stakeholders in relation to the review; and

- (c) at least 3 months before making the new non-binding guideline, the AER published on its website a draft of the proposed new non-binding guideline; and
 - (d) the draft was reviewed by an independent panel consisting of at least 3 members with qualifications or experience the AER considered appropriate to conduct the review; and
 - (e) the independent panel gave the AER a report on the panel's review.
- (2) The new non-binding guideline is taken to be the first rate of return instrument on the commencement.
 - (3) For section 30P, the instrument is taken to have been published on the AER's website on the commencement.
 - (4) The report mentioned in subclause (1)(e) need not be a consensus report on the panel's review.

93—Application of this Law to particular decisions

- (1) The amended Law applies in relation to an AER economic regulatory decision made after the commencement even if any action or process for making the decision started before the commencement.
- (2) However, subclause (1) does not apply in relation to an AER economic regulatory decision made before the commencement that has been remitted back to the AER to make the decision again.
- (3) In this clause—

amended Law means this Law as amended by the *Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Act 2018*;

commencement means the commencement of Chapter 2 Part 1 Division 1A.