

Parliamentary Counsel Committee

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

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Part 1 Preliminary

1 Short title

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

2 Commencement

This Act commences on a day to be fixed by proclamation.

3 Amendment provisions

In this Act—

- (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)

- (1) Section 2(1), definition of *AER economic regulatory function or power*, after ‘Rules’—

insert—

(other than a function or power under Part 3, Division 1B)

- (2) Section 2(1), after the definition of *protected information*—

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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 new Part 3, Division 1B

After Part 3, 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 rationale for the rate of return on capital or the value of imputation credits stated, or to be calculated, under the instrument; and
- (b) how the AER had regard to the following in making the instrument—
 - (i) the interrelationships between financial parameters used, or to be used, in

calculating the rate of return or the value of imputation credits;

- (ii) the matters mentioned in section 18L; and
- (c) if the instrument will replace another instrument before the fourth anniversary of the day the other instrument was published under this Division—why the AER considered it necessary to replace the other instrument.

rate of return instrument see section 18I(2).

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—

- (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

[s 6]

18I 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) the rate of return or the value of the imputation credits; or
 - (b) the way to calculate the rate or value.

18J Content of rate of return instrument

- (1) A rate of return instrument must state a rate of return on capital or the value of imputation credits, or a way to calculate the rate or value, that the AER is satisfied will, or is most likely to, contribute to the achievement of the national electricity objective to the greatest degree.
- (2) If the instrument states a rate of return or the value of imputation credits, the instrument must state a single rate or value to apply in relation to all regulated network service providers.
- (3) If the instrument states a way to calculate the rate of return 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 in relation to all regulated network service providers 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.

- (4) Subject to subsections (1) to (3), 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 Process for making rate of return instrument

18K Process—generally

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

18L Matters AER must have regard to in making instrument

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

- (a) the revenue and pricing principles; and
- (b) the following matters in relation to the instrument—
 - (i) advice, recommendations or submissions given by a consumer reference group;
 - (ii) submissions made, and the report published, under section 18M;
 - (iii) the report given by the independent panel under section 18P; and

[s 6]

- (c) other information the AER considers appropriate.

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) 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 publish on its website—
 - (a) submissions made under this section; and
 - (b) a report on the outcomes of seeking the expert opinions or evidence.

18N 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 electricity; 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.

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

[s 6]

- (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; and
 - (b) give the report to the AER before the AER makes the rate of return instrument.
- (4) 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.
- (5) 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 about rate of return instrument

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

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- (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 the fourth anniversary of the day the reviewed instrument was published.
- (3) Despite subsection (2), the AER may replace the reviewed instrument before the day mentioned in that subsection if satisfied it should be replaced earlier to ensure the rate of return instrument will, or is likely to, contribute to the achievement of the national electricity objective to the greatest degree.

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—
 - (a) the making of a rate of return instrument is not an AER economic regulatory function or power; but
 - (b) 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*.

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—

[s 6]

- (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), ‘provider; or’—
omit, insert—
provider or to make a rate of return instrument; or
- (2) Section 28Q(1)(a)(ii), ‘provider; and’—
omit, insert—
provider or the making of a rate of return instrument; and
- (3) Section 28Q(2)(a)—
omit, insert—
 - (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—

[s 9]

or instrument

9 Insertion of new section 90F

Part 7, Division 2—

insert—

90F South Australian Minister to 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 for each year in a regulatory period is the rate under the rate of return instrument in force when the AER economic regulatory decision to which the rate relates is made.
- (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)—
omit.
- (2) Schedule 1, item 26F(d)—
omit.

11 Amendment of Schedule 2 (Miscellaneous provisions relating to interpretation)

- (1) Schedule 2, clause 31AD—
insert—
- (ba) a stated document is a copy of a rate of return instrument;
- (2) Schedule 2, clause 41(3), definition of *statutory instrument*, ‘or the Rules’—
omit, insert—

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, the rate of return instrument or the Rules

12 Insertion of new Schedule 2, clause 41A

Schedule 2, after clause 41—

insert—

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 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.

13 Insertion of new Schedule 3, Part 15

Schedule 3—

insert—

Part 15 Transitional provisions for rate of return instrument

28 Making first rate of return instrument

- (1) This section applies if—
 - (a) before the commencement of this section, the AER started a review of the non-binding guideline; and
 - (b) in relation to the review, the AER has sought advice or comment from stakeholders about making the guideline; 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 non-binding guideline or a draft of the proposed first rate of return instrument; and
 - (d) the draft guideline or instrument 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) In this section—

non-binding guideline means the guideline about determining the rate of return on assets in effect under the Rules as in force before the commencement of this section.

relevant expert means any of the following persons the AER considers appropriate to give the AER advice or comment about making the non-binding guideline—

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- (a) persons engaged by a regulated network service provider, a consumer organisation or another entity to give the advice or comment;
- (b) other persons the AER considers have the qualifications or experience appropriate to give the advice or comment.

stakeholders means—

- (a) regulated network service providers, consumer organisations or relevant experts; or
- (b) network service users and prospective network service users; or
- (c) other persons the AER considers have an interest in the making of the non-binding guideline.

29 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, subsection (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 section—

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

14 Amendment of section 2 (Definitions)

- (1) Section 2(1), definition of *AER economic regulatory function or power*, after ‘Rules’—

insert—

(other than a function or power under Chapter 2, Part 1, Division 1A)

- (2) Section 2(1), definition of *initial National Gas Rules*, ‘or 294E’—

insert—

, 294E or 294G

- (3) Section 2(1), after the definition of *protected information*—

insert—

rate of return instrument see section 30D(2).

15 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

16 Insertion of new Chapter 2, Part 1, Division 1A

After Chapter 2, Part 1, 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 rationale for the rate of return on capital or the value of imputation credits stated, or to be calculated, under the instrument; and
- (b) how the AER had regard to the following in making the instrument—
 - (i) the interrelationships between financial parameters used, or to be used, in calculating the rate of return or the value of imputation credits;
 - (ii) the matters mentioned in section 30G; and
- (c) if the instrument will replace another instrument before the fourth anniversary of the day the other instrument was published under this Division—why the AER considered it necessary to replace the other instrument.

rate of return instrument see section 30D(2).

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) the rate of return or the value of the imputation credits; or
 - (b) the way to calculate the rate or value.

30E Content of rate of return instrument

- (1) A rate of return instrument must state a rate of return on capital or the value of imputation credits, or a way to calculate the rate or value, that the AER is satisfied will, or is most likely to, contribute to the achievement of the national gas objective to the greatest degree.
- (2) If the instrument states a rate of return or the value

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of imputation credits, the instrument must state a single rate or value to apply in relation to all covered pipeline service providers.

- (3) If the instrument states a way to calculate the rate of return 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 in relation to all covered pipeline service providers 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.

- (4) Subject to subsections (1) to (3), 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 Process for making rate of return instrument

30F Process—generally

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

30G Matters AER must have regard to in making instrument

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

- (a) the revenue and pricing principles; and
- (b) the following matters in relation to the instrument—
 - (i) advice, recommendations or submissions given by a consumer reference group;
 - (ii) submissions made, and the report published, under section 30H;
 - (iii) the report given by the independent panel under section 30K; and
- (c) other information the AER considers appropriate.

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

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- (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) 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 publish on its website—
 - (a) submissions made under this section; and
 - (b) a report on the outcomes of seeking the expert opinions or evidence.

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

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- (b) must seek to give the report by consensus.
- (3) The panel must—
 - (a) consist of at least 3 members appointed by the AER; and
 - (b) give the report to the AER before the AER makes the rate of return instrument.
- (4) 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.
- (5) 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 about rate of return instrument

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 the fourth anniversary of the day the reviewed instrument was published.
- (3) Despite subsection (2), the AER may replace the reviewed instrument before the day mentioned in that subsection if satisfied it should be replaced earlier to ensure the rate of return instrument will, or is likely to, contribute to the achievement of the national gas objective to the greatest degree.

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

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- (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—
 - (a) the making of a rate of return instrument is not an AER economic regulatory function or power; but
 - (b) 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*.

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.

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- (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.

17 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

18 Amendment of section 59 (Assumptions where there is non-compliance with regulatory information instrument)

- (1) Section 59(1)(a)(i), ‘provider; or’—
omit, insert—
provider or to make a rate of return instrument; or
- (2) Section 59(1)(a)(ii), ‘provider; and’—
omit, insert—
provider or the making of a rate of return

instrument; and

(3) Section 59(2)(a)—

omit, insert—

(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

19 Insertion of new section 294G

Chapter 9, Part 2—

insert—

294G South Australian Minister may make 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 for each year in a regulatory period is the rate under the rate of return instrument in force when the AER economic regulatory decision to which the rate relates is made.
- (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

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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.

20 Amendment of Schedule 1 (Subject matter for the National Gas Rules)

Schedule 1, item 41(g)—

omit.

21 Amendment of Schedule 2 (Miscellaneous provisions relating to interpretation)

- (1) Schedule 2, clause 34—

insert—

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

- (2) Schedule 2, clause 51, definition of *statutory instrument*, ‘the Rules’—

omit, insert—

the rate of return instrument, the Rules

22 Insertion of new Schedule 2, clause 51A

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,

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subject matters or circumstances, is not affected.

23 Insertion of new Schedule 3, Part 15

Schedule 3—

insert—

**Part 15 Transitional provisions
for rate of return
instrument**

90 Making first rate of return instrument

- (1) This section applies if—
 - (a) before the commencement of this section, the AER started a review of the non-binding guideline; and
 - (b) in relation to the review, the AER has sought advice or comment from stakeholders about making the guideline; 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 non-binding guideline or a draft of the proposed first rate of return instrument; and
 - (d) the draft guideline or instrument 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) In this section—

non-binding guideline means the guideline about determining the rate of return on assets in effect under the Rules as in force before the commencement of this section.

relevant expert means any of the following persons the AER considers appropriate to give the AER advice or comment about making the non-binding guideline—

- (a) persons engaged by a covered pipeline service provider, a consumer organisation or another entity to give the advice or comment;
- (b) other persons the AER considers have the qualifications or experience appropriate to give the advice or comment.

stakeholders means—

- (a) service providers, consumer organisations or relevant experts; or
- (b) end users and prospective users; or
- (c) other persons the AER considers have an interest in the making of the non-binding guideline.

91 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, subsection (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.

Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Bill 2018
Part 3 Amendment of National Gas Law

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(3) In this section—

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.