

2004 - 2005 - 2006

**THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA**

HOUSE OF REPRESENTATIVES

**AUSTRALIAN ENERGY MARKET AMENDMENT (GAS
LEGISLATION) BILL 2006**

EXPLANATORY MEMORANDUM

**(Circulated by authority of the Minister for Industry, Tourism and
Resources the Hon Ian Macfarlane MP)**

**AUSTRALIAN ENERGY MARKET AMENDMENT (GAS LEGISLATION)
BILL 2006**

GENERAL OUTLINE

1. The purpose of this Bill is to:
 - a) Repeal the *Gas Pipelines Access (Commonwealth) Act 1998*;
 - b) Amend the *Australian Energy Market Act 2004* (the AEM Act) to apply the new cooperative Commonwealth, State and Territory regime for access to gas pipelines and associated gas market issues (the new national gas regime) to the offshore area. The new national gas regime will involve a new National Gas Law and National Gas Rules to regulate access to gas pipelines. The new national gas regime will have the Australian Energy Regulator (AER) as regulator and the Australian Energy Market Commission (AEMC) will be responsible for changes to the new National Gas Rules made under the National Gas Law;
 - c) Amend the AEM Act (and the *Trade Practices Act 1974* (TPA)) to address technical issues with the conferral of functions and powers on the National Competition Council (the NCC), the Commonwealth Minister, the Australian Energy Market Commission (the AEMC), the Australian Energy Regulator (the AER) and the Australian Competition Tribunal (ACT) by the new national gas regime;
 - d) Amend the TPA to maintain the existing accommodation of incentives for greenfields gas pipelines (15-year no-coverage determinations and price regulation exemptions) in the new national gas regime;
 - e) Amend the *Administrative Decisions (Judicial Review) Act 1977* to provide for judicial review of decisions under the new national gas regime; and
 - f) Repeal the redundant common carrier provisions and make machinery amendments to the *Petroleum (Submerged Lands) Act 1967* and the *Offshore Petroleum Act 2006*.

Nature of the cooperative gas and electricity regimes

2. The appropriate regulation of gas and electricity infrastructure is essential to ensure efficient infrastructure investment, promote competitive energy markets and provide lower energy prices for consumers. Energy specific regulatory arrangements are considered necessary to accommodate the technical aspects of service provision in gas and electricity networks and associated market power issues.
3. A coordinated approach to energy access is also essential to maintaining consistency with national arrangements for access to essential infrastructure in the TPA and to promote more competitive energy markets. Accordingly, the

Commonwealth, States and Territories have coordinated their policy oversight of energy regulation through the Ministerial Council on Energy (MCE), acting under the Council of Australian Governments, as set out in the Australian Energy Market Agreement (AEMA) of 30 June 2004 as amended in 2006.

4. The current energy regulatory regime consists of the Commonwealth TPA and cooperative legislative schemes for both electricity and gas comprising:
 - the revised National Electricity Law and National Electricity Rules established by the *National Electricity (South Australia) Act 1996* (SA), and applied as a law in other jurisdictions through application Acts passed by participating States and Territories, including in relation to the offshore area by the Commonwealth's AEM Act (the electricity regime);
 - the Gas Pipelines Access Law (GPAL) established by Schedules 1 and 2 of the *Gas Pipelines Access (South Australia) Act 1997*, and applied as a law in other jurisdictions through application Acts passed by participating States and Territories, including in the offshore area by the Commonwealth's *Gas Pipelines Access (Commonwealth) Act 1998* (the gas access regime). The current changes, of which this Bill forms part, will replace this aspect of the current regime with the new national gas regime;
 - an industry specific national regulatory and enforcement body, the AER established by Part IIIAA of the TPA, which currently regulates electricity transmission. The current changes, of which this Bill forms part, will give the AER regulatory responsibility for gas transmission and distribution;
 - a national rule making and market development body, the AEMC established by the *Australian Energy Market Commission Establishment Act 2004* (SA), which currently oversees National Electricity Rules made in relation to electricity transmission. The current changes, of which this Bill forms part, will give the AEMC responsibility for the new National Gas Rules; and
 - State and Territory regulatory agencies for electricity and gas, currently covering electricity distribution, gas transmission and distribution, and licensing and retail regulation, most of which will pass to national bodies according to timelines set out in the AEMA.
5. These arrangements are supported by the general competition regulation in the TPA administered by the Australian Competition and Consumer Commission.
6. This Bill is part of the current MCE reform program, under which gas transmission and distribution will come under the national institutional framework and regulatory arrangements, thereby increasing consistency of regulation nation-wide and reducing regulatory uncertainty for industry. The current reforms will also bring the economic regulation of electricity distribution under the national institutional framework and regulatory arrangements, which will be achieved principally through amendments of the

National Electricity Law and National Electricity Rules. The AEM Act will remain the Commonwealth's application Act for the national electricity regime following these amendments. Further reforms to non-economic distribution and retail regulation of gas and electricity will be undertaken towards the end of 2007 in accordance with the AEMA.

Application of National Gas Law in Australia's offshore area

7. South Australian Parliament is expected to enact the *National Gas (South Australia) Act 2007 (SA)* by 30 June 2007, and the Schedule to this Act will be called the National Gas Law. An exposure draft of the National Gas Law was released by the MCE on 7 November 2006 and is available on the MCE website: www.mce.gov.au. The National Gas Law will then be applied as law by all jurisdictions with the exception of Western Australia (as to which see paragraph 13 below). The current gas access regime will be disbanded and the *Gas Pipelines Access (South Australia) Act 1997* repealed on the commencement of the *National Gas (South Australia) Act 2007 (SA)*, the application Acts applying the new National Gas Law, including this Bill, and the Western Australian legislation. This Bill will implement the new national gas regime to pipelines in Australia's offshore area (essentially, the area from 3 nautical miles offshore to the edge of the continental shelf) by:
 - repealing the *Gas Pipelines Access (Commonwealth) Act 1998*; and
 - amending the AEM Act to apply the National Gas Law and, where appropriate, complementary Western Australian legislation in the offshore area and the external territories.
8. Under this cooperative scheme, State and Territory laws will confer functions on a range of Commonwealth persons and authorities, namely the:
 - AER;
 - NCC;
 - ACT; and
 - the Minister responsible for the *AEM Act*.

The Commonwealth needs to legislatively provide for this conferral to take place.
9. This Bill inserts new sections 11C, 11D, 11E and 11F into the AEM Act setting out how functions and powers are conferred by the National Gas Law on the AEMC, AER, NCC, ACT and the Commonwealth Minister when applied as Commonwealth law.
10. This Bill also inserts new sections 13A, 13B and 13C into the AEM Act setting out how functions and powers are conferred by the National Gas Law on the Commonwealth Minister when applied as State or Territory law.

11. The Bill also replicates provisions in the application acts for the GPAL providing there will be no taxation consequences under State/Territory or prescribed Commonwealth law in relation to transfers of assets or liabilities for the purpose of:
- ensuring that a person does not carry on a related business prohibited by the new national gas regime; or
 - the separation of certain activities from other activities required by the new national gas regime.
12. This Bill also inserts new section 13F to clarify that any instrument made under the National Electricity Law or National Gas Law is not considered to be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, and so cannot be disallowed by the Commonwealth Parliament. This reflects the legal status of these instruments because they are applied by and not made under a Commonwealth law. Additionally, if those instruments were to be made legislative instruments under the *Legislative Instruments Act 2003*, an instrument made under the various state regimes would be disallowable in Commonwealth Parliament, which would undermine the cooperative nature of the scheme.
13. Western Australia will enact complementary legislation in substantially the same form as the National Gas Law. It will be called the National Gas Access Law and will be set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA). Western Australia will also adopt the National Gas Rules but will confer functions, powers and duties on its own regulator, the Economic Regulation Authority (ERA) rather than the AER. To avoid dual regulation of pipelines coming from the offshore area into Western Australia, this Bill applies as Commonwealth law:
- Western Australian legislation to offshore pipelines that do not cross from Western Australia into another State or Territory, and which are therefore regulated by the ERA; and
 - the National Gas Law to offshore pipelines that do cross from Western Australia into another State or Territory, and which are therefore regulated by the AER.
14. The Bill also confers jurisdiction on the Federal Court with respect to civil and criminal matters arising under the National Electricity Law and National Gas Law, and regulations made under those laws, when applied as laws of the Commonwealth. The Supreme Court of Western Australia is conferred with jurisdiction in relation to civil and criminal matters arising under the relevant Western Australian legislation relating to gas pipelines applied as a law of the Commonwealth.

Amendments to the *Trade Practices Act 1974* (the TPA)

15. The Bill empowers the AER, NCC and ACT to exercise functions or carry out duties conferred under the National Gas Law when applied as State or

Territory law, by amending the definition in the TPA of a "State/Territory energy law" to include the National Gas Law.

16. This Bill amends the TPA to clarify that specific procedural provisions in the TPA apply to the ACT when it performs merits review functions under the National Gas Law applied as a State or Territory or Commonwealth law, the Western Australian gas legislation applied as a State or Territory or Commonwealth law and the National Electricity Law applied as a State or Territory or Commonwealth law and to allow additional regulations to be made for those purposes. This Bill also clarifies that regulations made under the TPA dealing with the procedure of the ACT do not apply in relation to the functions of the ACT under a State/Territory energy law or a designated Commonwealth energy law.
17. This Bill inserts provisions into the TPA that deal with arbitrations conducted by the AER under a State or Territory energy law such as the National Gas Law. These provisions ensure that the TPA does not override a State or Territory energy law in determining processes for the AER to follow when undertaking an arbitration.
18. This Bill maintains the amendments made by the *Energy Legislation Amendment Act 2006* to Part IIIA of the TPA, providing for the national access regime, to ensure the effective operation of incentives for greenfields gas pipelines (explained below). The Bill updates the current references in the TPA to relevant State, Territory and Commonwealth legislation in the gas access regime to relevant State, Territory and Commonwealth legislation in the new national gas regime.
19. The Bill therefore amends the TPA to overcome the declaration and certification risks associated with the greenfields pipeline incentives. In particular the amendments contained in this Bill will, under Part IIIA of the TPA:
 - Require the greenfields pipelines incentives be disregarded by the NCC and the Treasurer when considering whether a regime is an 'effective access regime'; and
 - Prohibit the NCC from recommending for declaration, and the Minister from declaring, services provided by pipelines which have been granted a price regulation exemption or a 15-year no-coverage determination.

Amendment to the *Administrative Decisions (Judicial Review) Act 1977*

20. This Bill amends Schedule 3 of the *Administrative Decisions (Judicial Review) Act 1977* to ensure that decisions made by the AER, NCC, ACT or Commonwealth Minister under the National Gas Law, when applied as State or Territory law, or under the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA), are subject to judicial review by the Federal Court and the Federal Magistrates Court.

Amendments to the *Petroleum (Submerged Lands) Act 1967* and the *Offshore Petroleum Act 2006*

21. This Bill deletes the "common carrier" provisions in the *Petroleum (Submerged Lands) Act 1967* (PSLA) and the *Offshore Petroleum Act 2006* (OPA). The OPA is expected to replace the PSLA in late 2007.
22. This Bill also makes consequential changes to the PSLA and OPA to refer correctly to the relevant legislation constituting the new national gas regime.

Delegation of Legislative Power

23. Bills Digest (No 171 of 2003-04) for the Australian Energy Market Bill 2004 (now the AEM Act) prepared by the Parliamentary Library raised issues about the constitutionality of that Bill. Specifically, the Digest discussed possible difficulties with the delegation of Commonwealth legislative power to South Australia under the Bill.
24. The Bill is not open to constitutional objection on the ground that it involves an abdication of legislative power by the Commonwealth. This is supported by both long-standing and recent High Court decisions, and a number of legislative precedents.
25. Arguments that a State had invalidly abdicated its authority by 'picking up' and applying a Commonwealth law have been comprehensively rejected by the High Court in cases on the old Corporations Law scheme (*R v Hughes* (2000) 202 CLR 535 at 551; *Byrnes v R* (1999) 199 CLR 1 at 11; see also the cases cited in *Byrnes*).
26. The unanimous decision by all seven members of the High Court, including Dixon CJ, in *Hooper v Hooper* (1955) 91 CLR 529 is also directly relevant. In that case, the Court upheld the validity of a Commonwealth Act that created rights to dissolution of a marriage by 'picking up' the applicable State law, and applying it as Commonwealth law in a slightly modified form. The Court said at 537:

The Act might ... have defined the rights to which effect was to be given in 'matrimonial causes' by enacting a system of its own. Or it might have defined those rights by reference to the law of England or the law of New Zealand or the *law of one particular Australian State*. The fact that it chose to adopt the law of the State of the domicile in each particular case cannot affect the substance of the matter.

(Emphasis added.)

27. There are numerous legislative precedents for the Commonwealth ‘picking up’ and applying State laws including the *Petroleum (Submerged Lands) Act 1967* (see ss 9 and 11), the *Commonwealth Places (Application of Laws) Act 1970*, the *Crimes at Sea Act 2000*, and the *Judiciary Act 1903*.

FINANCIAL IMPACT STATEMENT

28. The Bill will have no financial impact.

NOTES ON CLAUSES

Preliminary

Clause 1: Short title

1. Clause 1 is a formal provision specifying the short title of the Bill. The Act will be called the *Australian Energy Market Amendment (Gas Legislation) Act 2006*.

Clause 2: Commencement

2. Subclause (1) provides that sections 1 to 3 and anything else that is not Schedule 1 or 2 to the Bill will commence on the day that the Bill receives Royal Assent.
3. Subclause 1 also provides that Schedule 1 of the Bill will commence on a single day to be fixed by Proclamation. It is proposed that this will be the same day as the *National Gas (South Australia) Act 2007*, the State and Territory application Acts, and the *National Gas Access (Western Australia) Act 2007* (WA) commence. That is, all elements of the new national gas regime will commence at the same time.
4. Subclause 1 also makes provisions about the commencement of Schedule 2. Schedule 2 amends the AEM Act to substitute definitions in the *Petroleum (Submerged Lands) Act 1967* with definitions from the *Offshore Petroleum Act 2006* which will replace the *Petroleum (Submerged Lands) Act 1967* when it comes into force. The Offshore Petroleum Act has passed through Parliament, but is yet to commence. Accordingly, if the Offshore Petroleum Act commences before Schedule 1 of this Act, then Schedule 2 will commence immediately after Schedule 1 commences. However, if the Offshore Petroleum Act has not commenced by the time Schedule 1 commences, then Schedule 2 does not commence until the Offshore Petroleum Act commences.

Clause 3: Schedule(s)

5. This clause provides that, subject to the commencement provisions above, each Act specified in Schedule 1 or Schedule 2 of this Bill, is amended as set out in the Schedules.

Schedule 1 – Amendments commencing on Proclamation

Part 1 - Amendments

Administrative Decisions (Judicial Review) Act 1977

Item 1 – Paragraph 2(d) of Schedule 3

6. It is anticipated that the *National Gas (South Australia) Act 2007* (SA) will replace the *Gas Pipelines Access (South Australia) Act 1997* (SA) by 1 July 2007. Paragraph 2(d) characterises the National Gas Law in the Schedule to the *National Gas (South Australia) Act 2007* (SA) as an "enactment" for the purposes of judicial review of decisions under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) (see paragraph (ca) of the definition of "enactment" in s 3(1) and Schedule 3). Regulations and Rules under the National Gas Law will also be enactments (see paragraph (cb) of the definition of "enactment" in s 3(1)). The effect of this amendment is that decisions of Commonwealth officers or authorities under the National Gas Law and National Gas Rules (when applied as a law of South Australia) will be subject to judicial review by the Federal Court and the Federal Magistrates Court under the ADJR Act (see paragraph (b) of the definition of "decision to which this Act applies" in s 3(1)). Commonwealth authorities and persons include the NCC, Commonwealth Minister, ACT and the AER.
7. Paragraph 2(daa) characterises an Act of a State or Territory other than South Australia that applies the National Gas Law as law in that jurisdiction as an "enactment" for the purposes of judicial review under the ADJR Act. The effect of this amendment is that decisions of Commonwealth officers or authorities under the National Gas Law and National Gas Rules, when applied in that jurisdiction, will be subject to judicial review under the ADJR Act.
8. Paragraph 2(dab) characterises the proposed National Gas Access Law set out in Schedule 1 of the *National Gas Access (Western Australia) Act 2007* (WA) as an "enactment" for the purposes of judicial review of state decisions in the Federal Court. It is mentioned separately because, as mentioned earlier, Western Australia is not applying the National Gas Law as a law in Western Australia. Instead the National Gas Access Law will be set out in Schedule 1 of the *National Gas Access (Western Australia) Act 2007* (WA). The effect of this amendment is that decisions of Commonwealth officers or authorities under the National Gas Access Law set out in Schedule 1 of the *National Gas Access (Western Australia) Act 2007* (WA) will be subject to judicial review under the ADJR Act.

Australian Energy Market Act 2004

Item 2 – Section 3

9. Item 30 of this Bill deletes subsections 3(2) and 3(3) of the AEM Act. The effect is that section 3 will be a stand alone section without any subsections. Therefore the signifier "(1)" for subsection 1 is redundant and can be deleted.

Items 3-14 insert a series of definitions which clarify the meaning of each term:

Item 3

10. “***coastal waters***” in relation to Western Australia is defined by reference to Schedule 2 of the *Petroleum (Submerged Lands) Act 1967* and, in essence, is the first three nautical miles of the territorial sea from the baseline of Western Australia and any waters that are within the baseline and not within the limits of Western Australia. The definition is pivotal for the definition of “***offshore Western Australian pipeline***” and therefore whether a pipeline beyond the coastal waters is subject to the National Gas (Commonwealth) Law (that is the National Gas Law as applied by the Commonwealth) or the Offshore Western Australian Pipelines (Commonwealth) Law (that is, the National Gas Access Law set out Schedule 1 to the *National Gas Access (WA) Act 2007* (WA) as applied by the Commonwealth).

Item 4

11. “***Commonwealth Minister***” is defined to mean the Commonwealth Minister that administers the AEM Act. Commonwealth Minister is used in section 11G of the AEM Act to define the “designated Minister” when the National Gas Law is applied as Commonwealth law.

Item 5

12. “***Economic Regulation Authority***” is defined to mean the body established by section 4 of the *Economic Regulation Authority Act 2003* (WA). The Economic Regulation Authority is the regulatory body for Western Australia and will regulate offshore Western Australian pipelines in place of the AER.

Item 6

13. “***federal tax-exempt matter***” is defined by reference to subsection 13D(2) of the AEM Act. This definition, and the provisions of subsection 13D(2), replicate provisions in the *Gas Pipelines Access (Commonwealth) Act 1998*.

Item 7

14. “***National Electricity (Commonwealth) Law and Regulations***” means the National Electricity Law and Regulations when applied as a law of the Commonwealth. The purpose of this item is to replace the previous definition of National Electricity (Commonwealth) Law, Regulations and Rules, repealed by item 8. There is no need to separately provide a definition for the

Rules. This is confirmed by item 34 of the Bill which adds subsection (2) to section 6 to clarify that the reference in subsection (1) of section 6 to National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law. These amendments are technical in nature and are to ensure consistency with State and Territory legislation applying the National Electricity Law and Regulations as State and Territory laws. The new formulation more accurately reflects the fact that the Rules are made under, and may be amended in accordance with, the National Electricity Law.

Item 8

15. As mentioned in the explanation under item 7, item 8 repeals the previous definition of National Electricity (Commonwealth) Law, Regulations and Rules.

Item 9

16. As mentioned in the explanation under item 7, because item 34 clarifies that the reference in subsection 6(1) of the AEM Act to the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA) includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law there is no longer any need to separately provide a definition for the Rules.

Item 10

17. “***National Gas (Commonwealth) Law***” means the National Gas Law when applied as a law of the Commonwealth, as provided in the new section 11A of the AEM Act. New subsection 11A(3) of the AEM Act clarifies that the reference in subsection (1) of section 11A to the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* of South Australia as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

Item 11

18. “***National Gas (Commonwealth) Law and Regulations***” means the National Gas Law and Regulations applied as a law of the Commonwealth.

Item 12

19. “***National Gas (Commonwealth) Regulations***” means regulations made under Part 3 of the *National Gas (South Australia) Act 2007* (SA) when applied as a law of the Commonwealth, as provided for in the new section 11B of the AEM Act.

Item 13

20. “*natural gas*” has the same meaning as in the National Gas (Commonwealth) Law, that is in the National Gas Law as applied as a law of the Commonwealth.

Item 14

21. “*offshore Western Australian pipeline*” means a pipeline located in both Western Australia's jurisdiction (in particular the coastal waters of Western Australia) and in Commonwealth waters beyond Western Australia's jurisdiction (the adjacent area of Western Australia), but does not include a pipeline any part of which is situated in the jurisdiction of another State or Territory. This definition enables the application of the National Gas Access Law set out in Schedule 1 of the *National Gas Access (Western Australia) Act 2007* (WA) as Commonwealth law to so much of an offshore Western Australian pipeline as is situated offshore in the adjacent area of Western Australia.

Item 15

22. “*Offshore Western Australian Pipelines (Commonwealth) Law*” means the National Gas Access Law set out in Schedule 1 of the *National Gas Access (Western Australia) Act 2007* (WA) when applied as Commonwealth law as provided for in the new section 11J of the AEM Act.

Item 16

23. “*Offshore Western Australian Pipelines (Commonwealth) Law and Regulations*” means the Offshore Western Australian Pipelines (Commonwealth) Law and the Offshore Western Australian Pipelines (Commonwealth) Regulations.

Item 17

24. “*Offshore Western Australian Pipelines (Commonwealth) Regulations*” means the regulations made under the *National Gas Access (Western Australia) Act 2007* (WA) applying as Commonwealth law under section 11K of the AEM Act.

Item 18

25. “*prescribed uniform energy law*” means a law of a State or Territory that relates to energy and is prescribed by the regulations made under the definition of “uniform energy law” in section 3 and section 14 of the AEM Act.

Item 19

26. Item 20 repeals paragraph (c) of the definition of South Australian Electricity Legislation to delete the unnecessary reference to the Rules, so paragraph (b) will be the last paragraph of that definition. The amendment made by item 19 is to reflect the deletion of paragraph (c) so that the end of paragraph (b) ends at "Act". Item 21 adds a reference to the Rules, in particular the National Electricity Rules.

Item 20

27. Consistent with the other changes to the AEM Act to remove reference to the National Electricity Rules in the AEM Act, paragraph (c) which refers to the Rules is repealed (see Item 7). Item 21 adds a reference to the Rules, in particular the National Electricity Rules.

Item 21

28. This item clarifies that the Rules and other instruments, as in force from time to time, made or having effect under the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA) are included within the meaning of the Law. It follows that ***South Australian Electricity Legislation*** includes those Rules and instruments, in particular the National Electricity Rules.

Item 22

29. “***South Australian Gas Legislation***” means the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* of South Australia, as in force from time to time and any regulations, as in force from time to time, made under Part 3 of that Act. The definition clarifies that the reference in paragraph (a) of the definition to the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* (SA) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law, in particular the National Gas Rules.

Item 23

30. “***State/Territory electricity law***” means South Australian Electricity Legislation, as it applies as a law of South Australia, or as it applies as a law of another State or as it applies as a law of the Australian Capital Territory or the Northern Territory.

Item 24

31. “***State/Territory energy law***” means a State/Territory electricity law or a State/Territory gas law as defined in the AEM Act. Sections 13A, 13B and 13C employ this term when providing for the relevant conferral of functions and powers, and the imposition of duties on, the Commonwealth Minister

Item 25

32. “***State/Territory gas law***” means the South Australian Gas Legislation as it applies as a law of South Australia, or as it applies as a law of another State or as it applies as a law of the Australian Capital Territory or the Northern Territory or the Western Australian Gas Legislation as it applies as a law of Western Australia.

Item 26

33. *"State/Territory tax-exempt matter"* has the meaning given by subsection 13F(2) of the AEM Act, and is replicated from the *Gas Pipelines Access (Commonwealth) Act 1998*.

Items 27 and 28

34. The definition of *"uniform energy law"* is expanded to include the South Australian Gas Legislation and the Western Australian Gas Legislation.

Item 29

35. *"Western Australian Gas Legislation"* is defined to mean the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* of Western Australia, as in force from time to time, and any regulations, as in force from time to time, made under Part 3 of that Act. This is the equivalent of the National Gas Law for Western Australia. The definition clarifies that the reference in paragraph (a) of the definition to the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law, in particular the National Gas Rules.

Item 30 – Subsections 3(2) and (3)

36. Subsections 3(2) and 3(3) currently clarify that words and expressions used in the National Electricity Law, but which are not defined in the AEM Act, have the same meaning as in the National Electricity Law. The additional definitions inserted by this Bill make these subsections unnecessary and so subsections 3(2) and 3(3) are repealed.

Item 31 – Sections 4 and 5

37. Sections 4 and 5 dealing with the application of laws to the Crown and extra-territorially currently refer only to the national electricity regime laws. With the addition of the new national gas regime to co-operative arrangements between the Commonwealth and the States and Territories it is appropriate to include reference to the new national gas regime.

New section 4 – Crown to be bound

38. This new section makes clear the Crown is bound by the AEM Act, the National Gas (Commonwealth) Law and Regulations, and the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations, in addition to the National Electricity (Commonwealth) Law and Regulations.
39. This provision changes the reference of *"any other uniform energy law"* to *"a prescribed uniform energy law"* to more precisely define the laws that bind the Crown.

New section 5 – Extra-territorial operation

40. The new section 5 conveys Parliament's intention to expand the scope of the existing section 5 so that this Act, the National Electricity (Commonwealth) Law and Regulations, the National Gas (Commonwealth) Law and Regulations, the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations, and a prescribed uniform energy law applied as a law of the Commonwealth, should apply as far as possible to things situated and transactions occurring either within or outside Australia. The operation of these laws also applies to things and transactions that would otherwise be governed or affected by the law of a State or Territory or a foreign country. The various laws need have an extraterritorial application to ensure, for example, that contractual arrangements entered into outside of Australia are not used to undermine the regime.

Item 32 – Division 1 - Electricity Laws

41. Part 2 of the amended AEM Act now has three divisions: electricity laws (Division 1); gas laws (Division 2); and prescribed uniform energy laws (Division 3). The inserted heading marks the beginning of Division 1, which covers electricity laws.

Items 33 and 34

Section 6 – Application of National Electricity Law in adjacent areas etc.

42. As a new subsection (2) is being added to section 6, the previous section 6 now requires a signifying (1) to mark the subsection.
43. The new subsection 6(2) clarifies that the definition of National Electricity Law incorporates any Rules or other instruments, as in force from time to time, made or having effect under this Law, in particular the National Electricity Rules.

Item 35 – Repeal of section 8

44. The current section 8 is otiose and is repealed. The new subsection 6(2) (added by item 34) confirms that reference to the National Electricity Law incorporates any Rules or other instruments, as in force from time to time, made or having effect under this Law, in particular the National Electricity Rules. These amendments are technical in nature and are to ensure consistency with State and Territory legislation applying the National Electricity Law and Regulations as State and Territory laws.

Items 36 and 37 – Amendment of sections 9 and 10

45. These items remove the previous separate reference to the National Electricity Rules. As earlier explained this separate reference is unnecessary, and the addition of subsection (2) to section 6 confirms that reference to the National Electricity Law incorporates any Rules or other instruments made or having effect under this Law, in particular the National Electricity Rules.

Item 38 – Electricity Laws

New section 10A – Functions and powers of the Australian Competition Tribunal under the National Electricity (Commonwealth) Law and Regulations

46. This section ensures that the Australian Competition Tribunal may perform functions and powers conferred on it under the National Electricity (Commonwealth) Law and Regulations.

New section 10B – Functions and powers of the Commonwealth Minister under the National Electricity (Commonwealth) Law and Regulations

47. This section ensures that the Commonwealth Minister may perform the functions and powers conferred on him or her under the National Electricity (Commonwealth) Law and Regulations. Any delegation by the Commonwealth Minister is taken to extend to and have effect for the purposes of those laws, regulations and rules.

Items 39 to 42 – Amendment to section 11

48. Consistent with other amendments in the AEM Act these items remove separate unnecessary references to the National Electricity Rules. The current separate reference in subsection (1) to the Rules is replaced by the addition of subsection 2 to section 6 (item 34). Further, for clarification, a new subsection (3) is added to section 11: a reference in paragraph 2(a) to the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA) specifically includes a reference to any Rules or other instruments made or having effect under that Law, in particular the National Electricity Rules.

Item 43 - Division 2 - Gas Laws

49. This item inserts new Division 2 of Part 2 in its entirety. Division 2 has two Subdivisions. Subdivision A - General, applies the National Gas Law and Regulations as Commonwealth law in adjacent areas and in certain Territories, as well as confers functions and powers, and imposes duties, on Commonwealth persons and authorities.
50. Subdivision B deals with the application of the *National Gas Access (Western Australia) Act 2007* (WA) as Commonwealth law to offshore Western Australian pipelines in the adjacent area of Western Australia.

Subdivision A – General

New section 11A – Application of National Gas Law in adjacent areas, certain Territories etc.

51. New section 11A applies the National Gas Law, as set out in the Schedule of the *National Gas (South Australia) Act 2007 (SA)*, as a law of the Commonwealth in offshore adjacent areas and external territories. This ensures that the jurisdiction of the Commonwealth does not overlap with State or Territory jurisdictions.
52. Broadly speaking, and with the particular exception of the application of Commonwealth law to an offshore Western Australian pipeline and the application of Commonwealth law to external territories, this section applies the National Gas Law in the same manner as section 6 of the AEM Act currently applies the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) 1996 (SA)*.
53. The National Gas Law applies as a law of the Commonwealth in relation to the adjacent areas of Norfolk Island, the Territory of Ashmore and Cartier Islands and the Territory of Heard and McDonald Islands. The adjacent area of the Territory of Ashmore and Cartier Island includes the land area of those islands. The National Gas Law also applies as a law of the Commonwealth to the Territory and adjacent areas of Christmas Island and Cocos (Keeling) Islands.
54. New sub-paragraph 11A(1)(a)(ix) also provides for the Commonwealth to apply the National Gas Law to persons, places and circumstances prescribed under Commonwealth regulations in the same way as sub-paragraph 6(a)(ii) of the AEM Act does for the National Electricity Law.
55. The National Gas (Commonwealth) Law does not apply in relation to an offshore Western Australian pipeline as these pipelines are covered by the Offshore Western Australian Pipelines (Commonwealth) Law: see new Subdivision B of Division 2, inserted in the AEM Act by this Bill. Apart from this, the National Gas (Commonwealth) Law applies in the adjacent area of each State and the Northern Territory.
56. Subsection (3) clarifies that the reference in subsection (1) to the National Gas Law set out in the Schedule to the *National Electricity (South Australia) Act 1996 (SA)* as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law, in particular the National Gas Rules. This amendment is technical in nature and is to ensure consistency with State and Territory legislation applying the National Electricity Law and Regulations, and National Gas Law, and Regulations, as State and Territory laws.
57. This section, together with the new sections 11B and 11C, apply the National Gas Law and Regulations as Commonwealth law in the offshore adjacent areas and islands within Commonwealth jurisdiction.

58. Changes to the National Gas (Commonwealth) Law will not be directly subject to Parliamentary scrutiny. Rather, the Commonwealth, States and Territories have agreed to apply the provisions of the new national gas regime uniformly. All jurisdictions (other than Western Australia) will therefore apply the same National Gas Law established by the *National Gas (South Australia) Act 2007* (SA); this National Gas Law, and any changes to it, will be subject to full scrutiny by the South Australian Parliament. The Commonwealth Parliament will scrutinise the application of the National Gas Law by the Commonwealth in this Bill, but will not otherwise consider changes to the National Gas Law. Other States and Territories will similarly scrutinise their application of the National Gas Law through the passage of their application Acts. The regulations in force under Part 3 of the *National Gas (South Australia) Act 2007* (SA), and the National Gas Rules in force under the National Gas Law, will not be subject to Parliamentary disallowance in each jurisdiction. Western Australia has agreed to ensure that its complementary legislation, which will implement the National Gas Law, mirrors the National Gas Law.
59. Further the Commonwealth has certain controls over the laws to be applied. Under the Australian Energy Market Agreement, the National Gas Law, and regulations made under it, may only be amended with the unanimous agreement of the Ministerial Council on Energy. Therefore the National Gas Law, and regulations made under it, can only be amended with the consent of the relevant Commonwealth Minister.
60. Under South Australia's *Australian Energy Market Commission Establishment Act 2004*, the Commonwealth nominates one of the three members of the Australian Energy Market Commission (AEMC), which is responsible for changes to the National Gas Rules. Further, under section 14(3) of the AEM Act, the Commonwealth has the power to modify or adapt the National Gas (Commonwealth) Law and Regulations through regulations made under the AEM Act. Such modification or adaptation of the gas regime through regulation is subject to disallowance in the usual manner in the Commonwealth Parliament.

New section 11B – Application of National Gas Regulations in adjacent areas, certain Territories etc.

61. Section 11B applies the regulations made under Part 3 of the *National Gas (South Australia) Act 2007* (SA) in force from time to time for the purposes of the National Gas (Commonwealth) Law. This means that they will only be in force in geographical areas or other situations where the National Gas (Commonwealth) Law applies. This clause also provides that these regulations, when in force as Commonwealth law, may be referred to as the National Gas (Commonwealth) Regulations.

New section 11C – Functions and Powers of the Australian Energy Market Commission under the National Gas (Commonwealth) Law and Regulations

62. Section 11C provides the AEMC has the functions and powers conferred on it under the National Gas (Commonwealth) Law and Regulations. Any

delegation by the AEMC is taken to extend to and have effect for the purposes of those laws and regulations. The purpose of this new section is essentially the same as that of existing section 9, but applies for the new national gas regime instead of for the national electricity regime. The new section 11C ensures that the AEMC, which is a South Australian statutory body, is able to perform the functions, and exercise the powers, conferred on it under Commonwealth law.

New section 11D – Functions and Powers of the Australian Energy Regulator under the National Gas (Commonwealth) Law and Regulations

63. Section 11D ensures that the AER may perform the functions and powers conferred on it by the National Gas (Commonwealth) Law and Regulations. Any delegation by the AER is taken to extend to and have effect for the purposes of those laws and regulations. The purpose of this new section is essentially the same as that of existing section 10, but applies for the new national gas regime instead of for the national electricity regime.

New section 11E – Functions and Powers of the National Competition Council under the National Gas (Commonwealth) Law and Regulations

64. Section 11E ensures that the National Competition Council (NCC) may perform the functions and powers conferred on it by the National Gas (Commonwealth) Law and Regulations.

New section 11F – Functions and powers of the Australian Competition Tribunal under the National Gas (Commonwealth) Law and Regulations

65. Section 11F ensures that the Australian Competition Tribunal may perform the functions and powers conferred on it by the National Gas (Commonwealth) Law and Regulations. The purpose of this new section is essentially the same as that of new section 10A, but applies for the new national gas regime instead of for the national electricity regime.

New section 11G - Functions and powers of the Commonwealth Minister under the National Gas (Commonwealth) Law and Regulations

66. Section 11G ensures that the Commonwealth Minister may perform the functions and powers conferred on them under the National Gas (Commonwealth) Law and Regulations. The purpose of this new section is essentially the same as section 10B, but applies for the new national gas regime. Any delegation by the Commonwealth Minister is taken to extend to and have effect for the purposes of the National (Commonwealth) Gas Law and Regulations.

New section 11H – Interpretation of some expressions in the National Gas (Commonwealth) Law and Regulations

67. Subsection 11H(1) defines some terms that apply for the purposes of the National Gas (Commonwealth) Law and Regulations.

68. The reference to the word *Court* in the National Gas (Commonwealth) Law and Regulations is taken to mean the Federal Court of Australia.
69. *designated Minister* for the purposes of the National Gas (Commonwealth) Law and Regulations means the Commonwealth Minister, which in turn is defined in subsection 3(1) as the Minister administering the AEM Act. Under the National Gas Law a "designated Minister" has the role of making 15-year no-coverage determinations, and coverage determinations as well as revoking coverage, for transmission gas pipelines that are solely within one jurisdiction. This definition means that the Commonwealth Minister will perform the relevant functions and exercise the relevant powers in respect of transmission gas pipelines to which the National Gas (Commonwealth) Law and Regulations apply, that is, those situated wholly in the offshore area. The National Gas Law itself ensures that the Commonwealth Minister makes similar decisions for any distribution pipelines in the offshore area, and cross-jurisdictional pipelines..
70. *magistrate*, means a Federal Magistrate of the Federal Magistrates Court.
71. Subsection 11H(2) provides that the *Acts Interpretation Act 1915* of South Australia, and other Acts of South Australia, do not apply to the National Gas (Commonwealth) Law or Regulations. The rationale for the insertion of this subsection is to clarify that although the National Gas Law is in the South Australian legislation, regulations are made under that South Australian legislation, and the National Gas Rules are made under the National Gas Law. These laws as applied by the Commonwealth are not subject to the general interpretative provisions of other South Australian legislation. The National Gas Law includes its own interpretation provisions in Schedule 2.
72. Subsection (3) clarifies that the reference in paragraph (2)(a) to the National Gas Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law, in particular the National Gas Rules. This amendment is technical in nature and is to ensure consistency with State and Territory legislation applying the National Electricity Law and Regulations and the National Gas Law and Regulations as State and Territory laws.

Subdivision B – Offshore Western Australian pipelines

73. Subdivision B deals with the Offshore Western Australian pipelines. The Western Australian gas regime will be established by complementary legislation, namely the *National Gas Access (Western Australia) Act 2007* (WA). Western Australia will not apply the National Gas Law through application legislation in the same manner as other jurisdictions. Rather it will set out the substance of the National Gas Law in its own Act. Western Australia's complementary legislation will empower its own regulator, the Economic Regulatory Authority (ERA), rather than the AER to perform relevant functions.

74. Western Australia is expected to apply the National Gas Rules to be made under the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* (SA) as Rules under the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA).
75. The existence of separate Western Australian legislation regulating access to gas pipelines suggests that, where a pipeline crosses both the Commonwealth's jurisdiction and that of Western Australia, it would be appropriate for only one regulatory regime to apply to that pipeline. This subdivision clarifies that the relevant Western Australian laws apply as Commonwealth law to so much of an offshore Western Australian pipeline as is situated in the adjacent area of Western Australia. This means that the law applying to a pipeline that crosses the jurisdictions of both the Commonwealth and Western Australia is, in substance, uniform, that is the terms of the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) either directly as a law of Western Australia or as a law of the Commonwealth applying the law of Western Australia (except where that pipeline subsequently enters a State or Territory other than Western Australia).

New sections 11J and 11K – Application of Offshore Western Australian Pipelines Law and Regulations in adjacent area of Western Australia

76. Section 11J, together with the new section 11K, provides for the application of Commonwealth law to pipelines in the adjacent offshore area of Western Australia, where those pipelines subsequently cross into the coastal waters of Western Australia. These two sections specifically apply the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) and regulations in force from time to time made under Part 3 of that Act as Commonwealth law to that part of an offshore Western Australian pipeline that is within the Commonwealth's jurisdiction in the adjacent offshore area of Western Australia.
77. All offshore pipelines that originate or terminate within the Commonwealth's jurisdiction and which cross into Western Australia's jurisdiction, but do not cross into South Australia or the Northern Territory, will be subject to the National Gas Access Law as set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) applied as Commonwealth law. As a result, these pipelines will be regulated by the ERA rather than the AER.
78. Consistent with terminology of other sections of the AEM Act, section 11J clarifies that the Commonwealth application of the Western Australian law offshore may be referred to as the Offshore Western Australian Pipelines (Commonwealth) Law. Similarly, section 11K provides that regulations made under Part 3 of the *National Gas Access (Western Australia) Act 2007* (WA) in force as Commonwealth law may be referred to as the Offshore Western Australian Pipelines (Commonwealth) Regulations.
79. Subsection 11J(2) clarifies that the reference in subsection 11J(1) to the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time,

made or having effect under that Law. This amendment is technical in nature and is to ensure consistency with State and Territory legislation applying the National Electricity Law and Regulations as State and Territory laws.

New section 11L – Functions and powers of the Australian Energy Market Commission under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations

80. Section 11L provides that the AEMC has the powers and functions conferred on it under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations. This section ensures that the AEMC, which is a South Australian statutory body, may perform the functions and exercise the powers conferred on it by the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations. Any delegation by the AEMC is taken to extend to and have effect for the purposes of the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.

New section 11M – Functions and powers of the Economic Regulation Authority under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations

81. Section 11M provides the ERA has the functions and powers conferred on it under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations. This section ensures that the ERA, which is a Western Australian statutory body, may perform the functions and exercise the powers conferred on it by the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.

New section 11N – Functions and powers of the National Competition Council under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations

82. Section 11N ensures that the NCC may perform the functions and exercise the powers conferred on it under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.

New section 11P – Functions and powers of the Australian Competition Tribunal under the Offshore Western Australia Pipelines (Commonwealth) Law and Regulations

83. Section 11P ensures that the ACT may perform the functions and exercise the powers conferred on it under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.

New section 11Q – Functions and powers of a Western Australian Minister under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations

84. Section 11Q ensures that the Western Australian Minister may perform the functions and exercise the powers conferred on him or her under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.

New section 11R – Interpretation of some expressions in the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations etc.

85. Section 11R assists with the interpretation of the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.
86. Subsection 11R(1) clarifies that pipelines which cross both Commonwealth and Western Australia jurisdictions (and which do not enter another State or Territory) are deemed to be wholly within Western Australia for the purposes of determining who is the relevant Minister under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations. The effect of this is that the Western Australian Minister is the relevant Minister for the purposes of making coverage and 15-year no-coverage determinations in relation to these pipelines under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.
87. Subsection 11R(2) provides that the *Interpretation Act 1984* of Western Australia, and other Acts of Western Australia, do not apply to the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations. The National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) will include its own interpretation schedule in the same form as the National Gas Law.
88. Subsection 11R(3) clarifies the reference in paragraph 2(a) to the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) includes a reference to any Rules or other instruments made or having effect under that Law. This amendment is technical in nature and is to ensure consistency with State and Territory legislation applying the National Electricity Law and Regulations and the National Gas Law and Regulations as State and Territory laws

New section 11S – Intergovernmental arrangements relating to the administration of the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations

89. Subsection 11S(1) empowers the Commonwealth to enter into arrangements with Western Australia for the effective administration of the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.
90. Subsection 11S(2) states that such an arrangement may provide for the exercise of powers and the performance of functions or duties by an officer or authority of Western Australia.

Division 3 – Prescribed uniform energy laws

Item 44 – Application of other uniform energy laws in adjacent areas

91. This section substitutes (for section 12) "A prescribed uniform energy law" for "Any other uniform energy law". The purpose of the section is to clarify that State or Territory laws relating to energy, other than legislation directly applied by the AEM Act, can be prescribed by regulations under section 14 of the AEM Act such that they are applied as a law of the Commonwealth in the adjacent area of each State and Territory.

Items 45, 46 and 47 – Application of the Administrative Decisions (Judicial Review) Act 1977

92. Item 45 removes reference to the AER from section 13(1), the effect of which is to expand the range of decisions which will be reviewable under the ADJR Act. This means, for example, decisions of the ACT and the NCC under the National Electricity (Commonwealth) Law and Regulations will be subject to review under the ADJR Act.
93. Existing section 13 already operates so that decisions made under the National Electricity (Commonwealth) Law and Regulations are reviewable under the ADJR Act. Item 46 expands the application of section 13 to bring decisions made under the National Gas (Commonwealth) Law and Regulations, and the Offshore Western Australian (Commonwealth) Law and Regulations, within the ambit of the ADJR Act.
94. Existing paragraph 13(1)(c) which refers to the National Electricity Rules is repealed. This is because, by the operation of new subsection 6(2) inserted by item 34, the National Electricity Rules fall within the ambit of the National Electricity (Commonwealth) Law in paragraph 13(1)(a).
95. Like item 44, item 47 substitutes “a prescribed uniform energy law” for “any other uniform energy law”. Using the new definition here clarifies that State or Territory laws relating to energy, in addition to legislation directly applied by the AEM Act, can be prescribed by regulations under section 14 of the Act, such that they are subject to review under the ADJR Act.

Item 48 – New sections 13A, 13B and 13C

96. New sections 13A to 13C of the AEM Act regulate the extent to which the State and Territory gas laws may confer duties, powers and functions upon the Commonwealth Minister in light of the decision in *R v. Hughes* (2000) 202 CLR 535. In *Hughes*, the High Court held that Commonwealth legislation had purported to impose a duty on the Commonwealth Director of Public Prosecution (DPP) to exercise State powers, and that the imposition of that duty needed to be supported by a Commonwealth constitutional power, particularly where the exercise of the power could adversely affect the rights of individuals. The Court in *Hughes* left open the question of whether there was any 'constitutional imperative' for the Commonwealth law to have imposed the duty on the DPP – in other words, whether it was necessary for this duty to have been imposed by Commonwealth rather than by State Law.
97. The *Hughes* decision related to the power of the DPP within the former Corporations Law co-operative legislative scheme, but is also potentially relevant to other Commonwealth-State co-operative schemes such as that for the new national gas regime. In relation to the issues raised in *Hughes*, these new sections are designed to ensure, to the greatest extent possible, that the duties, powers or functions of the Commonwealth, conferred under State or Territory law, will be able to be interpreted as being conferred by State and Territory law rather than Commonwealth law, so as to comply with the principles expressed in the *Hughes* decision.

98. It is noted that the functions of the Commonwealth Minister, and other Commonwealth bodies, under the Commonwealth, State and Territory new national gas regime are clearly related to Commonwealth heads of power, in particular the power in relation to foreign, trading and financial corporations (section 51(xx) of the Constitution) and international and interstate trade and commerce (section 51(i)). The Commonwealth's application of the National Electricity Law and Regulations, National Gas Law and Regulations, and Western Australian Gas Legislation clearly relates to the external affairs power (section 51(xxix)), and the Commonwealth's power with regard to territories (section 120).

New section 13A – Commonwealth consent to conferral of functions etc. on Commonwealth Minister

99. New subsection 13A(1) allows a State or Territory energy law to confer functions or powers or impose duties upon the Commonwealth Minister. This captures the conferral of functions or powers, or the imposition of duties, on the Commonwealth Minister by the National Electricity Law and Regulations as applied by State or Territory law, the National Gas Law and Regulations as applied by State or Territory law, and the Western Australian Gas Legislation as it applies as a law of Western Australia.
100. However, subsection 13A(1) needs to be read in conjunction with 13A(2). This subsection provides that a conferral of functions or powers is not authorised to the extent that it contravenes the Constitution or the authorisation otherwise exceeds the legislative power of the Commonwealth. Subsection 13A(2) is a reading down provision which aims to limit the operation of subsection 13A(1) to the extent necessary to ensure that the authorisation of the conferral of duties, functions and powers under section 13A is valid.
101. New subsection 13A(3) further limits the scope of the Commonwealth Minister in performing a duty or function, or exercising a power, under a State or Territory energy law unless it is in accordance with an agreement between the Commonwealth and the State or Territory concerned. Examples of agreements which provide the Commonwealth Minister with the relevant powers under this subsection include the Australian Energy Market Agreement or a decision of the Ministerial Council on Energy.

New section 13B – How duty is imposed

102. Section 13B sets out how a duty is imposed on the Commonwealth Minister by a State/Territory energy law. A number of alternative bases are specified.
103. Subsection 13B(1) provides that section 13B applies where a State/Territory tries to impose a duty on the Commonwealth Minister.
104. Subsection 13B(2) refers to situations where a State or Territory has sufficient legislative power to support imposing a duty on the Commonwealth Minister, and this is consistent with the Constitution. This subsection provides that if this is the case, the duty is imposed on the Commonwealth Minister by the

relevant State/Territory energy law rather than by the AEM Act or any other Commonwealth law.

105. Subsections 13B(3)-(5) refer to situations where State or Territory legislative powers are not sufficient to impose a duty on the Commonwealth Minister, or this is inconsistent with the Constitution, or for some other reason is invalid. In such a situation, the duty is imposed by the AEM Act (rather than the State/Territory energy law) (subsection 13B(3)). The Commonwealth intends to rely on all available powers to support its imposition of this duty in these circumstances (subsection 13B(4)). As we have noted the Commonwealth has significant relevant constitutional power, in particular in relation to foreign, trading and financial corporations (section 51(xx) of the Constitution) and international and interstate trade and commerce (section 51(i)), external affairs (section 51(xxix)), and territories (section 120). However, in these circumstances the duty is taken to be imposed by the AEM Act only to the extent that this is within the power of the Commonwealth and consistent with the Constitution (subsection 13B(5)).
106. For the avoidance of doubt subsection 13B(6) provides that none of these subsections limit the operation of section 13A.
107. *New section 13C – When a State/Territory energy law imposes a duty*
108. Section 13C is an interpretative provision. This section clarifies that a State/Territory energy law imposes a duty on the Commonwealth Minister when it obliges the Minister to act upon a function or power conferred by that State/Territory energy law.

New section 13D – No Commonwealth tax consequences for certain transfers of assets and liabilities etc.

109. The new section 13D replicates for the AEM Act what was in section 20 of the *Gas Pipelines Access (Commonwealth) Act 1998*. The intention is that there are to be no taxation consequences in relation to the separation of business activities for the purpose of complying with the ring-fencing obligations in the new national gas regime. So, for example, the National Gas Law, like the GPAL, will prohibit a gas pipeline service provider from also carrying on the business of producing, purchasing or selling natural gas unless exempted by the regulator. Were assets required to be transferred solely to avoid being in breach of the provision, this section would apply.
110. Paragraph 13D(1)(a) provides that no tax consequences will arise under a prescribed law of the Commonwealth where the Commonwealth Minister and the Treasurer are satisfied that a transfer of assets or liabilities is made:
 - for the purpose of ensuring compliance by a person carrying on a business of producing, purchasing or selling natural gas with a State/Territory gas law, the National Gas (Commonwealth) Law and Regulations or the

Offshore Western Australian Pipelines (Commonwealth) Law and Regulations; or

- for the purpose of the separation of certain activities from other activities of a person as required by a State/Territory gas law, the National Gas (Commonwealth) Law and Regulations or the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.

111. Paragraph 13D(1)(b) provides no tax consequences will arise under a prescribed law of the Commonwealth in respect of anything done because of, or arising out of, such a transfer of assets or liabilities.
112. Subsection 13D(3) ensures that the definition of natural gas is consistent between section 13D and the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007*.

New Section 13E – Exemption from State and Territory taxes

113. Similar to section 13D, section 13E replicates section 21 of the *Gas Pipelines Access (Commonwealth) Act 1998* in the AEM Act. This achieves the same effect as section 13D in relation to State and Territories taxes as opposed to federal taxes. However, this provision only applies in relation to the Commonwealth application of the National Gas Law and not the application by each State or Territory. Those States and Territories will enact similar exemptions for State and Territory taxes when they apply the National Gas Law.
114. Paragraph 13E(1)(a) provides that no stamp duty or other tax imposed by or under a law of a State or Territory is payable where the Commonwealth Minister is satisfied that a transfer of assets or liabilities is made:
- for the purpose of ensuring compliance by a person carrying on a business of producing, purchasing or selling natural gas with the National Gas (Commonwealth) Law and Regulations or the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations; or
 - for the purpose of the separation of certain activities from other activities of a person as required by the National Gas (Commonwealth) Law and Regulations or the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.
115. Paragraph 13E(1)(b) provides no stamp duty or other tax imposed by or under a law of a State or Territory is payable in relation to anything done because of, or arising out of, such a transfer of assets or liabilities.

New Section 13F – Legislative instruments

116. Section 13F provides that an instrument that has effect as Commonwealth law under the national electricity and new national gas regime is taken not to be and never to have been a legislative instrument for the purposes of the Commonwealth *Legislative Instruments Act 2003*.
117. The National Electricity (Commonwealth) Law and Regulations, National Gas (Commonwealth) Law and Regulations and the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations under the AEM Act give effect as Commonwealth law to primary legislation, regulations, Rules and other instruments established under the co-operative regimes. In particular, they give effect to the National Electricity Rules and the National Gas Rules. To avoid doubt, section 13F ensures that these Rules and other instruments are not made subject to the Commonwealth *Legislative Instruments Act 2003*. If that Act were to apply the co-operative schemes would be rendered unworkable. For example, allowing the National Electricity Rules or National Gas Rules to be disallowable in Commonwealth Parliament would undermine the national cooperative nature of the schemes. Section 13F is merely declaratory of the law because all the relevant Rules and instruments are only *applied by* and not *made under* a Commonwealth enactment, the AEM Act. The section is included to clarify that the various applied Rules and instruments are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

New Section 13G – Jurisdiction of the Federal Court

118. New section 13G gives the Federal Court jurisdiction with respect to civil and criminal matters arising under the National Electricity (Commonwealth) Law and Regulations or the National Gas (Commonwealth) Law and Regulations. Authorisation by the National Electricity (Commonwealth) Law or by the National Gas (Commonwealth) Law of the institution of a civil or criminal proceeding in the Federal Court is taken to vest the Court with jurisdiction in that matter.
119. It should be noted that the Federal Court's jurisdiction under this provision is specifically to hear civil and criminal matters relating to pipelines situated within the Commonwealth's jurisdiction. Section 44AAG of the TPA gives the Federal Court general jurisdiction in relation to proceedings by the AER in relation to breaches of the National Electricity Law and National Electricity Rules, and the National Gas Law and National Gas Rules, whether as applied by the Commonwealth or by a State or Territory. As noted above, the Federal Court, and the Federal Magistrates Court, also has jurisdiction in relation to decisions by Commonwealth bodies and officers in relation to the schemes under the ADJR Act. State and Territory Supreme Courts also have jurisdiction in relation to the National Electricity Law and National Electricity Rules, and the National Gas Law and National Gas Rules, as applied by their State or Territory.

New Section 13H – Jurisdiction of the Supreme Court of Western Australia

120. This section gives the Supreme Court of Western Australia jurisdiction to hear civil and criminal matters arising under the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations. Authorisation by the Offshore Western Australian Pipelines (Commonwealth) Law of the institution of a civil or criminal proceeding in the Supreme Court of Western Australia is taken to vest the Court with jurisdiction in that matter and the jurisdiction is not limited by any limits to which any other jurisdiction of the Court may be subject.
121. The effect of this provision is that civil or criminal matters arising under the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* and the regulations in force under that Act as applied by Western Australia, or as a law of the Commonwealth relating to pipelines that are situated in the jurisdiction of both the Commonwealth and Western Australia, could be heard by the Supreme Court of Western Australia. Section 44AAG of the TPA gives the Federal Court jurisdiction in relation to proceedings by the AER in relation to breaches of the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations, including the application of the National Gas Rules, and the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* and regulations made under the National Gas Access Law, including the application of the National Gas Rules.

New Section 13J – Jurisdiction of a State or Territory court under a prescribed uniform energy law

122. Section 13J explicitly vests the courts of a State or Territory with jurisdiction with respect to civil and criminal matters arising under a prescribed uniform energy law of that State or Territory which is applied as a law of the Commonwealth. Authorisation by a prescribed uniform energy law of a State or Territory of the institution of a civil or criminal proceeding in a court of the State or Territory is taken to vest the court with jurisdiction in that matter and the jurisdiction is not limited by any limits to which any other jurisdiction of the court may be subject.

Items 49 and 50 - Regulations

123. Currently, regulations made under existing subsection 14(3) may amend the operation of the National Electricity (Commonwealth) Law, Rules and Regulations.
124. Existing paragraph 14(3)(c) which refers to the National Electricity Rules is repealed. This is because it is unnecessary, and by the operation of new subsection 6(2) inserted by item 34, it is confirmed that the Rules fall within the ambit of the definition of the National Electricity (Commonwealth) Law in paragraph 14(1)(a).
125. New paragraphs 14(3)(c) to (cc) are inserted to expand this provision so that regulations may be made to amend the operation of the National Gas

(Commonwealth) Law and Regulations, and the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations.

126. This provides the Commonwealth with the capacity to adjust the application by the Commonwealth of a uniform energy law to meet the particular needs of operating within the Commonwealth's jurisdiction. It will, for example, allow regulations to modify an applied law, for example, to deal with the offshore environment in the adjacent area, or to conform to the limits on Commonwealth constitutional powers, such as the separation of judicial and executive powers and matters relating to taxation.
127. Item 50 substitutes "a prescribed uniform energy law" for "a uniform energy law" for paragraph 14(3)(d), consistent with the revised definition in item 18.

Petroleum (Submerged Lands) Act 1967

128. Items 51 to 57 are consequential amendments to the *Petroleum (Submerged Lands) Act 1967* (PSLA) made necessary by the repeal of the *Gas Pipelines Access (Commonwealth) Act 1998* and the changed arrangements for the application of the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* (SA) or the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) to (relevantly) external territories and offshore adjacent areas.

Item 51 – definition of Gas Pipelines Access Law is repealed

129. The definition of *Gas Pipelines Access Law* is repealed as, upon commencement of the new national gas regime, reference to the current gas access regime is no longer relevant.

Item 52 – definition of gas pipelines access legislation is repealed

130. Similarly, the definition of *gas pipelines access legislation* is repealed as the PSLA no longer needs to refer to terminology used in the existing gas access regime once the National Gas Law has commenced.

Item 53 – definition of Third Party Access Code is repealed

131. The definition of *Third Party Access Code* is also repealed as the PSLA no longer needs to refer to terminology used in the existing gas access regime once the National Gas Law has commenced.

Item 54 – Application of laws in areas adjacent to States

132. Subsections 9(1A) and (1B) relating to the application of the *Gas Pipelines Access (Commonwealth) Act 1998* offshore in the adjacent areas of States in some circumstances are redundant and are being repealed. The AEM Act itself will, under section 11A, apply the National Gas Law to the adjacent area of each State (except in relation to offshore Western Australian pipelines), and under section 11B, will apply the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) in

relation to offshore Western Australian pipelines in the adjacent area of Western Australia.

Item 55 – Application of laws in areas adjacent to Territories

133. Subsections 11(1A) and (1B) relating to the application of the *Gas Pipelines Access (Commonwealth) Act 1998* offshore in the adjacent area of the Northern Territory in some circumstances are redundant and are being repealed. The AEM Act itself will, under section 11A, apply the National Gas Law to the adjacent area of the Northern Territory.

Item 56 – Common carrier

134. Section 73 allows the Joint Authority, which consists of the Commonwealth Minister and the relevant State Minister, to declare a pipeline operator to be a common carrier of petroleum. Declaration as a common carrier allows a form of third party access but it is unclear how it would operate and has been made unnecessary by Part IIIA of the TPA. This provision has been in the PSLA since 1967 and has never been used. It is unlikely that this provision will be used in the future and only causes regulatory uncertainty by its continued existence. For these reasons, this section will be repealed.

Item 57 – Exemption

135. Paragraph 103(1)(f) becomes redundant once section 73 relating to common carriers is repealed, and therefore it can also be repealed.

Trade Practices Act 1974

136. Items 58 to 85 insert a series of definitions in subsection 4(1) of the TPA. Some of these definitions update and replace definitions previously located in Part IIIAA of the TPA relating to the Australian Energy Regulator (AER). Moving these definitions to the general definitions section of the TPA means they apply to the entire TPA. Other definitions are inserted to appropriately define the new gas regime in the TPA.

Item 58

137. The definition of "***designated Commonwealth energy law***" is inserted into the TPA to capture the national electricity and gas regimes to the extent they are applied by the Commonwealth. Specifically, this definition includes the National Electricity (Commonwealth) Law and Regulations; the National Gas (Commonwealth) Law and Regulations and the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations as defined by the *Australian Energy Market Act 2004*.

Item 59

138. Item 67 removes the definition of "**South Australian Electricity Legislation**" from section 44AB in Part IIIAA of the TPA, which establishes the AER. Item 59 replicates that definition in subsection 4(1) of the TPA and makes the reference to the Rules consistent with the AEM Act.

Item 60

139. The definition of "**South Australian Gas Legislation**" is a new definition inserted into subsection 4(1) of the TPA for the purpose of capturing the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* and the regulations made under that Act. The definition clarifies that the reference in paragraph (a) of the definition to the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* (SA) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

Item 61

140. Item 68 removes the definition of "**State/Territory energy law**" from section 44AB of Part IIIAA, which establishes the AER. Item 61 replicates that definition, with one addition, in subsection 4(1). The addition in subparagraph (c)(i) clarifies that only provisions of a law of a State or Territory that relate to energy may be prescribed for the purposes of the definition. In substance, the definition now also includes gas laws because of the addition of these to the concept of a uniform energy law. Previously, by defining "State/Territory energy law" within Part IIIAA, this definition was only relevant to matters relating to the AER. By transferring this definition to apply generally throughout the TPA, it can also be relevant to matters relating to the NCC and the ACT as well.
141. Paragraphs (a) and (b) of the definition of State/Territory energy law include uniform energy laws applying as a law of a State or Territory, and a State or Territory law actually applying that law. This definition is intended to capture all State and Territory laws applying the National Electricity Law and the National Gas Law set out in the Schedules to the relevant South Australian legislation and the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) as well as any other State or Territory energy related law prescribed by the regulations.
142. Paragraph (c) of the definition of State/Territory law includes any other provisions of a law of a State or Territory relating to energy that are prescribed by the regulations. Such a law might include, for example, the *Essential Services Commission Act 2001* (Vic). This will, for example, enable the AER to exercise functions under that Act.
143. The phrase "State/Territory energy law" is employed, including by amendments made by this Bill, in sections 29B(2B), 29BA, 29BB, 29BC, new

44AAEA, 44B, 44ZZP, new 44ZZR and 172(1A). Broadly, these provisions operate to confer functions and powers on, or clarify the operation of the NCC, AER and ACT in relation to the operation of the national electricity and gas regimes as applied in State or Territory law.

Item 62

144. Item 69 removes the definition of “**uniform energy law**” from section 44AB of Part IIIAA of the TPA. Item 62 replicates that definition, with amendments, in subsection 4(1), which contains definitions applying throughout the TPA. The amended definition expands the meaning of uniform energy law to include the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007*, the regulations made under Part 3 of that Act and the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* and regulations made under Part 3 of that Act.

Item 63

145. The definition of “**Western Australian Gas Legislation**” is a new definition inserted into subsection 4(1) of the TPA. It includes the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007*, and regulations made under Part 3 of that Act. Western Australia will not apply the National Gas Law established in South Australian law through application legislation in the same manner as other jurisdictions. The Western Australian gas regime will be established by “complementary legislation”, namely the *National Gas Access (Western Australia) Act 2007*. The definition clarifies that the reference in paragraph (a) of the definition to the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

Item 64

146. Section 29AA (located in Part IIA dealing with the NCC) currently provides definitions, including “State/Territory gas law”, that are relevant for the current gas access regime. With the commencement of the new national gas regime these provisions are no longer correct, and the appropriate definitions have been placed in subsection 4(1). Accordingly, they are repealed.

Items 65 and 66

147. The definition of “**State/Territory gas law**” currently in Part IIA is repealed under item 64 as it relates to the current State and Territory gas access regime. As noted earlier, item 61 generally replicates the current definition of “State/Territory energy law” (in section 44AB) in subsection 4(1). Items 65 and 66 make consequential changes to subsection 29B(2B) and sections 29BA, 29BB and 29BC of the TPA such that the terminology refers to the newly defined “State/Territory energy law”.

Items 67, 68 and 69

148. Items 67 to 69 repeals the definitions of "South Australian Electricity Legislation", "State/Territory energy law" and "uniform energy law" in section 44AB of the TPA relating to the AER. These definitions are now redundant because they are now being incorporated in the general definitions in subsection 4(1) of the TPA so that they can apply not only to the AER, but also to the ACT and NCC.

Item 70 – Commonwealth functions

149. Consequent upon the repeal of the *Gas Pipelines Access (Commonwealth) Act 1998*, the note to section 44H is amended to remove mention of that Act. The AEM Act is now the sole application act for both the national electricity and new national gas regimes.

Item 71 - New section 44AAEA - Arbitration

150. Subsection 44AAEA(1) provides that sections 44AAD and 44AAE of the TPA dealing with meetings and resolutions without meetings do not apply to the AER when it is conducting arbitration under the National Electricity (Commonwealth) Law, the National Gas (Commonwealth) Law or a provision of a State/Territory energy law. The National Gas Law provides, for example, how a hearing is to be conducted and whether there is a right to representation. The effect of this new section will be to make it clear that the requirements for formal meetings of the AER in the TPA do not apply to such arbitrations; this would clearly be inappropriate.
151. For the sake of clarity, subsection 44AAEA(2) provides that “arbitration” in this context includes a reference to the making, variation or revocation of an access determination (within the meaning of the relevant law, in particular the National Gas Law and National Gas Rules) and the performance of a function, or the exercise of a power in connection with the making, variation or revocation of an access determination (with the meaning of the relevant law, in particular the National Gas Law and National Gas Rules).

Item 72 – Definitions

152. This item inserts the definition of “**National Gas Law**” into section 44B of the TPA. The term "National Gas Law" appears in subsections 44G(5), (6) and (7), and subsections 44H(6A), (6B) and (6C) of the TPA. The purpose of those provisions is to ensure that greenfields gas pipelines incentives in Chapter 5 of the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* (SA) (and as applied by the States and Territories and the Commonwealth) or Chapter 5 of the National Gas Access Law in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (as applied by Western Australia and the Commonwealth) do not prevent the new national gas regime being an effective access regime under Part IIIA of the TPA. These provisions provide for the continuation of the existing exemptions of the greenfields gas pipelines incentives from NCC and Ministerial consideration of effective access regime (see items 74-79 below).

Item 73 - Definitions

153. Paragraph (c) is inserted to clarify that the definition of *State or Territory access regime law* includes State/Territory energy laws, i.e. the laws implementing the national electricity regime and the new national gas regime.

Background – Items 74-79

154. The point of the amendments to the TPA contained in items 74-79 is to maintain the current TPA provision for ensuring the effective operation of the incentives for greenfields gas pipelines agreed by the Ministerial Council on Energy.
155. The incentives were agreed by the MCE Ministers in 2004 to provide greater incentive mechanisms for the development of new pipelines ("greenfield pipelines") to cope with increasing demands for natural gas. The incentives essentially provide a 15 year regulation free period for new pipelines that meet the criteria. These incentives were passed by the South Australian Parliament in June 2006 in the *Gas Pipelines Access (Greenfields Pipeline Incentives) Amendment Bill 2006*. The Commonwealth amended the TPA in June 2006 through the *Energy Legislation Amendment Act 2006* to allow the incentives to operate under the TPA
156. The existing provisions of the GPAL dealing with greenfields incentives will be largely replicated in Chapter 5 of the National Gas Law set out in the Schedule to the South Australian *National Gas (South Australia) Act 2007*. The Western Australian government will also include the greenfields incentives in Chapter 5 of the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* (WA).
157. The amendments to the TPA in this Bill are largely consequential amendments necessary to ensure the effective continuing operation of the greenfields incentives under the new national gas regime.

Item 74 – Limits on the Council recommending declaration of a service

158. This item repeals existing subsections 44G(5), (6) and (7) and inserts new subsections 44G(5) and (6).
159. Section 44G sets out all the matters the NCC must take into consideration in recommending whether a service should be declared. For a service to be declared, a business that wishes to gain access to a particular infrastructure service applies to the NCC for a recommendation to have the service declared. The NCC considers this application before forwarding a recommendation to the responsible Commonwealth Minister (the Commonwealth Treasurer) for a decision. By obtaining a declaration, the business will be able to have access to the regulated infrastructure services which are already in existence.
160. The NCC can only recommend that a service be declared if, amongst other things, it is satisfied 'that access to the service is not already the subject of an effective access regime' (paragraph 44G(2)(e)). In determining, for the purpose of making a declaration recommendation, whether there is an

effective access regime the NCC must, subject to subsection 44G(5), apply the relevant principles set out in the Competition Principles Agreement.

161. The effect of subsection 44G(5) will be to continue to provide that a national gas access regime may be an effective access regime even though it includes the provision for greenfields gas pipeline incentives under Chapter 5 of the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* as applied by the States, Territories or the Commonwealth, or Chapter 5 of the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* as applied by Western Australia or the Commonwealth. This will also mean that, by the operation of s.44G(2)(e) of the TPA, services provided by greenfields gas pipelines cannot be the subject of a recommendation for declaration by the NCC.
162. Subsection 44G(6) provides that the NCC cannot recommend *declaration* of a service provided by a pipeline that is covered by the greenfields gas pipeline incentive scheme under Chapter 5 of a National Gas Law.

Item 75 – Designated Minister may declare a service

163. The purpose of the addition of these subsections is similar to the purpose of the insertion of subsections 44G(5), (6) and (7) (refer to item 74 above). In this case, however, the relevant decision maker is the designated Minister, that is the Treasurer, and not the NCC.

Background – Items 76 and 77 – New subsections 44M(4A) and 44N(2A)

164. Existing subsections 44M(4A) and 44N(2A) are repealed and replaced by new subsections. The objective of the amendments to these subsections is to continue to ensure that the NCC's recommendation for certification and the Treasurer's certification of, State and Territory national gas access regimes as effective access regimes are not compromised by the presence of the greenfields gas pipelines incentives in Chapter 5 of the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2007* as applied by the Commonwealth, States or Territories, and Chapter 5 of the National Gas Access Law set out in Schedule 1 to the *National Gas Access (Western Australia) Act 2007* as applied by Western Australia or the Commonwealth. It will also follow that greenfields gas pipelines in receipt of incentives under Chapter 5 of the National Gas Law as defined in section 44B will not be at risk of declaration under the TPA by operation of subsection 44H(6B).

Item 76 -Recommendation for a Ministerial decision on effective access regime

165. Subsection 44M(4A) requires the NCC to disregard greenfields gas pipelines incentives set out in Chapter 5 of a National Gas Law as defined in section 44B in deciding whether a national gas access regime is an effective access regime.

Item 77 – Ministerial decision on effectiveness of access regime

166. Subsection 44N(2A) requires the Minister to disregard greenfields gas pipelines incentives set out in Chapter 5 of a National Gas Law as defined in section 44B in deciding whether a national gas access regime is an effective access regime.

Background – Items 78-80

167. The ACT may acquire functions under a State/Territory energy law or a designated Commonwealth energy law, for example, in conducting merits review of decisions made under those laws. Those laws may provide for certain procedural requirements in relation to merits review applications before the ACT. For example, they may set out who may intervene in merits review proceedings, the circumstances in which the ACT may grant leave to user or consumer groups to participate and what orders the ACT may make with respect to costs. The TPA and the regulations made under it may also provide for general requirements concerning the ACT's procedure. Currently, the possibility that a State/Territory energy law may be inconsistent with the TPA cannot be ruled out. This may arise particularly in relation to the regulation making power in section 172 of the TPA and (possibly) section 44ZZP of the TPA. These items clarify the interaction between the State/Territory energy and designated Commonwealth energy law procedural requirements with procedural requirements in the TPA and regulations made under it.

Items 78 and 79 – Regulations about review by the Tribunal

168. Section 44ZZP which previously contained no subsections is now divided so that there is a subsection (1) and a subsection (2): Item 43A adds the signifier "(1)".
169. The addition of subsection 44ZZP(2) to section 44ZZP provides that regulations made under this provision do not apply in relation to the functions of the ACT under a State/Territory energy law or a designated Commonwealth energy law. This clarifies that regulations made under this provision do not apply to the ACT's functions under a State/Territory energy law or a designated Commonwealth energy law. New section 44ZZR (item 80) sets out the ACT's procedure when performing functions under a State/Territory energy law or a designated Commonwealth energy law.

Item 80 – Procedure of the Tribunal when performing function under a State/Territory energy law

170. New section 44ZZR provides that the procedural requirements set out in sections 103, 105-108 and 110 of the TPA apply to the ACT in a merits review under a State/Territory energy law or a designated Commonwealth law.
171. Subsection (2) provides that regulations may be made under section 44ZZR of the TPA in relation to specific listed aspects of the functions of the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth law. Subsection (3) clarifies that the regulations made under section 44ZZR give way to a State/Territory energy law or a designated Commonwealth law to the extent (if any) of any inconsistency with those laws.

Item 81 - Regulations

172. Subsections 172(1)(a) and 172(1)(b) provide that regulations may be made under the TPA with respect to the procedures of and fees and expenses of witnesses to the ACT. The insertion of new subsection 172(1B) ensures that regulations made for this purpose do not apply to the ACT when it is performing functions under a State/Territory energy law or a designated Commonwealth law.

Part 2 - Repeal *Gas Pipelines Access (Commonwealth) Act 1998*

Item 47 – Repeal of Gas Pipelines Access (Commonwealth) Act 1998

173. The National Gas Law will be established as the Schedule to South Australia's *National Gas (South Australia) Act 2007* and applied by the Commonwealth through the AEM Act. As earlier noted Western Australia will enact complementary legislation that will be applied by the Commonwealth to offshore Western Australian pipelines in the adjacent area of Western Australia. Together they will replace the existing gas access regime, which was applied by the *Gas Pipelines Access (Commonwealth) Act 1998*. For this reason, the *Gas Pipelines Access (Commonwealth) Act* is being repealed.

Schedule 2 – Amendments dependent on the commencement of Chapter 2 of the Offshore Petroleum Act 2006

Australian Energy Market Act 2004

174. The amendments to the AEM Act reflect the different terminology employed by the PSLA and the OPA to describe what is in essence the same area. The changes in definitions below ensure consistency in wording between the OPA and the AEM Act once the OPA commences and the PSLA is repealed.
175. This Schedule will take effect once Chapter 2 of the OPA commences and repeals the PSLA.

Item 1 – Amendment to “coastal waters” definition in subsection 3(1)

176. This item substitutes “scheduled area (within the meaning of the OPA)” for “area described in Schedule 2 to the PSLA under the heading”.

Item 2 – Amendment to “offshore Western Australian pipeline” definition in subsection 3(1)

177. To reflect the terminology employed by the OPA this item substitutes “offshore area” for “adjacent area”.

Item 3 – Amendment to Paragraph 11A(1)(a)

178. This item substitutes “offshore area” for “adjacent area”.

Item 4 – Amendment to Paragraph 11J(a)

179. This item substitutes “offshore area” for “adjacent area”.

Offshore Petroleum Act 2006

Item 5 – Gas Pipeline Access Legislation

180. Section 69 relating to gas pipeline access legislation to the offshore area of a State or Northern Territory will be redundant and is repealed.

Item 6 – Simplified Outline

181. The fourth dot point note to section 178 needs to be repealed as it becomes meaningless once section 192 is repealed (see *Item 6* below).

Item 7 – Common Carrier

182. Section 192 of the OPA is equivalent to section 73 of the PSLA. Section 73 has never been used in the PSLA since its inception in 1967 and it is unlikely that this provision will ever be used in the future. Its existence merely creates business uncertainty and may undermine the effective operation of access arrangements in Part IIIA of the TPA. For this reason, section 73 of the PSLA

is being repealed in Schedule 1 of this Bill (see item 56). For the same reasons, section 192 of the OPA should also be repealed.

Item 8 – Variation, suspension and exemption—conditions of titles

183. Table item 9 is repealed as it becomes meaningless once section 192 of the OPA is repealed.

Offshore Petroleum (Repeals and Consequential Amendments) Act 2006

Item 9 – Item 4 of Schedule 2 (note 3)

184. Note 3 of the *Offshore Petroleum (Repeals and Consequential Amendments) Act 2006* changes the heading of section 8 of the AEM Act to use the term "offshore area" instead of "adjacent area". As section 8 of the AEM Act is being repealed, Note 3 therefore becomes redundant and is repealed.