



Final Draft Replacement Code

**ELECTRICITY
RING-FENCING CODE**

April 2001

Table of Contents

Foreword	1
Final Draft Replacement Code	2
Appendix A: Explanatory Notes on Revisions	25
Appendix B: Responses to Other Matters Raised in Submissions.....	33

FOREWORD

In July 2000, the Commission commenced consultations on a code to replace the Ring-Fencing Code that has been in effect since April 2000 (“interim Code”).

In December 2000, the Commission issued a revised draft replacement Code (“revised draft”) together with detailed explanatory material dealing with the revisions that had been made to the previous version of the draft replacement Code (“initial draft”). Interested parties were invited to make submissions to the Commission in relation to the revised draft by the end of February 2001. Submissions were received from the Power and Water Authority (“PAWA”) and NT Power Generation Pty Ltd (“NT Power”).

The Commission has now had an opportunity to review those submissions and the terms of the revised draft. The final draft replacement Ring-Fencing Code (“final draft”) which follows addresses some of the issues raised in the submissions and a number of additional matters which have come to the attention of the Commission since preparation of the revised draft. In addition:

- Appendix A provides an explanation of the main amendments which the Commission has made in the final draft; and
- Appendix B provides the Commission’s responses to certain matters raised in submissions but not reflected in the final draft.

Two steps remain before a replacement Code can be formally adopted by the Commission.

First, a regulation under the Utilities Commission Act is required specifically authorising the Commission to make the Ring-Fencing Code with respect to the electricity supply industry. This regulation is expected to come into force in early May 2001.

Secondly, once the regulation is in place, the Commission will need to undertake a final round of consultations with interested parties and the Regulatory Minister in accordance with section 24 of the Act. This process is expected to be completed by the end of May, at which time the Commission will, through instrument of a Notice in the Gazette, publicly notify the making of the replacement Electricity Ring-Fencing Code (“Replacement Code”). The interim Code will continue to take effect until the expected commencement of the Replacement Code on 1 July 2001.

Interested parties should take this opportunity to familiarise themselves with the final draft which follows, in preparation for the final round of consultations expected shortly after the enabling regulation comes into force.

Submissions, comments or inquiries regarding this final draft and the supporting material should be directed to:

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Final Draft ELECTRICITY RING-FENCING CODE

Table of Provisions

Clause

1. Authority
2. Application
3. Objectives
4. Ring-Fencing Minimum Obligations
5. Compliance with Approved Procedures
6. Adding to or Amending this Code
7. Procedures for Adding To or Amending Ring-Fencing Obligations
8. Compliance Procedures and Compliance Reporting
9. Exemption from Compliance with Specified Obligations
10. Preservation of Other Obligations
11. Interpretation

SCHEDULE 1

SCHEDULE 2

Notice for Gazette

This Ring-Fencing Code ("**Code**") is published by the **Commission** pursuant to section 24 of the *Utilities Commission Act 2000* and will take effect on the date specified in the notice published in the *Gazette* making this **Code**. This **Code** replaces the Interim Ring-Fencing Code which commenced with effect on 1 April 2000.

NORTHERN TERRITORY ELECTRICITY RING-FENCING CODE

1. Authority

- (a) This **Code** is made by the **Commission** under section 24 of the Act and in accordance with the authority granted to the **Commission** by [insert relevant *regulation*].
- (b) In making this **Code**, the **Commission** has had regard to the matters listed in section 6(2) of the **Act**.

2. Application

This **Code** will apply to all **Electricity Entities** that carry on a **Prescribed Business** in the Northern Territory as and from the **Commencement Date**.

3. Objectives

The objectives of this **Code** are to:

- (a) promote and safeguard competition and fair and efficient market conduct in the **Electricity Supply Industry** including by promoting the simulation of competitive market conduct and preventing the misuse of monopoly power; and
- (b) require that **Electricity Entities** have in place arrangements which ensure that its **Related Businesses** are not treated in such a manner by a **Prescribed Business** as to confer a non-commercial discriminatory price or non-price advantage on the **Related Business** as compared to an arm's length third party in the same commercial circumstances.

4. Ring-Fencing Minimum Obligations

An **Electricity Entity** that carries on a **Prescribed Business** in the Northern Territory must:

- (a) establish and maintain a separate set of financial accounts and reports in respect of:
 - (i) each **Prescribed Business**; and
 - (ii) its **Electricity Business** as a whole,

which have been prepared in accordance with the **Accounting Procedures** applying to that **Electricity Entity** from time to time under clause 5;

- (b) allocate any costs that are shared between a **Prescribed Business** and a **Related Business** in a manner that:
 - (i) complies with the **Cost Allocation Procedures** applying to that **Electricity Entity** from time to time under clause 5; and
 - (ii) is otherwise fair and reasonable;
- (c) ensure that **Confidential Information** provided by a **Customer** to a **Prescribed Business** is:
 - (i) used only for the purpose for which that **Confidential Information** was provided by that **Customer**;
 - (ii) only disclosed to a **Related Business** if the disclosure of that **Confidential Information** is not prohibited under the **Information Procedures** applying to that **Electricity Entity** under clause 5 from time to time; and
 - (iii) otherwise dealt with in accordance with the **Information Procedures** applying to that **Electricity Entity** under clause 5 from time to time;
- (d) ensure that any information (including **Confidential Information**):
 - (i) obtained by that **Electricity Entity** (or by its employees, consultants, contractors or agents) in the course of conducting a **Prescribed Business**; or
 - (ii) known to that **Electricity Entity** (or by its employees, consultants, contractors or agents) as a result of conducting a **Prescribed Business**; and
 - (iii) which might reasonably be expected to materially affect the commercial interests of a competitor of a **Related Business** if disclosed to that **Related Business**; or
 - (iv) which might reasonably be expected to provide a competitive advantage to a **Related Business** over a competitor of that **Related Business** if disclosed to that **Related Business** without also being disclosed to that competitor,is:
 - (v) used only for the purpose for which that information was provided or obtained;

- (vi) only disclosed to a **Related Business** if the disclosure of that information is not prohibited under the **Information Procedures** applying to that **Electricity Entity** under clause 5 from time to time; and
 - (vii) otherwise dealt with in accordance with the **Information Procedures** applying to that **Electricity Entity** under clause 5 from time to time;
- (e) ensure that goods or services provided to a **Related Business** by a **Prescribed Business** are provided on a non-discriminatory arm's length commercial basis to other **Customers** who wish to obtain the same type of goods or services from the **Prescribed Business** (including competitors of that **Related Business**);
 - (f) ensure that goods or services provided to a **Prescribed Business** by a **Related Business** are provided on a non-discriminatory arm's length commercial basis; and
 - (g) ensure that the **marketing staff** of its **Related Businesses** are not also used as **marketing staff** for its **Prescribed Businesses** and, in the event that the **marketing staff** of its **Prescribed Businesses** do become or are found to become involved in a **Related Business**, ensure that that involvement immediately ceases.

5. Compliance with Approved Procedures

- 5.1 In this clause 5 unless the context otherwise requires, a reference to "**Procedures**" includes in each case the **Accounting Procedures**, **Cost Allocation Procedures** and **Information Procedures**.
- 5.2 An **Electricity Entity** that carries on a **Prescribed Business** must within:
 - (a) 3 months (in the case of the **Accounting Procedures** and the **Cost Allocation Procedures**); and
 - (b) 6 months (in the case of the **Information Procedures**)of the **Commencement Date** submit to the **Commission** for approval final draft **Procedures** for its **Prescribed Businesses** developed in accordance with clause 5.3.
- 5.3 The final draft **Procedures** submitted by an **Electricity Entity** under clause 5.2 must be:
 - (a) designed to ensure compliance with the **Electricity Entity's** obligations under clause 4;
 - (b) otherwise consistent with the general principles set out in Schedule 2 to this **Code** for each type of **Procedure**; and

- (c) developed in conjunction with the **Commission** so as to ensure that the final draft **Procedures** when submitted can be approved by the **Commission** without the need for substantial amendments.
- 5.4 In considering whether to approve any draft **Procedures** submitted by an **Electricity Entity** under clause 5.2, the **Commission** will have regard to (among other things):
- (a) the matters set out in section 6(2) of the **Act**; and
- (b) whether the draft **Procedures** give effect to the principles set out in Schedule 2 to this **Code** for that type of **Procedures**.
- 5.5 The **Commission** may grant its approval of the draft **Procedures** submitted by an **Electricity Entity** under clause 5.2 subject to such conditions as the **Commission** considers are appropriate in the circumstances including conditions requiring that:
- (a) specific amendments be made to the draft **Procedures** submitted by the **Electricity Entity**;
- (b) the **Procedures** are approved for a fixed term;
- (c) the **Procedures** be reviewed at regular intervals by the **Commission** and the **Electricity Entity**;
- (d) the **Procedures** must be resubmitted for approval following any change to the **Code** affecting the **Procedures** or when otherwise requested by the **Commission**; and
- (e) the **Electricity Entity** report to the **Commission** concerning the implementation, application and/or compliance with the **Procedures** when requested by the **Commission**.
- 5.6 An **Electricity Entity** must comply with any **Procedures** approved by the **Commission** from time to time under clause 5.2 and any conditions attaching to the **Commission's** approval of those **Procedures**.
- 5.7 An **Electricity Entity** may at any time apply to the **Commission** to approve a proposed variation to any existing **Procedures**. Unless the **Commission** considers that the application has been made on trivial or vexatious grounds (in which case the **Commission** may reject the application without further notice) an application to vary existing **Procedures** will be dealt with by the **Commission** in accordance with the procedure set out in this clause 5 applying to an application to approve the initial **Procedures**.
- 5.8 The **Commission** must notify an **Electricity Entity** within 30 days after receiving an application from the **Electricity Entity** to approve any **Procedures** (or any variation to the existing **Procedures**) of:

- (a) whether the **Commission** approves those **Procedures** (or the proposed variation to the existing **Procedures**);
- (b) any conditions attaching to the **Commission's** approval of those **Procedures** (or the proposed variation to the existing **Procedures**).

The **Electricity Entity** must implement any **Procedures** within 30 days after the date upon which they are approved by the **Commission**.

5.9 If an **Electricity Entity**:

- (a) fails to submit any of the draft **Procedures** to the **Commission** within the time period specified in clause 5.2 for the submission of that type of **Procedures**; or
- (b) submits draft **Procedures** to the **Commission** which require substantial amendment before they can be approved by the **Commission**,

the **Commission** may issue its own **Procedures** which will be deemed for the purposes of this **Code** to be the **Procedures** applying to that **Electricity Entity** until such time as appropriate draft **Procedures** are submitted to the **Commission** and approved.

5.10 Until such time as **Procedures** are approved or issued by the **Commission** under this clause 5, an **Electricity Entity** must comply with the principles set out in Schedule 2 to this **Code** for that type of **Procedures** as if those principles were the **Procedures**.

5.11 An **Electricity Entity** that carries on a **Prescribed Business** must provide to any person upon request copies of the accounts provided to the **Commission** under clause 4(a) for the most recent annual reporting period upon payment by that person of the fee approved for that purpose by the **Commission**.

6. Adding to or Amending this Code

6.1 The **Commission** may at any time vary or revoke this **Code** (or any part of this **Code**) in accordance with section 24 of the **Act**.

6.2 An **Electricity Entity** may request that the **Commission** vary or revoke any part of this **Code**. Unless the **Commission** considers that the application has been made on trivial or vexatious grounds (in which case the **Commission** may reject the application without further notice) an application to vary or revoke any part of this **Code** will be dealt with by the **Commission** in accordance with the procedure set out in this clause 6.

6.3 Without limiting the powers of the **Commission** under section 24 of the **Act** to vary or revoke the **Code**, the **Commission** may vary the **Code** to require that an **Electricity Entity** comply with an obligation in relation to the conduct of a **Prescribed Business** which differs from or is in addition to the

minimum obligations set out in clauses 4 and 5 (including by requiring the **Electricity Entity** to comply with procedures issued by the **Commission** which vary or are additional to the **Procedures** approved or issued by the **Commission** under clause 5 from time to time).

6.4 In deciding whether to vary or revoke this **Code** (or any part of this **Code**) under clauses 6.1 or 6.2, or impose any additional or varied obligation on an **Electricity Entity** under clause 6.3, the **Commission** will have regard to:

(a) the matters listed in section 6(2) of the **Act**; and

(b) in the case of a variation to the **Code** which imposes an additional or varied obligation on a particular **Electricity Entity**, the general principle that the administrative cost to that **Electricity Entity** of complying with the additional or varied obligation should not, or should not be likely to in the opinion of the **Commission**, outweigh the benefits to the public from compliance with that additional or varied obligation.

6.5 Before varying or revoking this **Code**, or imposing any additional or varied obligation on an **Electricity Entity**, under this clause 6, the **Commission** will consult with each **Electricity Entity** in accordance with the procedure set out in clause 7 and otherwise comply with the other requirements of the **Act** and clause 7.

6.6 An **Electricity Entity** must comply with any additional or varied obligation imposed upon that **Electricity Entity** under this clause 6 as and from the date upon which that obligation takes effect under section 24 of the **Act**.

7. Procedures for Adding To or Amending Ring-Fencing Obligations

7.1 The **Commission** must, before varying or revoking this **Code** (or any part of this **Code**) or imposing an additional or varied obligation on an **Electricity Entity**, inform each person known to the **Commission** (whom the **Commission** believes has a sufficient interest in the matter) that the **Commission** is considering varying or revoking this **Code** (or any part of this **Code**) or imposing an additional or varied obligation on an **Electricity Entity** by publishing a written notice which at least:

(a) states the nature of the proposed variation, revocation or additional or varied obligation; and

(b) requests submissions by a date specified in the notice (not being a date earlier than 30 days after the date of the notice).

7.2 The **Commission** will also give a copy of any notice published in accordance with this clause 7 to each **Electricity Entity** to which the notice relates.

- 7.3 The **Commission** must consider any submissions received by the date specified in the notice published under clause 7.1(b) and may (but is not obliged to) consider any submissions received after that date.
- 7.4 Within 30 days (or such longer period as the **Commission** notifies) after the last day for submissions specified in the notice published under clause 7.1(b), the **Commission** must issue a draft decision stating whether or not it intends to proceed with the proposed variation, revocation or additional or varied obligation.
- 7.5 The **Commission** must:
- (a) provide a copy of its draft decision to each **Electricity Entity**, any person who made a submission on the matter and any other person who requests a copy; and
 - (b) request submissions from persons to whom it provided the draft decision by a specified date (not being a date earlier than 30 days after the date the draft decision was issued).
- 7.6 The **Commission** must consider any submissions it receives by the date specified by the **Commission** under clause 7.5(b) and it may (but is not obliged to) consider any submissions received after that date.
- 7.7 Within 30 days (or such longer period as the **Commission** notifies) after the last day for submissions on the draft decision specified by the **Commission**, the **Commission** must issue a final decision stating:
- (a) whether or not it will proceed with the proposed variation, revocation or additional or varied obligation; and
 - (b) the final form of that proposed variation, revocation or additional or varied obligation.
- 7.8 A notice in relation to a variation, revocation or additional or varied obligation will have effect 30 days after the notice is given to each **Electricity Entity** and published in the *Gazette* (or such later date as the **Commission** specifies in the notice).
- 8. Compliance Procedures and Compliance Reporting**
- 8.1 An **Electricity Entity** that carries on a **Prescribed Business** must within 6 months of the **Commencement Date** establish and maintain appropriate internal procedures to ensure that it complies with its obligations under this **Code**. The **Commission** may require the **Electricity Entity** to demonstrate the adequacy of, and level of, compliance with these procedures upon reasonable notice. However, any statement made or assurance given by the **Commission** concerning the adequacy of an **Electricity Entity's** compliance procedures will not affect the **Electricity Entity's** obligations under this **Code**.

- 8.2 An **Electricity Entity** must provide a report to the **Commission**, at reasonable intervals determined by the **Commission**, describing the measures taken by the **Electricity Entity** to ensure compliance with its obligations under this **Code**. This report, along with the **Commission's** assessment of compliance, will be made publicly available by the **Commission** subject to the **Commission** first complying with its obligations under section 26 of the **Act**.
- 8.3 The **Commission** may, upon reasonable notice to an **Electricity Entity**, appoint an independent auditor to undertake an audit of the **Electricity Entity's** compliance with any of its obligations under this **Code**.
- 8.4 If the **Commission** nominates standards or requirements to apply to an audit under clause 8.3, the auditor will report in accordance with those standards or requirements.
- 8.5 The **Commission** will provide a copy of the auditor's report to the **Electricity Entity** as soon as reasonably possible after it has been received from the auditor.
- 8.6 The **Electricity Entity** will be responsible to pay the costs of undertaking that audit if the auditor discovers any failure by the **Electricity Entity** to comply with a material obligation under this **Code**.
- 8.7 An **Electricity Entity** must report any breach of its obligations under this **Code** to the **Commission** as soon as reasonably possible after becoming aware that the breach has occurred and advise of the remedial action that is being undertaken to rectify the breach.

9. Exemption from Compliance with Specified Obligations

- 9.1 As at the **Commencement Date** each **Electricity Entity** listed in column 1 of Schedule 1 is exempt from complying with the obligations under this **Code** set out in column 2 of Schedule 1 in relation to the **Prescribed Business** or the **Electricity Business** set out in column 3 of Schedule 1 until such time as the **Commission** revokes that exemption in accordance with clause 6 of this **Code**.
- 9.2 An **Electricity Entity** may apply to the **Commission** for an exemption from compliance with any obligation (or component of an obligation) under this **Code**. A notice requesting an exemption must include all information and materials necessary to support the **Electricity Entity's** application for exemption.
- 9.3 In determining whether to grant any exemption, the **Commission** will have regard to:
- (a) the matters listed in section 6(2) of the **Act**; and

- (b) the general principle that the **Commission** will only grant an exemption if it is satisfied that the benefit, or likely benefit, to the public of compliance with the relevant obligation will be outweighed by the administrative cost to that **Electricity Entity** of complying with that obligation.

9.4 The **Commission** may grant an exemption:

- (a) on different terms to those sought by the **Electricity Entity**, or
- (b) subject to such conditions as the **Commission** considers are appropriate in the circumstances, including conditions requiring that:
 - (i) the exemption be for a fixed term;
 - (ii) the continuation of the exemption be subject to review by the **Commission** on such terms as the **Commission** considers appropriate in the circumstances;
 - (iii) the **Electricity Entity** report to the **Commission** concerning any matter relating to the operation or impact of the exemption; and
 - (iv) the grant of the exemption be conditional upon the occurrence of a nominated event (for example, the variation of the **Code** to impose an additional or varied obligation on the **Electricity Entity** or the implementation of agreed compliance procedures).

9.5 When the **Commission** receives an application under clause 9.2 the **Commission** must:

- (a) if it considers that the application has been made on trivial or vexatious grounds, reject the application without further consideration; or
- (b) in all other cases within 14 days after receipt of the application, inform each person known to the **Commission** whom the **Commission** believes has a sufficient interest in the matter, that the **Commission** has received the application by publishing a written notice which at least:
 - (i) identifies the **Electricity Entity** that has applied for the exemption and the nature of the requested exemption;
 - (ii) states how copies of the application can be obtained; and
 - (iii) requests submissions by a date specified in the notice (not being a date earlier than 30 days after the date of the notice).

- 9.6 The **Commission** must provide a copy of the application to any person within 7 days after the person requests a copy and pays any reasonable fee required by the **Commission**.
- 9.7 The **Commission** must consider any submissions received by the date specified in the notice published under clause 9.5 and it may (but is not obliged to) consider any submissions received after that date.
- 9.8 Within 30 days (or such longer period as the **Commission** notifies) after the last day for submissions specified in the notice published under clause 9.5 the **Commission** must issue a draft decision stating whether or not it intends to grant the exemption sought in that application.
- 9.9 The **Commission** must:
- (a) provide a copy of its draft decision to the relevant **Electricity Entity**, any person who made a submission on the matter and any other person who requests a copy; and
 - (b) request submissions from persons to whom it provides the draft decision by a specified date (not being a date earlier than 30 days after the date the draft decision was issued).
- 9.10 The **Commission** must consider any submissions it receives by the date specified by the **Commission** under clause 9.9 and it may (but is not obliged to) consider any submissions received after that date.
- 9.11 Within 30 days (or such longer period as the **Commission** notifies) after the last day for submissions on the draft decision specified by the **Commission**, the **Commission** must issue a final decision stating whether or not it will grant the exemption sought in that application.
- 9.12 A final decision under clause 9.11 has effect 30 days after the decision is issued to the **Electricity Entity** or such later date as the **Commission** specifies in the notice.
- 9.13 An **Electricity Entity** may at any time request that the **Commission** consider whether the requirements set out in paragraph (b) of the definition of 'Prescribed Business' have been satisfied. A request under this clause 9.13 will be dealt with by the **Commission** in the same manner as an application for an exemption from compliance with any obligation (or component by obligation) under clause 9.2.

10. Preservation of Other Obligations

Nothing in this **Code** will derogate from any obligation imposed upon an **Electricity Entity** under the **Act**, the *Electricity Reform Act 2000*, any regulation made under those Acts, any condition of a licence issued to the **Electricity Entity** or any other code made by the **Commission** under the **Act**.

11. Interpretation

11.1 In this **Code**, words appearing like **this** will have the meaning set out in clause 11.2.

11.2 In this **Code**, unless the contrary intention appears:

“Accounting Procedures” means the procedures of that name approved or issued by the **Commission** under clause 5 for the purposes of this **Code**;

“Act” means the *Utilities Commission Act 2000*;

“Associate” means in relation to:

- (a) an **Electricity Entity** that is a legal entity incorporated pursuant to the *Corporations Law*, a person that is an associate of that **Electricity Entity** under Division 2 of Part 1.2 of the *Corporations Law* if sections 13, 14, 16(2) and 17 of the *Corporations Law* were repealed; and
- (b) an **Electricity Entity** that is not a legal entity incorporated pursuant to the *Corporations Law*, a person that would be an associate of that **Electricity Entity** under Division 2 of Part 1.2 of the *Corporations Law* if sections 13, 14, 16(2) and 17 of the *Corporations Law* were repealed and if that **Electricity Entity** were a legal entity incorporated pursuant to the *Corporations Law*;

“Code” means this Ring-Fencing Code;

“Commencement Date” means the date set out in the notice published in the *Gazette* making this **Code** from which this **Code** will take effect;

“Commission” means the Utilities Commission of the Northern Territory established by the *Utilities Commission Act 2000*;

“Confidential Information” means information which is or has been provided to, or has otherwise been obtained by, an **Electricity Entity** in connection with the carrying on of a **Prescribed Business** and which is confidential or commercially sensitive and includes information which is derived from any such information;

“Cost Allocation Procedures” means the procedures of that name approved or issued by the **Commission** under clause 5 for the purposes of this **Code**;

“Customer” means a person who engages (or proposes to engage) in the activity of purchasing goods or services from a **Prescribed Business**;

“directors” includes in the case of the Power and Water Authority its chief executive officer from time to time and each of the persons appointed to the Power and Water Authority by the Minister under the *Power and Water Authority Act*.

“Electricity Business” means in relation to an **Electricity Entity**, all of the businesses conducted by that **Electricity Entity** in the **Electricity Supply Industry**;

“Electricity Entity” has the same meaning as is given to that term in the *Electricity Reform Act 2000* and includes, where the context requires, the **Associates** of that entity;

“Electricity Supply Industry” has the same meaning as in the *Electricity Reform Act 2000*;

“Information Procedures” means the procedures of that name approved or issued by the **Commission** under clause 5 for the purposes of this **Code**;

“marketing staff” means an employee, consultant, contractor or agent of an **Electricity Entity** who is directly involved in the sale, promotion or advertising of any goods or services provided by the **Electricity Entity** to **Customers** (whether or not that employee, consultant, contractor or agent is involved in other functions) but does not include an employee, consultant, or agent who is only involved in:

- (a) strategic decision making, including the executive officer or officers to whom **marketing staff** reports either directly or indirectly; or
- (b) technical, administrative, accounting or service functions;

“Prescribed Business” means:

- (a) a business (or component of a business) carried on by an **Electricity Entity** which consists of:
 - (i) the operation of an electricity network and the provision of network access services in relation to that electricity network to **Customers**;
 - (ii) the provision of power system control and dispatch services in relation to any electricity network;
 - (iii) the sale of electricity to non-contestable **Customers**; or

- (iv) a business (or component of a business) carried on by an **Electricity Entity** which consists of the provision of any other goods or services:
 - (A) to which the Regulations authorising the making of this **Code** extend to; and
 - (B) which the **Commission** determines in accordance with clause 6 are not reasonably contestable and should be included within the definition of '**Prescribed Business**' for the purposes of this **Code**; or
- (b) the business carried on by the Power and Water Authority of generating electricity for sale (whether to third parties or notionally to another business division of the Power and Water Authority) carried on by the Power and Water Authority, until such time as the **Commission** is satisfied that having regard to factors set out in section 6(2) of the **Act** and such other matters as the **Commission** considers are appropriate:
 - (i) the Power and Water Authority no longer has a substantial degree of market power in the market for the generation of electricity for sale in respect of a particular geographical area; or
 - (ii) this **Code** should no longer apply to that business;

"Procedure" has the meaning given to it by clause 5.1 of this **Code**; and

"Related Business" means, in relation to an **Electricity Entity**, any business carried on or activities undertaken in the **Electricity Supply Industry** by that **Electricity Entity** or an **Associate** of that **Electricity Entity** which do not form part of a **Prescribed Business**.

11.3 In this **Code**, unless the context otherwise requires:

- (a) if a term is defined in the *Electricity Reform Act 2000* and is not otherwise defined in clause 11.2, that term will have the same meaning as is given to that term under the *Electricity Reform Act 2000*;
- (b) headings are for convenience only and do not affect the interpretation of this **Code**;
- (c) words importing the singular include the plural and vice versa;
- (d) words importing a gender include any gender;

- (e) an expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate and any governmental agency and vice versa;
- (f) a reference to any thing includes a part of that thing;
- (g) a reference to a clause, Schedule or part of a clause or Schedule is a reference to a clause, Schedule or part of this **Code**;
- (h) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws varying, consolidating, re-enacting, extending or replacing them and a reference to a statute includes all regulations, proclamations, ordinances, by-laws and determinations issued under that statute;
- (i) other parts of speech and grammatical forms of a word or phrase defined in this **Code** have a corresponding meaning;
- (j) mentioning an example or anything after the words “include”, “includes” or “including” will not limit what else might be included;
- (k) a period of time:
 - (i) which dates from a given day or the day of an act or event is to be calculated exclusive of that day; or
 - (ii) which commences on a given day or the day of an act or event is to be calculated inclusive of that day;
- (l) a reference to:
 - (i) a day is a reference to a period commencing immediately after midnight and ending the following midnight; and
 - (ii) a month is a reference to a calendar month; and
- (m) a reference to an accounting term is to be interpreted in accordance with accounting standards under the *Corporations Law* and, if not inconsistent with those accounting terms, generally accepted principles and practices in use from time to time in Australia in the electricity supply industry.

11.4 Where this **Code** authorises the making of an instrument or decision:

- (a) the power includes the power to amend or repeal the instrument or decision; and
- (b) the power to amend or repeal the decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

SCHEDULE 1**Exemptions as at Commencement Date**

Column (1) - <i>Electricity Entity</i>	Column (2) - <i>Code Obligation</i>	Column (3) - <i>Prescribed Business</i>
Power and Water Authority	Clause 5.11	Franchise Retail
Power and Water Authority	Clause 5.11	Generation Business
Power and Water Authority	Clause 5.11	Electricity Business as a whole

SCHEDULE 2

Accounting, Cost Allocation and Information Principles

1. Common Principles

In addition to the matters referred to in clause 5.4 of the *Code*, the *Commission* will, when considering whether to:

- (a) approve any *Procedures* submitted by an *Electricity Entity* under clause 5.3;
- (b) impose any conditions upon the grant of its approval; or
- (c) issue its own procedures,

have regard to the need to achieve an appropriate balance between the public benefits of requiring an *Electricity Entity* to comply with those obligations or conditions and the administrative costs to the *Electricity Entity* of complying with those obligations or conditions.

2. Accounting Principles

2.1 The *Accounting Procedures* will only be approved by the *Commission* if:

- (a) they ensure compliance with the relevant ring-fencing minimum obligations stated in clause 4 of this *Code*;
- (b) they are consistent with the accounting policies and procedures for other regulatory instruments;
- (c) their utilisation involves a recognisable and rational economic basis;
- (d) the resultant financial information satisfies the concepts of relevance and reliability, thereby ensuring that the substance of the underlying transactions and events is reported; and
- (e) they comply with the principles set out in this Schedule 2.

2.2 The *Accounting Procedures* must be presented to the *Commission* in a manner that ensures that the *Commission* may readily understand the methodologies and procedures comprising such *Accounting Procedures* and the resultant financial statements and reports of each *Prescribed Business* and its *Electricity Business* as a whole.

2.3 The *Accounting Procedures* must conform to Australian Accounting Standards wherever possible.

2.4 The *Accounting Procedures* must ensure the reporting of the substance of transactions by:

- (a) where substance and form differ, reporting the substance rather than the legal form of a transaction or event;
 - (b) in determining the substance of a transaction, considering all its aspects and implications, including the expectations of and motivations for, the transaction; and
 - (c) for the purposes of determining the substance of a transaction, viewing in aggregate a group or series of transactions that achieves, or is designed to achieve, an overall commercial effect.
- 2.5 An **Electricity Entity** must maintain accounting and reporting arrangements which:
- (a) enable financial statements and reports to be prepared for each **Prescribed Business** and its **Electricity Business** as a whole; and
 - (b) provide information in the financial statements and reports that can be verified.
- 2.6 Information must be presented in financial statements and reports in the most understandable manner, without sacrificing relevance or reliability.
- 2.7 The financial statements and reports prepared by an **Electricity Entity** in compliance with its obligations under this **Code** must:
- (a) give a fair and reasonable view of the profit and loss and the balance sheet relating to each **Prescribed Business** and its **Electricity Business** as a whole;
 - (b) be capable of certification as such by an auditor when and if required by the **Commission**;
 - (c) be derived from the statutory accounts or their equivalent of the **Electricity Entity**; and
 - (d) contain the entirety of the activities of each **Prescribed Business** and its **Electricity Business** as a whole by:
 - (i) eliminating costs not related to each **Prescribed Business** and (where applicable) its **Electricity Business** as a whole;
 - (ii) not consolidating amounts from statutory accounts of different entities; and
 - (iii) consolidating or disaggregating statutory account amounts within an entity in order to prepare financial statements.
- 2.8 If some or all of the activities of an **Electricity Entity** are carried out by an entity that does not have statutory accounts, all financial representations of

Prescribed Business activities by such an entity must be capable of being audited by an external independent auditor.

- 2.9 An **Electricity Entity** must present on a fair and consistent basis, from the accounting records that underlie its statutory accounts, the costs, revenues, assets employed and liabilities that may be reasonably attributed to each **Prescribed Business** and its **Electricity Business** as a whole.
- 2.10 The financial statements and reports of each **Prescribed Business** and its **Electricity Business** as a whole must, in so far as is reasonably practicable, be prepared in accordance with the accounting principles and policies applicable to the statutory accounts.
- 2.11 The financial statements and reports of each **Prescribed Business** and its **Electricity Business** as a whole must, in so far as is reasonably practicable, be prepared in a consistent manner so that the **Commission** can make comparisons between them over time.
- 2.12 An **Electricity Entity** must provide to the **Commission** full and detailed documentation of any policies and procedures that the **Electricity Entity** may have used to prepare the financial statements and reports, that are additional to or in place of, the accounting principles and policies used to prepare its statutory accounts.
- 2.13 The **directors** of an **Electricity Entity** will be responsible for the purposes of this **Code** for the preparation and presentation of the financial statements and reports, and the information they contain.
- 2.14 The **directors** of an **Electricity Entity** must ensure that the **Electricity Entity** keeps accounting records that:
- (a) correctly record and explain the transactions and financial position of each **Prescribed Business** and its **Electricity Business** as a whole;
 - (b) enable financial statements and reports to be prepared in accordance with this **Code**; and
 - (c) are capable of allowing an auditor to conveniently and properly form an opinion on the basis of those financial statements and reports as to the level of compliance by the **Electricity Entity** with the requirements of this Schedule, the **Accounting Procedures** and the provisions of clause 4 of the **Code**.

3. Cost Allocation Principles

- 3.1 The **Cost Allocation Procedures** will only be approved by the **Commission** if:
- (a) they ensure compliance with the relevant ring-fencing minimum obligations stated in clause 4 of this **Code**;

- (b) they are consistent with the accounting policies and procedures for other regulatory instruments;
 - (c) their utilisation involves a recognisable and rational economic basis;
 - (d) the resultant financial information satisfies the concepts of relevance and reliability, thereby ensuring that the substance of the underlying transactions and events is reported; and
 - (e) they comply with the principles set out in this Schedule 2.
- 3.2 The **Cost Allocation Procedures** must be presented to the **Commission** in a manner that ensures that the **Commission** may readily understand the methodologies and procedures comprising such **Procedures** and the resultant financial statements and reports prepared by the **Electricity Entity**.
- 3.3 The cost allocations prepared by the **Electricity Entity** in compliance with its obligations under this **Code** must be capable of certification as such by an auditor when and if required by the **Commission**.
- 3.4 For the purpose of financial statements and reports required to be provided to the **Commission** under this **Code**, the allocation of accounts between each **Prescribed Business** and the activities of the **Electricity Business** as a whole and across segments of a **Prescribed Business** are to be based on the principle that:
- (a) items which are directly attributable to a **Prescribed Business** or to the **Electricity Business** as a whole and segments of a **Prescribed Business** are assigned accordingly; and
 - (b) items not directly attributable, are to be allocated to a **Prescribed Business** or to the **Electricity Business** as a whole and across segments of the **Prescribed Business** using an appropriate allocator, as indicated in following paragraphs.
- 3.5 An item may be directly attributable to a **Prescribed Business** or to the **Electricity Business** as a whole but not directly attributable to a segment of a **Prescribed Business**. In these circumstances, the allocation across segments of **Prescribed Businesses** will be made using an appropriate allocator as indicated in the following paragraphs.
- 3.6 Items that are not directly attributed either to a **Prescribed Business** or to the **Electricity Business** as a whole or to a segment of a **Prescribed Business** are to be allocated on a causation basis. Allocation based on avoidable cost is not permitted.
- 3.7 An **Electricity Entity** must produce for each item that has not been directly attributed to a **Prescribed Business** or the **Electricity Business** as a whole and/or **Prescribed Business** segment supporting paper work that includes:

- (a) the amounts that have been allocated to the **Prescribed Business** or the **Electricity Business** as a whole and/or **Prescribed Business** segment and amounts that have not been so allocated; and
 - (b) the numeric quantity of each allocator.
- 3.8 If an item is immaterial and a causal relationship cannot be established without undue cost and effort, the **Electricity Entity** may effect an allocation of these items on a non-causal basis, provided it is accompanied by a supporting note documenting for each such item:
 - (a) a defensible basis of allocation (which must not be avoidable cost);
 - (b) the reason for choosing that basis; and
 - (c) an explanation why no causal relationship could be established.
- 3.9 A non-causal basis of allocation may only be applied to the extent that:
 - (a) the aggregate of all items subject to all non-causal bases of allocation is not material to the financial statements or reports; or
 - (b) an **Electricity Entity** can demonstrate that there is likely to be a strong positive correlation between the non-causal basis and the actual cause of resource or service consumption or utilisation that those costs represent.
- 3.10 An item is material if its omission, misstatement or non-disclosure has the potential to prejudice the understanding of the financial position and nature of the **Prescribed Business** or the **Electricity Business** as a whole (whichever is applicable), gained by reading the financial statements and reports.
- 3.11 All bases of allocation must be explained and documented in the **Cost Allocation Procedures**.
- 4. Information Principles**
- 4.1 The **Information Procedures** will set out the procedures to be followed by staff of an **Electricity Entity** involved in the conduct of a **Prescribed Business** for the purpose of identifying, and then appropriately handling, storing, sharing and publishing, information that is either:
 - (a) deemed to be **Confidential Information**; or
 - (b) capable of materially affecting the commercial interests of a competitor of a **Related Business**.
- 4.2 The proposed **Information Procedures** must contain procedures for ensuring that the identification and the handling, storing, sharing and

publishing of such information will not provide a competitive advantage to the **Related Business** over any competitor of a **Related Business**.

4.3 If an **Electricity Entity** proposes to allow the disclosure of information of the type referred to in clause 4(d) to an employee, consultant, contractor or agent involved in the conduct of a **Related Business**, the **Information Procedures** must identify categories of information which will also be made available to competitors of the **Related Business**.

4.4 Without limiting the matters which may be covered in the **Information Procedures**, those **Procedures** should deal with the electronic, physical and procedural security measures that the **Electricity Entity** proposes to employ in respect of the conduct of a **Prescribed Business** (including separation of office space, access to information systems and procedures for the minimisation of **Customer** confusion and opportunities for preferential treatment or other unfair competitive advantage).

5. Scope of Principles

Nothing in these principles will limit the matters which the **Commission** may take into account in approving or issuing any **Procedures** or imposing any conditions upon its approval of any **Procedures**.

APPENDIX**A****EXPLANATORY NOTES ON REVISIONS****Introduction**

1. This Appendix provides a brief explanation concerning the material amendments that the Commission has made to the December 2000 Code and the reasons for those amendments.
2. The final draft of the Code represents the views of the Commission as to the most appropriate form of ring-fencing arrangements for the Northern Territory electricity supply industry and has been developed having regard to the matters listed in section 6(2) of the *Utilities Commission Act 2000* (“UCA”).

Objectives

3. The Commission foreshadowed in paragraphs 49 and 50 of the Explanatory Notes to the revised draft Code issued in December 2000 that it proposed to adopt an approach similar to that adopted by IPART. In particular, the framework proposed by IPART involved three key features, namely:
 - (a) a high level statement prohibiting anti-competitive conduct;
 - (b) a set of detailed activity-focused default ring-fencing guidelines; and
 - (c) a mechanism whereby service providers could seek to alter default guidelines.
4. The revised draft included the second and third features, but did not include a high level statement prohibiting anti-competitive conduct. The Commission has now incorporated the first feature into the Code by the inclusion of a new clause 3 setting out the objectives of the Code. These objectives have been developed with reference to the objectives set out in the UCA and the *Electricity Reform Act 2000* (“ERA”) and after having regard to the matters listed in section 6(2) of the UCA.

5. The inclusion of a new clause 3 in the Code has necessitated the renumbering of the remainder of the Code. In this Appendix, references to clause numbers are references to the renumbered clauses in the final draft Code.

Clause 4(a) – financial accounts

6. The Commission has decided to reinstate the requirement that Electricity Entities must establish and maintain a separate set of financial accounts and reports in respect of their Electricity Businesses as a whole.

7. This is consistent with the approach adopted in other jurisdictions where entities are required to establish and maintain a consolidated set of accounts for the entire business of the entity that is being regulated by the relevant ring-fencing code or guidelines.

8. However, it is not possible to adopt the exact same form of this requirement in the Northern Territory because PAWA carries on business in more than one regulated industry.

9. The Commission believes that it would not be possible for the Commission to achieve the objectives of the Code if PAWA is only required to establish and maintain a separate set of financial accounts and reports in respect of its prescribed electricity businesses.

10. While the Commission is able to access the statutory financial accounts for PAWA's entire business, these accounts are unlikely to contain the level of detail concerning PAWA's related electricity businesses necessary to enable the Commission to determine whether or not PAWA is complying with its obligations under clauses 4(a) and (b).

11. The Commission recognises that the objectives of the Code would be significantly impeded if the Commission does not have access to a separate set of financial accounts and reports in relation to PAWA's electricity business as a whole (as compared to PAWA's total business operations).

12. However, the Commission has taken into account PAWA's previous submission in relation to the publication of financial statements and accounts provided to the Commission under the Code in respect of PAWA's franchise retail business and related electricity businesses and has extended the exemption granted to PAWA in relation to clause 5.11 of the Code to the financial accounts and reports of the electricity business as a whole.

Clauses 4(c) and (d) – information use and disclosure

13. In the Explanatory Notes to the revised draft, the Commission noted in paragraph 57 that it had determined to retain a general restriction on the disclosure of nominated types of information obtained by a prescribed business. The Commission went on to note that, having regard to PAWA's submissions concerning the costs that PAWA would potentially incur in

implementing the arrangements necessary to restrict disclosure of all types of information falling within the description set out in clauses 4(c) and (d), the Commission proposed to suspend the obligation prohibiting disclosure of these types of information pending the development and approval of detailed information procedures.

14. Both PAWA and NT Power have commented on this issue in their submissions. In particular, NT Power has noted that it would be inappropriate for there to be no restriction on the disclosure information obtained by or known to a prescribed business during the period from the commencement of the Code to the date upon which detailed information procedures are approved or issued by the Commission.

15. NT Power also noted that the revised draft essentially permitted full disclosure of all types of information between a prescribed business and a related business, notwithstanding that the disclosure of that information could greatly assist the related business to the detriment of the competitors of the related business that did not have access to the same type of information.

16. The Commission is inclined to agree with this view. The Commission has recognised that a blanket prohibition on disclosure of all information would be inappropriate because in relation to various types of information, the administrative costs of complying with that prohibition would outweigh the potential benefits to the public. However, there are clearly some types of information which are so critical to the ability of a related business to compete in a contestable market that they should not be allowed to be disclosed by a prescribed business to a related business without equal disclosure to competitors of that related business.

17. The Commission believes that the principles set out in paragraph 4 of Schedule 2 to the revised draft must be amended to include high level principles as to the type of information obtained by or known to a prescribed business which cannot be disclosed to a related business during the period leading up to the approval or issue of detailed information procedures.

18. Under the revised draft, the disclosure restrictions effectively had no application until information procedures were approved or issued by the Commission (i.e. if there were no information procedures, then there was nothing under the Code which would prohibit the disclosure of information by a prescribed business to a related business). Even if clause 5 were amended to require an electricity entity to comply with the principles set out in paragraph 4 of Schedule 2 pending the approval or issue of detailed information procedures, this would not have prevented the disclosure of information because the principles set out in paragraph 4 of Schedule 2 do not by themselves prohibit the disclosure of any type of information.

19. The Commission will need to work with PAWA and other interested parties to develop general principles as to the types of information which cannot be disclosed by a prescribed business to a related business during the period leading up to the issue or approval of detailed information procedures.

PAWA is clearly in the best position to identify the types of information which are currently disclosed by its prescribed businesses to its related businesses, and in particular the types of information which PAWA believes should be permitted to be disclosed during this period. The Commission will then consider whether the disclosure of that type of information is likely to materially affect the commercial interests of a competitor of a related business, or provide a significant competitive advantage to that related business over its competitors.

20. In addition, clause 4(d)(ii) has been added in recognition of the fact that PAWA's prescribed businesses are already in possession of a considerable amount of information which if disclosed to a related business may materially affect the commercial interests of a competitor of that related business.

21. Paragraph (iv) has also been added to reflect the concepts referred to in the information principles set out in paragraph 4 of Schedule 2. While paragraphs (iii) and (iv) may overlap to a degree, the Commission believes that clause 4(d) should refer to the concept of a related business obtaining a competitive advantage over a competitor as a result of the disclosure of information by a prescribed business in circumstances where that competitor does not have access to the same information.

Clause 4(e) – non-discriminatory provision of goods and services

22. Clause 4(e) has been amended to emphasise that the Commission is concerned to ensure that goods and services acquired by a related business from a prescribed business are provided on an arm's length commercial basis and are available on the same basis to other customers (including competitors of the related business). For example, the Commission would be concerned if a prescribed business was providing an accounts processing service to a related business on non-arm's length commercial terms (i.e. less than cost) because the net effect would be to provide a competitive advantage to the related business as compared to the competitors of the related business.

Clauses 5.2 and 5.3 – preparation of Draft Procedures

23. The Commission is concerned to ensure that at the end of the relevant development periods, the procedures that are submitted to the Commission for approval have been developed in conjunction with the Commission, and can be approved without significant amendments. It is very important in the Commission's view that these procedures are implemented as soon as possible and the Commission is not prepared to extend the time period set out in clause 5.2 any further. The Commission expects that the procedures will be finalised and implemented no later than four months in the case of accounting procedures and cost allocation procedures and seven months in the case of information procedures after the commencement date of the Code (being 1 July 2001).

Clause 5.5 – approval of Draft Procedures

24. The Commission has included some additional examples of the types of conditions that the Commission may impose when approving procedures. Under clause 5.5, the Commission has the right to grant its approval subject to such conditions as the Commission considers appropriate in the circumstances. In exercising its discretion, the Commission would obviously have regard to the matters listed in section 6(2) of the UCA.

Clauses 5.9 and 5.10 – inadequate or no Draft Procedures

25. The right of the Commission to issue its own procedures has been extended to allow the Commission to issue its own procedures if the draft procedures submitted by an electricity entity cannot be approved without substantial amendment. While it is unlikely that the Commission will need to exercise this power, given the requirement to develop the procedures in conjunction with the Commission, the inclusion of this additional power emphasises the Commission's determination to ensure that final procedures are operating within the time periods referred to above.

26. Clause 5.10 has been added to clarify the obligations of electricity entities prior to the approval or issuing of final procedures.

27. The Commission did not intend that, during the period from the end of the interim Code to the date upon which procedures were issued or approved under the new Code, an electricity entity could avoid its obligations under clauses 4(b), (c) and (d). Rather, electricity entities will need to comply with the general principles relating to those obligations set out in Schedule 2.

28. While these principles are necessarily 'high level' in nature, they still convey the general objectives which the Commission wishes to achieve via the final procedures. If clause 5.10 was not included in the Code, the obligations under clauses 4(b), (c) and (d) would effectively be delayed for a further four months (in the case of the accounting procedures and cost allocation procedures) and seven months (in the case of the information procedures). This would be inappropriate, particularly given the scope of PAWA's obligations under the interim Code.

Clause 9 – exemptions from compliance

29. Clause 9.1 has been amended to make it clear that the Commission has the power to revoke any of the exemptions set out in Schedule 1 provided it follows the procedures set out in clause 6.

Clause 11.2 – definitions

'Associate'

30. Paragraph (a) of this definition has been amended to make it consistent with the use of this term in other ring-fencing codes and guidelines.

In addition, paragraph (b) has been added to adapt the concept of an 'associate' to PAWA's particular circumstances. In general terms, the definition of 'Associate' seeks to ensure that an electricity entity that carries on a prescribed business cannot avoid its obligations under the Code by carrying on any related business through an Associate of the electricity entity.

'Directors'

31. PAWA noted in its submission that paragraphs 2.14 and 2.15 of Schedule 2 purported to impose obligations on the directors of PAWA even though PAWA does not have directors. This definition has been included to extend the concept of directors to the Chief Executive Officer and members of PAWA appointed under section 5(1) of the Power and Water Authority Act. In that regard, we note that the financial statements published by PAWA in November 2000 refer to the Directors of PAWA and have been signed by the Directors of PAWA.

'Prescribed Business'

32. The Commission received a number of submissions concerning the scope of the definition of 'Prescribed Business'. Those submissions can be summarised as follows:

- (a) Should the definition of 'Prescribed Businesses' extend to other monopoly or near monopoly businesses carried on by an electricity entity outside of the electricity supply industry?
- (b) Should the test set out in paragraph (b) of the definition be modified to reflect the nature of the market for generation of electricity in the Northern Territory?

33. In response to the first question, the Commission has included the qualification that the Regulations authorising the making of the Code must extend to these types of goods or services. In that regard, the Commission notes that the drafting instructions for the new Regulation authorising the Commission to make the Code specifically extend to the making of ring-fencing codes with respect to industries declared to be regulated industries under relevant Industry Regulation Acts.

34. This authority would clearly entitle the Commission to make a ring-fencing code in relation to the electricity supply industry, the water supply services industry and the sewerage services industry.

35. At this stage, the Commission does not propose to exercise its power under paragraph (a)(iv) of the definition of 'Prescribed Business' to determine that the provision of goods or services outside of the electricity supply industry should be covered by the Code. However, it is the Commission's intention to make a ring-fencing code for these other industries in the near future, and to investigate the possibility of amalgamating these two codes into one general ring-fencing code.

36. Notwithstanding this fact, if it becomes apparent to the Commission that a related business is gaining an unfair advantage over its competitors as a result of the activities of any monopoly or near monopoly business carried on by the relevant electricity entity outside of the electricity supply industry (including the provision of goods or services on non-commercial terms, cross-subsidisation or disclosure of commercially valuable information) the Commission would need to reconsider its decision concerning the scope of the definition of 'Prescribed Businesses' under the Code.

37. In that regard, the Commission believes that there is no logical reason why activities which would be prohibited if undertaken by a Prescribed Business operating in the electricity supply industry should not also be prohibited should the same activities be undertaken by a monopoly or near monopoly business outside of the electricity supply industry if the net effect of those activities was to unfairly advantage a related business in a competitive market.

38. Finally, the final draft now requires that the Commission follow the procedures set out in clause 6 of the Code before making any determination under this part of the definition of 'Prescribed Business'.

39. In relation to the second question, the Commission has recognised that the particular circumstances of the Northern Territory generation market require a number of amendments to paragraph (b) of the definition of 'Prescribed Businesses'.

40. In particular, as a matter of law, it is not possible for one business division of PAWA to sell electricity to another business division of PAWA. Any sale between business divisions can only be notional. In addition, there may exist geographical areas in which PAWA does not generate electricity for sale. In determining the degree of PAWA's market power, it will be necessary to exclude these areas from that determination.

41. In that regard, it has been suggested by PAWA that the Code should:

- (a) clarify the basis on which the Commission will assess whether PAWA still has a substantial degree of market power; and
- (b) clarify whether PAWA will have the right to request the Commission to reassess PAWA's market power and whether the Commission intends to review the issue on a regular basis (and, if so, how often that review would take place).

42. At this stage, the Commission does not propose to include in the Code a definitive set of criteria which will be applied by the Commission in determining whether PAWA still has a substantial degree of market power in relation to the market for generation of electricity for sale within a defined geographical area.

43. There exists a considerable body of authority concerning the determination of the degree of market power held by a market participant. It is

a common feature of these authorities that, when determining whether a particular participant has a substantial degree of market power, the particular circumstances of the participant and the market need to be considered.

44. Accordingly, the Commission believes it would be inappropriate to limit the manner in which it can exercise this power by including detailed criteria in the Code. Rather, the Commission will have regard to the approach adopted by other regulators within Australia and, in particular, the approach adopted by the ACCC from time to time in relation to the determination of the degree of market power held by a participant operating in a particular market.

45. In order to address PAWA's concerns as to its ability to request the Commission to review whether PAWA still has a substantial degree of market power in the market for the generation of electricity for sale in the Northern Territory, the Commission has amended clause 9 to specifically entitle an electricity entity to apply to the Commission for a review of this decision. PAWA can be assured that the Commission will continue to review this issue as and when required to take into account changes in the market for the generation of electricity for sale within the Northern Territory.

APPENDIX**B****RESPONSES TO OTHER MATTERS
RAISED IN SUBMISSIONS**

1. This Appendix sets out the Commission's responses to some matters raised in the submissions that the Commission has not seen fit to incorporate into the final draft.

PAWA's submission**Public benefit test**

2. PAWA suggested that the formulation of the 'public benefit test' in the Code should be modified to include other costs in addition to the administrative costs of the relevant electricity entity.

3. The Commission has retained the current public benefit test which is consistent with the test applied in other jurisdictions. In complying with the Commission's obligations under the UCA, the Commission is already required by section 6(2) of the UCA to have regard to a broad range of matters which would encompass other types of costs.

Audit standards

4. PAWA has suggested that the principles set out in Schedule 2 of the Code should clarify the standards that will be applied in conducting any audit under clause 8 of the Code.

5. The Commission has not made any amendments to Schedule 2 to address this issue because the provisions of clause 8 will operate to ensure that any audit conducted by the Commission was appropriately targeted. The Commission is required to bear the costs of an audit under clause 8 unless the audit reveals a failure by the electricity entity to comply with a material obligation of the Code.

Material obligation

6. In that regard, PAWA has also requested that the term ‘material obligation’ be clarified in the Code.

7. The Commission does not believe that the Code should be amended to address this issue. The concept of ‘materiality’ is used in a wide range of commercial and regulatory context without any detailed criteria limiting its application. Given the nature of the obligations set out in the Code, and the uncertainty as to the potential impact of any non-compliance with an obligation on competition, the Commission believes that this term should be left to be interpreted in the context of the relevant failure.

Scope of code

8. PAWA has suggested that the Commission’s role is limited to the regulation of conduct in the electricity supply industry.

9. The provisions of the UCA make it clear that the Commission’s role extends to various regulated industries, which currently include the water supply services industry and the sewerage services industry. Moreover, the proposed regulation authorising the making of the Code for the purposes of section 24(2) of the UCA will authorise the Commission to make ring-fencing codes in relation to regulated industries.

10. Finally, one of the primary purposes of the Code is to ensure that related businesses are not unfairly advantaged by the provision of goods and services or information by monopoly or near monopoly businesses. The Code is designed to promote and safeguard competition in the markets in which related businesses compete and to prevent the misuse of monopoly power, particularly if that misuse impacts upon the competitive market.

NT Power Group’s submission

Scope of code

11. NT Power has raised a number of issues in its submission which refer to matters which are outside of the scope of the Code and the Commission’s powers and functions.

12. In particular, many of the issues that NT Power has raised under the heading ‘Legislative requirements’ relate to issues of competitive neutrality which are not within the scope of the Commission’s powers and functions. The ‘ring-fencing’ responsibilities which the Commission have relate only to separating the monopoly and contestable activities of PAWA, not also to separating PAWA from the rest of government. If there are issues about the wider Government relationship, these are competitive neutrality matters which need to be raised with NT Treasury as the Territory’s competitive neutrality complaints office.

Definition of Associate

13. As noted in Appendix A, the definition of 'Associate' is not intended to operate so that business divisions of PAWA are associates. The business divisions of PAWA are effectively bound by the imposition of the obligation on PAWA in respect of the conduct of its various businesses.

Use of causation principle

14. NT Power has raised concerns regarding the use of the 'causation' principle as the basis for cost allocation, mainly on the grounds that the 'causation' approach could result in 'marginal costing' in some markets.

15. The Commission does not share NT Power's concern with the causation principle. The principle is accepted by all other jurisdictional regulators as a basis for cost allocation, and Schedule 2 specifically does not permit cost allocation based on avoidable (i.e. marginal) cost. If more than one business cause a cost to be incurred, the causation principle will see that cost fairly and equitably allocated among the businesses that cause the cost to be incurred.

Exemptions from public disclosure of financial statements

16. The Commission has reinstated the requirement on PAWA to provide financial statements and reports in relation to its electricity business as a whole. However, the Commission does not agree that all of these accounts should be made publicly available. The Code already includes provisions which enable the Commission to audit compliance with the Code.

17. The reason for requiring financial statements and reports to be submitted to the Commission is to provide the Commission with sufficient information to monitor compliance with the Code. It was not intended that information concerning or impacting upon PAWA's contestable activities should be made publicly available via this means.