

**REVIEW OF NT ELECTRICITY  
RING-FENCING CODE  
PROPOSED DRAFT CODE**

**MAY 2008**



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## Inquiries

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## GLOSSARY

<b>Act</b>	<i>Utilities Commission Act</i>
<b>Code</b>	Northern Territory Electricity Ring-fencing Code
<b>Commission</b>	Utilities Commission
<b>Consultation Paper</b>	<i>Review of NT Electricity Ring-fencing Code: Proposed Variations</i> , Consultation Paper, February 2008
<b>Draft Code</b>	Draft Third Version of the Northern Territory Electricity Ring-fencing Code
<b>ERA</b>	<i>Electricity Reform Act</i>
<b>Issues Paper</b>	<i>Possible Review of Certain Regulatory Instruments</i> , Issues Paper, August 2007
<b>Power and Water</b>	Power and Water Corporation
<b>PWC Generation</b>	Power and Water's generation business unit
<b>PWC Retail</b>	Power and Water's retail business unit
<b>Response Paper</b>	<i>Possible Review of Certain Regulatory Instruments</i> , Response Paper, January 2008



**CHAPTER****1****INTRODUCTION****Background**

1.1 In February 2008, the Commission published a consultation paper “Review of the NT Electricity Ring-fencing Code: Proposed Variations” (the Consultation Paper) proposing a comprehensive revamping of the Northern Territory Electricity Ring-fencing Code. This possibility was first foreshadowed in the “Possible Review of Certain Regulatory Instruments” Issues Paper published by the Commission in August 2007 and confirmed in the Commission’s Response Paper published in January 2008.

1.2 The Consultation Paper was the Commission’s formal notice under clause 7.1 of the Code of that proposal.

1.3 In that paper, the Commission proposed that it revoke the existing Code in its entirety, and promulgate a new version of the Code. A Draft Code, showing how a final Code may look with the proposed variations incorporated, was also provided.

1.4 Following publication of the Consultation Paper, submissions were received from:

- NT Major Energy Users Group (NTMEU); and
- Power and Water Corporation (Power and Water).

1.5 NT Treasury advised that they would defer its submission until a revised Draft Code was circulated.

**Purpose of this Paper**

1.6 Following consideration of submissions from interested parties and its own further deliberations in consultation with its legal advisers, the Commission has decided to proceed with the proposed variations to the Code, although with some modification to the specific drafting detail set out in the earlier Consultation Paper.

1.7 Clauses 7.4 and 7.5 of the NT Electricity Ring-fencing Code require that:

*“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).”*

1.8 This “Proposed Draft Code” paper is the Commission’s formal notice in accordance with clause 7.4 of the Code that it has made a draft decision to proceed with the proposed variation.

## Call for submissions

1.9 Submissions are invited from interested parties concerning the issues raised in this Proposed Draft Code paper and related matters.

1.10 Submissions, comments or inquiries regarding issues raised in this Paper should be directed in the first instance to:

Executive Officer	Telephone:	(08) 8999 5480
Utilities Commission	Fax:	(08) 8999 6262
GPO Box 915		
DARWIN NT 0801	Email:	utilities.commission@nt.gov.au

1.11 To facilitate publication on the Commission’s website, submissions should be made electronically by disk or email. However, if this is not possible, submissions can be made in writing.

1.12 The closing date for submissions is **Friday, 27 June 2008**.

1.13 The Commission will consider any submissions which are received by the closing date, but it is not obliged to consider submissions received after that date.

1.14 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 will 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.

1.15 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).

### ***Confidentiality***

1.16 In the interests of transparency and to promote informed discussion, the Commission intends to make submissions publicly available. However, if a person making a submission does not want their submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. In addition, a copy of the submission suitable for publication (i.e., with any confidential material removed) should also be provided.

## Proposed timetable

1.17 The present intention of the Commission is to follow a timetable for consultation under the requirements of clause 7 of the Code which would enable a new Code to be introduced with a commencement date of 1 September 2008.

1.18 The Commission will expect persons who wish to make submissions to comply strictly with the timetable set by the Commission.



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<b>Due Date</b>	<b>Event</b>
Friday, 27 June 2008	Submissions due on proposed Draft Code
Wednesday, 30 July 2008	Gazettal and Publication of Revised Code
Monday, 1 September 2008	Commencement date of Revised Code

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**CHAPTER****2****INITIAL VARIATION PROPOSAL****Review of Code and background to the proposed variation of the Code**

2.1 In February 2008, the Commission published a consultation paper “Review of the NT Electricity Ring-fencing Code: Proposed Variations” (the Consultation Paper) in which the Commission proposed that it revoke the existing Code in its entirety, and promulgate a new version of the Code in the form of the Draft Code.

2.2 The NT Electricity Ring-fencing Code was made in 2001 and came into force on 1 July 2001. The Code replaced an interim ring-fencing code. Minor definitional amendments were made to the Code in April 2002. Accordingly, the Code has been in operation for over six and a half years without detailed review. During this time, there have been considerable regulatory developments in relation to ring-fencing and other forms of regulatory structuring in the electricity supply industry (and other industries) elsewhere in Australia. The Commission inclines to the view that further delay by the Commission in deciding whether to make changes to the Code is not warranted.

2.3 The most significant of the proposed changes to the Code in the Commission’s Consultation Paper related to two topics, namely ring-fencing minimum requirements and default terms and conditions for goods or services provided by a Prescribed Business to a Related Business. The background reasons for these proposed changes were set out in detail in the Consultation Paper.

2.4 The proposed changes to the ring-fencing requirements were considered by the Commission to be a means by which it could deal in an effective manner with at least one aspect of the current regulatory deficiencies, that is, the deficiencies associated with barriers to entry into the market.

**Views in submissions**

2.5 There was general agreement with the Commission’s view that there are some regulatory deficiencies in the NT electricity supply market that might be addressed by some variation of the Ring-fencing Code.

2.6 Power and Water submitted that:  
*“Many of the changes may have merit.”*

2.7 The NTMEU advised that:  
*“...the UC has the NTMEU’s full support in addressing aspects of the regulatory deficiencies (including this review of the ring-fencing code) currently in the NT electricity market. It is important that NT consumers have the full benefit of electricity policy and administrative reforms similar to best practice developments elsewhere in Australia.”(p.4)*

2.8 Further:  
*“The NTMEU considers that with these (at times) competing goals and the decision to delay the further expansion of the contestable base, the Commission must now develop a*

*set of ring fencing rules that will be comprehensive and effective and address the concerns of consumers who have been exposed to the contestable market as provided and operated by [Power and Water].*

*Therefore, the NTMEU agrees strongly with the UC's proposal to reissue a new Code, rather than just making amendments to the existing Code, as a new Code has the potential to provide some constraint on the ability of [Power and Water] to exercise its undoubted market power.”(pp.7-8)*

2.9 NT Treasury has also acknowledged that potential investors in the Territory electricity market can face risks and increased costs arising from a ring-fencing regime that does not provide transparency on the restraints on Power and Water's commercial dealings between related businesses.:

#### **Power and Water's submission**

2.10 Despite a high-level agreement with the concept of reform, however, Power and Water expressed a number of serious concerns.

2.11 In relation to possible compliance costs, Power and Water argued as follows:

*“Many of the changes ... have the potential to impose substantial costs on Power and Water. Given the Commission's objective that the public benefit of proposed variations should exceed the cost of compliance, any decision to proceed with the changes must be informed by information on costs. Unfortunately, in the time available, Power and Water has been unable to assess rigorously its additional costs. It will undertake this work as a matter of urgency. Power and Water recommends that the Commission delays material decisions until this information is available.”*

2.12 With regard to necessary transitional arrangements, Power and Water noted that:

*“The Paper envisages that the new Code would be implemented by August 2008. Much more time is required to manage the transition properly.*

...

*Power and Water recommends that meaningful transitional arrangements be provided for in the new Code.”*

2.13 With regard to the proposed role for the Commission role in approving default terms and conditions and arms' length contracts:

*“Our understanding is that this type of involvement by a regulator in commercial negotiations is exceptional (outside a regulated monopoly environment). It appears to cut across the intentions of the contestable regime. Current provisions in the Trade Practices Act (TPA) provide significant disciplines to ensure that Power and Water does not engage in anti-competitive conduct. Given Power and Water's obligations under the TPA, there is a substantial risk that the Commission's proposed role could expose Power and Water to action by the ACCC.”*

2.14 Finally, Power and Water advocated deferral of consideration of variations to the Code until after a decision is made by the NT Government whether to adopt the national regulatory framework.

2.15 In summary, the Commission notes Power and Water's main concerns to be as follows:

- (a) More time is needed to assess the possible costs of compliance with the revised Code, in order that such costs can be compared with the public benefits – by implication, Power and Water is suggesting that such costs could be material.
- (b) The revised Code does not provide sufficient time to manage transitional issues, with the default contracts as well as the arm's length contracts seemingly required to be in place by the commencement date (proposed for 1 August 2008).
- (c) The Commission's role in approving default terms and conditions and arms' length contracts both goes beyond the usual type of involvement by a regulator

in commercial negotiations, and could expose Power and Water to action by the ACCC under the Trade Practices Act.

- (d) The consideration of variations to the Code should be left until after a decision is made by the NT Government whether to adopt the national regulatory framework.

### ***NT Major Energy Users' submission***

- 2.16 The NTMEU noted that:

*“Power and Water is a vertically integrated business involving generation, networks and retail activities, with a lack of legal separation between all elements of the supply chain, including between the franchise and contestable retail businesses. Thus there is a real need to ensure that the allocation of costs between contestable retail, franchise retail, network and generation businesses is developed on a non-discriminatory and cost reflective basis, and that consumers can be confident that such is the case.”(p.9)*

- 2.17 Further,

*“...the ring-fencing processes need to be effective to ensure competitively-neutral commercial terms between the networks, the generation and the retail businesses. For example, a potential new retailer (or a large customer) needs to be able to obtain competitively-neutral access to Power and Water's networks on the **same** terms and conditions available to Power and Water's generation and retail business. The same principle applies in regard to the terms of access for franchise and contestable customers.”(p.10)*

- 2.18 The NTMEU drew particular attention to references in the Draft Code to “terms and conditions”:

*“The NTMEU assumes that these terms and conditions also include price information. In this regard, the NTMEU notes that unless prices are explicitly included to be part of Terms and Conditions, this may create some confusion and concern.”(p.14)*

- 2.19 In relation to the default terms and conditions, the NTMEU argued that:

*“the UC should ensure that appropriate public consultations are undertaken. Potential new retail competitors would have important contributions to make, as would major electricity users. Such transparency will directly assist in gaining new entrants to the market.”(p.18)*

- 2.20 The NTMEU also supported a greater level of public consultation in the Commission's approval of other instruments under the Code e.g., accounting, cost allocation and information procedures.

- 2.21 Finally, the NTMEU submitted that:

*“Given that the NT market may not develop into a fully mature and competitive market for the foreseeable future, it is necessary that the Commission errs on the side of promoting the public benefit in its current review. Concerns about not imposing too great a regulatory burden on Power and Water need to be seen in that light.”(p.20)*

- 2.22 In summary, the Commission notes the Major Energy Users Group's main concerns to be as follows:

- (a) The revised Code should also discourage Power and Water from adopting a discriminatory approach between “*prescribed (franchise) customers and contestable customers*”, by ensuring that PWC Generation's arm's length contract with PWC Retail encompasses the supply of electricity to all customers and not just to contestable customers.
- (b) The revised Code's requirements regarding “terms and conditions” may place less emphasis upon pricing terms than is necessary.
- (c) Guidelines made under the Code regarding the various required Procedures should be essential rather than just optional.
- (d) There should be some process whereby public comments can be made and received on the arm's length contracts.

- (e) There should be provision for appropriate public consultations in the approval of the default terms and conditions.
- (f) The Commission should err on the side of promoting the public benefit rather than being concerned with not imposing too great a regulatory burden on Power and Water.
- (g) There should be provision for legal separation of Power and Water's various businesses as well as some physical separation between key staff.

## **Commission's response**

### ***Power and Water's submission***

2.23 In relation to Power and Water's compliance cost, the Commission considers that its proposed amendments to the revised Code should reduce compliance costs.

2.24 The Commission accepts that the transitional arrangements require further refinement. The Commission has made amendments to the revised Code aimed at clarifying transitional issues and timelines.

2.25 Power and Water considered that the proposed requirement to submit default terms and conditions to the Commission for approval is 'exceptional' outside a regulated monopoly environment, and would amount to an involvement by a regulator in 'commercial negotiations'. The Commission cannot accept the accuracy of this view, for a number of reasons.

2.26 First, a requirement that a regulated entity must offer to provide customers with goods or services on 'standard' or 'default' terms and conditions (whether or not approved by the regulator) in the absence of the parties negotiating other terms does not involve a regulator in commercial negotiations, and does not prevent commercial negotiations from occurring should the parties wish to negotiate other arrangements.

2.27 Secondly, regulatory provisions of this type are the norm in the Australian electricity supply industry, and many other regulated industries. Broadly speaking, regulatory arrangements have tended to adopt either of two main approaches. One approach is to require the prior approval of the regulator to a customer contract or to specify in a regulatory instrument a form of customer contract which must be used. Another approach is for the regulator or regulatory instrument to set out principles or procedures which must be followed by the regulated entity in preparing customer contracts, and give to the regulator a power to intervene should the regulator consider that there is non-compliance.

2.28 Examples of the first approach are the requirements under the Victorian Electricity Industry Act for standing offers to domestic or small business customers to be on terms and conditions approved by the Essential Services Commission, and the customer sale contract prescribed by the South Australian Energy Retail Code.

2.29 An example of the second approach is the new Division 5A of Part 2 of the Victorian Electricity Industry Act dealing with terms and conditions for the purchase of small renewable energy generation electricity. In that jurisdiction, the licensee may determine the prices, terms and conditions on which it will purchase such electricity but the Minister may refer the published terms and conditions to the Essential Services Commission for assessment as to whether they are fair and reasonable.

2.30 Generally, the second approach is less prescriptive than the first. Both are possible approaches for a regulator to take.

2.31 The further changes proposed to the Code remove the requirement for the Commission to approve in advance default terms and conditions. The Commission now

considers that it is appropriate to adopt a less prescriptive approach to default terms and conditions, and the changes proposed to the draft Code reflect this.

2.32 The Commission is also unable to accept the unexplained contention of Power and Water that a regime for default terms and conditions cuts across the intentions of the contestable regime. Regimes involving default or standard terms and conditions are adopted in other jurisdictions which allow for contestability of customers. Those regimes are not perceived as impeding the development of competition. The need for the proposed Code arises at least in part from the lack of actual competition in the Northern Territory electricity supply industry despite the existence of notional contestability of customers.

2.33 Power and Water also commented that it had ‘significant concerns’ under the *Trade Practices Act 1974* (TPA) in relation to the impact of the proposed Code. It asserted there was a ‘substantial risk’ that it could be exposed to action by the ACCC in consequence. This concern appears to relate to the previously proposed role of the Commission in approving default terms and conditions. No further details of these concerns were provided by Power and Water.

2.34 In the absence of a more detailed explanation of the concerns of Power and Water to the Commission, the Commission can only respond to the submission in general terms. The Commission points out that the changes proposed to the draft Code remove the role of the Commission in approving all default terms and conditions.

2.35 Further, as noted above, many regulatory systems adopt an approach of requiring a regulator to approve standard or default terms and conditions for certain types of customer contracts. The Commission is not aware of any instance where this has resulted in the ACCC taking action against a regulated entity under the TPA in relation to the requirement for regulatory approval of customer contracts.

2.36 In relation to the final issue raised by Power and Water, that the matter of variations to the Code should be left until after a decision is made by the NT Government whether to adopt the national regulatory framework, the Commission rejected this view in its “Possible Review” Response Paper.

2.37 The Commission stands by this stance for a range of reasons set out below.

2.38 Over the last two years, the NT Government has been reviewing the effectiveness of the existing electricity market regulatory regime, and in doing so has identified a number of structural and regulatory barriers to private investment and competition in the Territory electricity supply industry.

2.39 While the Commission notes that there is a prospect that the NT Government could ultimately adopt a broader reform program that involves regulatory arrangements which may differ from those proposed in the Draft Code, the changes to the Code now being made by the Commission reflect regulatory changes that are currently being considered.

2.40 As NT Treasury has noted, a major challenge is:

*“...to develop market and regulatory arrangements that will, as far as possible, provide consumers with the confidence that [Power and Water’s] incumbency does not prevent the price and standard of electricity services from being fair and reasonable.”*

2.41 Further, since disaggregation of Power and Water is not considered a viable alternative in the Territory context due to the small size of the market, NT Treasury has acknowledged that:

*“The decision to retain [Power and Water] as a vertically integrated generation, network and retail business, while at the same time relying on competition to promote efficiency and reliability of supply, heightens the importance of an effective ring-fencing regime. In particular, ring-fencing should minimise administrative and operational costs, while ensuring the market is delivering fair and reasonable prices and standards and does not discourage investors from entering the market, or lead to inefficient consumption decisions. A well resourced, independent and expert regulator is considered an essential requirement of an effective ring-fencing regime.”*

2.42 As the Commission strongly agrees with this view, it considers the proposed changes to the Ring-fencing Code to be aligned with the broader policy review currently under way and so consistent with what may be future policy direction over the longer term.

2.43 Indeed, the Commission considers that a Territory specific ring-fencing code, like the proposed Draft Code would serve to protect consumers for adverse supply outcomes and create the conditions for competition in the future by:

- requiring Power and Water to develop service contracts between each business unit that define the commercial relationship between each party, for example introducing an explicit contract outlining the commercial relationship between the Retail and Generation business units;
- requiring Power and Water to offer similar terms to third parties as apply to its business units; and
- allowing the independent regulator to determine and monitor the cost allocation methodology and outcomes to ensure third party and internal transfer pricing decisions are equivalent.”

2.44 The Commission also notes that, should the Government choose to join the national energy regime, some existing regulatory instruments may continue in place for a time as the NT transitions. Moreover, the national regulatory bodies are unlikely to devote time and resources to NT-specific issues in the short to medium term if existing instruments exist that can be ‘grandfathered’. The latter is more likely if such instruments (particularly a Territory specific ring-fencing regime) have been developed in an appropriately consultative manner by an independent and expert regulator, rather than a shareholder-government.

2.45 Nevertheless, there is currently no certainty about whether the Government will choose to join the national energy regime or the likely timing of the introduction of any changed regulatory arrangements. A transition period of up to five years has been mooted. In the Commission’s view, it is not reasonable to expect Territory electricity consumers to wait for up to another five years for some deficiencies in current arrangements to be addressed as part of a broad review of the regulatory framework when there is sufficient scope in current arrangements for mitigation of some deficiencies by a redrafting of the Code in the shorter term.

2.46 In these circumstances, the Commission would be remiss were it to continue to defer the exercise of its existing powers in such areas on the grounds that the NT could be joining the national regulatory regime at some stage.

2.47 The changes which the Commission proposes to make to the existing ring-fencing minimum obligations, and the proposed new provisions relating to default terms and conditions for the supply of goods or services, together are designed to deal with issues of that type by introducing arrangements which are intended to increase the transparency of dealings between a Prescribed Business and a Related Business, and provide an environment more conducive to potential entry of other market participants.

#### ***NT Major Energy Users’ submission***

2.48 With regard to discouraging Power and Water from adopting a discriminatory approach between “*prescribed (franchise) customers and contestable customers*”, the Commission considers that its proposed amendments to the revised Code address this issue.

2.49 Also, the Commission considers that the revised Code is clear that terms and conditions include “...in particular prices and terms and conditions relating to prices” with this being specifically addressed in clauses 3.4(b)(ii)(A) and 4.1(b).

2.50 While not proposing to adopt the NTMEU’s suggestion that guidelines regarding the various required Procedures should be essential rather than just optional, the



Commission intends to develop and publish guidelines with respect to the (new) proposed Contracting Procedures and the Default Terms and Conditions Procedures. In addition, any interested party may, at any time, request the Commission to consider issuing guidelines where they believe this will improve transparency or clarify matters that may be in dispute.

2.51 The Commission will consider any and all comments addressed to it regarding the arm's length contracts and the default terms and conditions irrespective of when they are received, and does not consider that formal requirements are necessary in this regard.

2.52 While not considering it necessary to specifically provide for it in the Code, the Commission will ensure that appropriate consultations in the approval of default terms and conditions are addressed as part of the approved Procedures.

2.53 In response to the NTMEU's contention that the Commission should err on the side of promoting the public benefit rather than being concerned with not imposing too great a regulatory burden on Power and Water, the Commission aims to achieve a fair balance between these two considerations.

2.54 With regard to the NTMEU's contention that there should be provision for legal separation of Power and Water's various businesses as well as some physical separation between key staff, the Commission considers that the legal structure of Power and Water is a matter for broader consideration by Government at the policy level.

## **Amendments to the Draft Code**

2.55 Against this background, the Commission acknowledges the following:

- (a) The transitional arrangements in the revised Code were deficient in the sense that it is unreasonable to expect that the arm's length contracts could be in place at the commencement of the Code.
- (b) The Commission's involvement in approving default terms and conditions (and all variances between terms and conditions in the arm's length (related-party) contracts and the approved default terms and conditions) was in contrast with the approved Procedures approach taken with regard to accounting separation, cost allocation and information sharing under the existing Code.
- (c) Default terms and conditions (especially regarding price) for the supply of electricity from PWC Generation to PWC Retail are likely to be affected by the NT Government's decisions regarding wholesale generation pricing arrangements. The likely decisions at a minimum will require revision of default pricing or at a maximum will make any default pricing completely redundant.

2.56 Therefore, the Commission has made the following amendments to the Draft Code:

- (a) In order to phase in arm's length (third-party) contracts – by:
  - (i) regarding clause 3.4, adding the requirement for the development and approval of "Arm's Length Contracting Procedures", and
  - (ii) making a related amendment to clause 5.2(a) to the effect that draft "Arm's Length Contracting Procedures" be submitted within 6 months of the date of commencement.
- (b) In order to redirect the Commission's role to approval of processes to be followed by Power and Water rather than the resultant contracts themselves, and to increase emphasis on the Commission's compliance role instead – by:
  - (i) regarding clause 3.3, adding the requirement for the development and approval of "Default Terms and Conditions Procedures",

- (ii) deleting entirely the approval provisions in clause 4, and including only some of the deleted requirements instead in the relevant Procedures/Principles in Schedule 2,
- (iii) adding the requirement that default terms and conditions be published, to increase the accountabilities on Power and Water, and
- (iv) regarding clause 3.4, modifying subclause (b)(v) and deleting subclause (b)(vi).

As a result, the only approval role which is retained is in regard to those arm's length (related-party) contracts (in clause 3.4) where the parties are not legally separate entities and there is a material variance between terms and conditions in the related-party contract and the published default terms and conditions.

- (c) In order to allow additional time to take into account the likely direction regarding the NT Government's decisions regarding wholesale generation pricing arrangements – by:
  - (i) regarding clause 5.2(a), adding a requirement that draft "Default Terms and Conditions Procedures" be submitted within 9 months of the date of commencement, in place of the requirement in the current draft allowing just a 40 day development period for proposed default terms and conditions.

2.57 In addition, on the advice of its legal advisers, the Commission has amended the Draft Code by including an additional clause on 'Decision Making, Public Consultation and Disclosure of Information by the Commission', which aims to provide a comprehensive, but flexible, structure for public consultation by the Commission and the gathering of information which the Commission may require for its decision making. This clause will apply where the Code does not otherwise make specific provision for the procedures and processes which the Commission must follow.

2.58 This additional amendment also includes provision for the release of confidential information if, in the opinion of the Commission, there is a net public benefit. The Commission's legal advisers have put forward convincing arguments that such a provision does not conflict with the confidentiality requirements of section 26 of the Act and the Commission has accepted that position, including for the reason that such a power is an inevitable part of any amendments to a transition to the national electricity regime or an equivalent.

2.59 The Commission has also made a number of other amendments, most notably:

- (a) slipping the date of commencement by one month to 1 September 2008;
- (b) adding a definition of "arm's length"; and
- (c) deleting clause 5.11, and subsequently clause 9.1 and Schedule 1.

## **Commission's Draft Decision**

2.60 The Commission's Draft Decision is that it will revoke the existing Code in its entirety, and promulgate a new version of the Code in the form of the Draft Code as set out in Appendix A of this paper.

## CHAPTER

## 3

## EXPLANATORY NOTES

## Comments on changes to the Draft Code

3.1 The table below explains the principal drafting changes which have been made to the version of the Draft Code which was issued in February 2008.

3.2 The changes have been made following further consideration of the issues by the Commission and the submissions made in response to publication of the Draft Code.

Clause No.	Subject	Comment
2.2	Scope	These changes follow on from the other changes made to the Code.
3.3	Minimum Ring-fencing Requirements - provision to third parties of goods or services provided to a Related Contestable Business	<p>The changes are minor and separate out into three sub-clauses the previous clause.</p> <p>Clause (c) defines the applicable principles as <i>third party contracting principles</i>.</p> <p>Clause (a) obliges an Electricity Entity to comply with those principles in its supply of goods or services of a Prescribed Business to its Related Contestable Business.</p> <p>Clause (b) imposes an obligation on an Electricity Entity to supply third parties in accordance with those principles where it supplies the goods or services to its Related Contestable Business.</p>
3.4	Minimum Ring-fencing Requirements – Related Party Contracting	<p>There is a change of nomenclature (<i>related party contracting principles</i>) to better reflect the fact that clause 3.4 is concerned with related party contracting by an Electricity Entity.</p> <p>Some changes are proposed to the way in which an Electricity Entity will be required to prepare and document its related party contracts (both actual and notional).</p> <p>An Electricity Entity will be required to develop detailed procedures for related party contracting and submit them to the Commission for approval. Those procedures must be consistent with the basic principles described in clause 5 of</p>

Clause No.	Subject	Comment
		<p>Schedule 1.</p> <p>The process of development and approval of the procedures will occur under the existing regime for ‘Approved Procedures’ in clause 5 of the Code.</p> <p>The procedures will be designed to ensure that a Prescribed Business complies with the requirement to deal with a Related Contestable Business in an <i>arm’s length</i> manner and that related party contracts are negotiated in that manner.</p> <p>Some changes are proposed to the Commission’s role in approving and monitoring related party contracts for compliance with the <i>related party contracting principles</i>. These are described below.</p>
3.4(d) & (e)	Minimum Ring-fencing Requirements – Related Party Contracting	<p>The provisions dealing with the requirement for the approval of the Commission for certain related party contracts have been modified.</p> <p>The initial role of the Commission in approving related party contracts will be limited to the situation where a Prescribed Business wishes to contract with its Related Contestable Business for the supply of <i>nominated goods or services</i> but on terms which differ materially from the relevant <i>default terms and conditions</i> for those goods or services applying under clause 4 of the Code. It is only where the Prescribed Business and Related Contestable Business are not separate legal entities that the approval of the Commission will be required for the related party contract. The test for approval remains unchanged.</p>
3.4(f) to (i)	Minimum Ring-fencing Requirements – Related Party Contracting	<p>Clauses 3.4(f) to (i) are new. They provide a regime for monitoring and review of related party contracts where the Commission considers that an Electricity Entity’s related party contract does not comply with the <i>related party contracting principles</i>.</p> <p>The Commission will not be able to require changes to related party contracts to remedy non-compliance until it has consulted with the relevant Electricity Entity.</p>
3.4(j)	Minimum Ring-fencing Requirements – Related Party Contracting	<p>Clause 3.4(j) is new. It is designed to allow for publication of information about related party contracts by giving powers to the Commission to require the publication of information by an Electricity Entity.</p> <p>This may either be the related party contract itself (where the Commission thinks this is appropriate), or information about the approval of a related party contract by the Commission.</p>

Clause No.	Subject	Comment
		<p>Further, since the Commission will have a limited role to play in approving only some types of related party contracts, it also allows the Commission to require an Electricity Entity to make a declaration, and publish information, about its compliance with the requirements in relation to <i>notional agreements</i> where the approval of the Commission is not sought.</p> <p>These provisions will enable a flexible measure of public information to be provided about related party contracting.</p>
3.5 & 3.6	Minimum Ring-fencing Requirements	It is now proposed to use the defined term ‘ <i>arm’s length</i> ’ in the Code. These clauses have been amended to use the defined term. The substantive meaning of the clauses should not change.
4	Default Terms and Conditions	<p>The provisions in clause 4 have been modified to change the basis on which an Electricity Entity is to prepare default terms and conditions where these are required for <i>nominated goods or services</i>.</p> <p>The approach in the Draft Code was that default terms and conditions would need to be submitted to the Commission for its approval in advance.</p> <p>The approach that the Commission now proposes to adopt is that an Electricity Entity should itself prepare and publish default terms and conditions in accordance with detailed approved procedures, but that the approval of the Commission will not be required to default terms and conditions.</p> <p>The default terms and conditions will have to comply with those approved procedures and comply with the <i>third party contracting procedures</i> but otherwise be a matter for the Electricity Entity itself to determine.</p> <p>The Commission will be given the power to monitor and review published default terms and conditions to ensure their compliance with those requirements, and to direct that changes be made to the default terms and conditions to remedy any non-compliance, but otherwise will not play a role in approving default terms and conditions.</p> <p>Certain of the machinery provisions found in the previous draft of clause 4 dealing with an Electricity Entity’s obligations when its default terms and conditions are amended have been moved to Clause 6 of Schedule 1.</p>

Clause No.	Subject	Comment
4.1	Requirement for Default Terms and Conditions	<p>This clause has been restructured to reflect the different approach outlined above.</p> <p>It incorporates the substantive requirements of clause 4.5 of the previous draft that default terms and conditions must be <i>fair and reasonable</i> and <i>non-discriminatory</i>. Those requirements are now part of the <i>third party contracting principles</i>.</p> <p>An Electricity Entity will be required to develop detailed procedures for preparing default terms and conditions and submit them to the Commission for approval. Those procedures must be consistent with the basic principles described in clause 6 of Schedule 1.</p> <p>The process of development and approval of the procedures will occur under the existing regime for ‘Approved Procedures’ in clause 5 of the Code.</p> <p>The procedures will be designed to ensure that the substantive default terms and conditions comply with the <i>third party contracting principles</i>.</p>
4.3	Commencement of Default Terms and Conditions	<p>An Electricity Entity will have to publish its default terms and conditions, and any variations, at least two months before they take effect. This requirement exists under the Victorian Electricity Industry Act.</p>
4.4	Review of Default Terms and Conditions by the Commission	<p>This clause replaces the provisions of clauses 4.3, 4.6 and 4.9 of the previous draft.</p> <p>It provides a similar regime for monitoring and review of default terms and conditions by the Commission to that found in clause 3.4.</p>
5	Compliance with Approved Procedures	<p>The requirements of this clause concerning the development of detailed procedures by an Electricity Entity, and their approval by the Commission, will now also apply in relation to related party contracts and default terms and conditions.</p> <p>Lead in times of 6 and 9 months respectively from the commencement date of the new Code will apply to the preparation of those new procedures as the Commission recognises that it will take some time for the development of the procedures, and consequent preparation of required related party contracts and default terms and conditions. The Commission recognises that there will need to a transition to full implementation of the new requirements.</p>

Clause No.	Subject	Comment
5.5	Approval by Commission of Procedures	Clause 5.5(a)(vi) provides another example of the type of conditions which the Commission may impose in approving Procedures under clause 5.
9	Exemptions from Compliance with Specified Obligations	The previous clause 9.1 has been deleted. The Commission considers that the preferable regulatory approach is that exemptions in place under the previous Code should not be automatically carried over into the new Code, and that if an Electricity Entity seeks the continuation of an exemption it should make fresh application.
11.2	Non-discriminatory	The existing definition of this term is now located in this clause.
11.4	Arm's Length	It is considered desirable to use the defined term ' <i>arm's length</i> ' and give further definition of the expression. The definition draws on case law about the meaning of the term.
12.2	Compliance with Applicable Laws	This clause is inserted for reasons of clarification. It makes clear that whatever the Commission does under the Code cannot be inconsistent with other applicable laws.
13	Decision Making, Public Consultation and Disclosure of Information by the Commission	<p>This clause is new.</p> <p>There are a range of decision making matters under the Code where it may be considered appropriate for the Commission to consult with other persons, or the public generally, about the matter for decision.</p> <p>This clause aims to provide a comprehensive, but flexible, structure for public consultation by the Commission and the gathering of information which the Commission may require for its decision making, and will apply where the Code does not otherwise make specific provision for the procedures and processes which the Commission must follow.</p>
13.6	Treatment of confidential information	<p>The structure of this clause is largely based on similar provisions of the WA Networks Access Code.</p> <p>The clause extends the legal authorisation given to the Commission to disclose confidential information in certain circumstances.</p>

Clause No.	Subject	Comment
Previous Schedule 1	Exemptions at Commencement Date	<p>The previous Schedule 1 has been deleted in consequence of the deletion of previous clause 9.1, and the removal of initial exemption under the Code.</p> <p>Previous Schedule 2 has been renumbered accordingly.</p>
Clause 5 of Schedule 1	Arm's Length Contracting Principles	<p>Clause 5 is largely new.</p> <p>It sets out general principles with which an Electricity Entity must comply when developing its Arm's Length Contracting Procedures under clause 5 of the Code.</p> <p>Clauses 5.2 and 5.3 were previously contained in the main body of the Code, and are not new.</p>
Clause 6 of Schedule 1	Default Terms and Conditions Principles	<p>Clause 6.1 is new. It sets out general principles with which an Electricity Entity must comply when developing its Default Terms and Conditions Procedures under clause 5 of the Code.</p> <p>Clauses 6.2 to 6.7 were previously contained in the main body of the Code, and are not new.</p>
Previous Schedule 3	Transitional Provisions	<p>Previous Schedule 3 is now renumbered as Schedule 2. Clause 2 dealing with exemptions has been deleted in consequence of the decision not to continue in force any exemptions given under the previous Code.</p>



**APPENDIX****A****DRAFT CODE**

The Draft Code shows how a final Code may look with the proposed variations incorporated.

A ‘Delta View’ showing the substantive changes between the version of the Draft Code issued in February with the “Proposed Variations” consultation paper and version of the Draft Code as now revised is also available on the Commission’s website.

While the Commission has taken all reasonable care in preparing this delta view document, it is provided for the purpose of general guidance only. Certain formatting and consequential changes are not marked up in this document. Interested parties should refer to the original Codes rather than rely on this delta view document.



**Draft**

Date: May 2008

# Northern Territory Electricity Ring Fencing Code

Third Version

1 September 2008



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## FOREWORD

This Third Version of the Northern Territory Electricity Ring-Fencing Code (*Code*):

- is made by the Utilities Commission of the Northern Territory pursuant to section 24 of the *Utilities Commission Act*;
- commences operation on 1 September 2008; and
- replaces the previous versions of the *Code*.

Notice of the making of the *Code* was published in the *Gazette* on [insert date].

Any questions regarding the *Code* should be directed in the first instance to the Executive Officer, Utilities Commission, at any of the following:

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### Amendment History

Version	Date made	Date of commencement
1	27 June 2001	1 July 2001
2	29 April 2002	29 April 2002
3	[insert date]	1 September 2008

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# Northern Territory Electricity Ring-Fencing Code

## 1. Introduction

### 1.1 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 Regulation 2 of the *Utilities Commission Regulations*.
- (b) In making this *Code*, the *Commission* has had regard to the matters listed in section 6(2) of the *Act*.

### 1.2 Date of Commencement

- (a) This *Code* takes effect on and from the *Commencement Date*.

### 1.3 Previous versions of the Code

- (a) This *Code* is the third version of the *Codes* made by the *Commission*.
- (b) This *Code* replaces the previous versions of the *Codes* made by the *Commission* on and from the *Commencement Date*.
- (c) On and from the *Commencement Date* the previous versions of the *Codes* have continued application only in respect of matters and things occurring before the *Commencement Date*.

### 1.4 Application

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must comply with this *Code*.
- (b) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must also comply with any *guideline* published by the *Commission* in relation to this *Code*.
- (c) An *Electricity Entity* that must comply with this *Code* must also ensure that its *Associates*, *Employees* and *Outsourced Service Providers* comply with applicable provisions of this *Code*.

### 1.5 Obligation to remedy

- (a) If an *Electricity Entity* breaches this *Code* it must remedy that breach as soon as practicable.

### 1.6 Guidelines

- (a) The *Commission* may publish *guidelines* relating to the application or interpretation of, or matters arising under, this *Code*.
- (b) The *Commission* must publish a *guideline* by publishing a copy on the website of the *Commission*.
- (c) The *Commission* may, but is not required to, also publish a *guideline* by giving notice of the making of the *guideline* or a copy of the *guideline* to each *Electricity Entity* that is required to comply with the *guideline*.
- (d) A *guideline* takes effect from the date of publication of the *guideline* by the *Commission* or from a later date specified in the *guideline*.

## 2. Objectives and Scope

### 2.1 Objectives

- (a) The objectives of this *Code* are to:
- (i) promote and achieve the object of the *Act*;
  - (ii) promote and achieve the objects of the *ERA*; and
  - (iii) without limiting paragraphs (i) and (ii) above, promote and safeguard competition and fair and efficient market conduct in the *Electricity Supply Industry* by promoting the simulation of competitive market conduct and preventing the misuse of monopoly power (for example by requiring *Electricity Entities* to implement measures which:
    - (A) prevent the misuse of monopoly power, and simulate behaviour and outcomes likely to exist in a competitive market; and
    - (B) ensure that its *Related Contestable Businesses* are not treated by its *Prescribed Businesses* in a manner which confers a non-commercial discriminatory price or non-price advantage on the *Related Contestable Business* as compared to an arm's length third party in the same commercial circumstances.)

### 2.2 Scope

- (a) The scope of this *Code* includes:
- (i) to require that an *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must comply with the *minimum ring-fencing requirements* specified in this *Code*;
  - (ii) to specify the *minimum ring-fencing requirements*;
  - (iii) to require that an *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must develop and publish *default terms and conditions* in relation to specified goods or services nominated by the *Commission*, and must provide the relevant goods or services to *Customers* on the *default terms and conditions*;
  - (iv) to establish a mechanism for the development and approval of certain *Accounting Procedures*, *Cost Allocation Procedures*, *Information Procedures*, *Arm's Length Contracting Procedures* and *Default Terms and Conditions Procedures* with which an *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must comply;
  - (v) to provide mechanisms for adding to or amending this *Code*;
  - (vi) to provide procedures for adding to or amending ring-fencing obligations under this *Code*;
  - (vii) to provide procedures for ensuring compliance with the requirements of this *Code*, and compliance reporting;
  - (viii) to provide mechanisms for exempting an *Electricity Entity* from compliance with specified requirements of this *Code*; and
  - (ix) to empower the *Commission* to undertake public consultation in relation to certain of the specified requirements of this *Code*.



### 3. Minimum Ring-Fencing Requirements

#### 3.1 Financial accounts

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must:
- (i) establish and maintain a separate set of financial accounts and reports in respect of:
    - (A) each *Prescribed Business*; and
    - (B) 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; and
  - (ii) allocate any costs that are shared between a *Prescribed Business* and a *Related Contestable Business* in a manner that:
    - (A) complies with the *Cost Allocation Procedures* applying to that *Electricity Entity* from time to time under clause 5; and
    - (B) is otherwise *fair and reasonable*.

#### 3.2 Confidential Information

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must ensure that *Confidential Information* provided by or in respect of a *Customer* to a *Prescribed Business* is:
- (i) used only for the purpose for which that *Confidential Information* was provided by or in respect of that *Customer*;
  - (ii) only disclosed to a *Related Contestable Business* of that *Electricity Entity* 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 disclosure is otherwise permitted by law; and
  - (iii) otherwise dealt with in accordance with the *Information Procedures* applying to that *Electricity Entity* under clause 5 from time to time.
- (b) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must ensure that any information (including *Confidential Information*):
- (i) obtained by that *Electricity Entity* (or by its *Associates* or *Employees*) in the course of conducting a *Prescribed Business*; or
  - (ii) known to that *Electricity Entity* (or by its *Associates* or *Employees*) 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 Contestable Business* of that *Electricity Entity* if disclosed to that *Related Contestable Business*; or
  - (iv) which might reasonably be expected to provide a competitive advantage to a *Related Contestable Business* of that *Electricity Entity* over a *Competitor* of that *Related Contestable Business* if disclosed to that *Related Contestable 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 Contestable Business* of that *Electricity Entity* 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 is otherwise permitted by law; and
- (vii) otherwise dealt with in accordance with the *Information Procedures* applying to that *Electricity Entity* under clause 5 from time to time.

### 3.3 Provision to third parties of goods or services of a Prescribed Business provided to a Related Contestable Business

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must comply with the *third party contracting principles* in relation to any goods or services of a *Prescribed Business* of that *Electricity Entity* offered or provided to a *Related Contestable Business* of that *Electricity Entity* by that *Prescribed Business* which are also offered to other *Customers* (including *Competitors* of that *Related Contestable Business*) who wish to obtain the same type of goods or services from that *Prescribed Business*.
- (b) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must ensure that any goods or services of a *Prescribed Business* of that *Electricity Entity* which are offered or provided to a *Related Contestable Business* of that *Electricity Entity* by that *Prescribed Business* are also offered and provided to other *Customers* (including *Competitors* of that *Related Contestable Business*) who wish to obtain the same type of goods or services from that *Prescribed Business*.
- (c) The *third party contracting principles* are that the terms and conditions (including in particular prices and terms and conditions relating to prices) upon which the relevant goods or services of an *Electricity Entity* are offered by that *Electricity Entity* to *Customers* must be:
  - (i) *non-discriminatory*; and
  - (ii) *fair and reasonable*.

### 3.4 Provision of goods or services of a Prescribed Business to a Related Contestable Business

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must comply with the *related party contracting principles* in relation to any goods or services of a *Prescribed Business* of that *Electricity Entity* which are offered or provided by that *Prescribed Business* to a *Related Contestable Business* of that *Electricity Entity*.
- (b) The *related party contracting principles* are:
  - (i) that:
    - (A) the *Prescribed Business* and the *Related Contestable Business* (the *contracting parties*) must prepare and enter into a written agreement between them in relation to goods or services of the *Prescribed Business* which are offered or provided by the *Prescribed Business* to the *Related Contestable Business*; or
    - (B) if the *contracting parties* are not separate legal entities, the *contracting parties* must:
      - (I) prepare and enter into a notional written agreement between them in relation to the goods or services of the *Prescribed Business*

- which are offered or provided by the *Prescribed Business* to the *Related Contestable Business* (a *notional agreement*); and
- (II) act at all times on the notional basis that the *contracting parties* have and must comply with the *notional agreement*,  
(a *related party contract*); and
- (ii) the terms and conditions (including in particular prices and terms and conditions relating to prices) of a *related party contract* must:
- (A) be *fair and reasonable*; and
- (B) be at *arm's length*.
- (c) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must also comply with:
- (i) the Arm's Length Contracting Procedures and Principles in clause 5 of Schedule 1; and
- (ii) the *Arm's Length Contracting Procedures* applying to the *Electricity Entity* from time to time.
- (d) If:
- (i) a *related party contract* or a proposed *related party contract* is in respect of the supply of *nominated goods or services* of that *Prescribed Business* of a type in relation to which *default terms and conditions* are in force;
- (ii) the *contracting parties* are not separate legal entities; and
- (iii) the terms and conditions of the *related party contract* or a proposed *related party contract* differ materially from the relevant *default terms and conditions*,
- the *Electricity Entity* must make application to the *Commission* for approval by the *Commission* of the *related party contract* or proposed *related party contract*.
- (e) The *Commission* may approve a *related party contract* or a proposed *related party contract* upon application being made to it under clause 3.4(d) if the *Electricity Entity* establishes to the satisfaction of the *Commission*, in the opinion of the *Commission*, that:
- (i) the terms and conditions of the *related party contract* or proposed *related party contract* are not more favourable to the *Related Contestable Business* relative to the position that the *Related Contestable Business* would be in if the *contracting parties* had an agreement for the supply of the relevant goods or services on the *default terms and conditions*; or
- (ii) if the terms and conditions of the *related party contract* or proposed *related party contract* do not satisfy clause 3.4(e)(i), the *related party contract* or proposed *related party contract* is *fair and reasonable* and *non-discriminatory* and should be approved,  
(an *approved related party contract*).
- (f) If at any time the *Commission* is of the opinion that:
- (i) a *related party contract* or a proposed *related party contract* does not comply with the *related party contracting principles*; or

- (ii) an *approved related party contract* has ceased to comply with the *related party contracting principles* for any reason (including without limitation by reason of variation of the *related party contract* or a change in circumstances),

the *Commission*:

- (iii) may give written notice to the *contracting parties* of the *Commission's* opinion giving particulars of the non-compliance; and
- (iv) may by written notice specify any steps that the *Commission* proposes to require the *Electricity Entity* to take to remedy the non-compliance which proposed steps:
  - (A) if the *contracting parties* are not separate legal entities, may include requiring the *Electricity Entity* to amend, within a specified period, the *related party contract* in a specified manner which, in the opinion of the *Commission*, will remedy the non-compliance; or
  - (B) if the *contracting parties* are separate legal entities, may be to require the *Electricity Entity* to use all reasonable endeavours to procure the *contracting parties* to amend, within a specified period, the *related party contract* in a manner specified by the *Commission* which, in the opinion of the *Commission*, will remedy the non-compliance.
- (g) If the *Commission* gives notice in accordance with clause 3.4(f):
  - (i) it must give the *contracting parties* a reasonable opportunity, within a period to be specified by the *Commission*, to:
    - (A) take the specified proposed steps without direction of the *Commission*; or
    - (B) make representations to the *Commission* in relation to the matter;
  - (ii) it must consider any representations made to it in response to the notice; and
  - (iii) it may make any changes which the *Commission* considers should be made to the proposed steps after considering any representations made to it.
- (h) Subject to compliance with the requirements of clause 3.4(g), and if the *contracting parties* have not taken the proposed steps without direction of the *Commission* within the period specified under clause 3.4(g)(i), the *Commission* may by written notice direct the *Electricity Entity* to take the steps specified in the notice by the *Commission* in relation to the *related party contract* to remedy the non-compliance.
- (i) An *Electricity Entity* must comply with a direction given by the *Commission* in accordance with clause 3.4(h).
- (j) The *Commission* may by written notice require an *Electricity Entity*:
  - (i) if the *contracting parties* are not separate legal entities, to *publish in the prescribed manner* or publish in another manner specified by the *Commission*:
    - (A) an *approved related party contract*; or
    - (B) an instrument of approval by the *Commission* of an *approved related party contract*; and
  - (ii) in respect of a *notional agreement* of that *Electricity Entity* which is not an *approved related party contract* and in relation to which the approval of the *Commission* has not been sought under clause 3.4(d) :
    - (A) to give to the *Commission*; and

- (B) *publish in the prescribed manner* or publish in another manner specified by the *Commission*,

a declaration signed by a *Director* of the *Electricity Entity* certifying on behalf of the *Electricity Entity* that it is not required in the circumstances to make application to the *Commission* for approval of the *notional agreement*.

### 3.5 Provision of contestable goods or services by a Prescribed Business to a Related Contestable Business

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must ensure that *contestable* goods or services which are provided to a *Related Contestable Business* of that *Electricity Entity* by a *Prescribed Business* of that *Electricity Entity* are provided on an *arm's length* basis.

### 3.6 Provision of contestable goods or services to a Prescribed Business by a Related Contestable Business

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must ensure that *contestable* goods or services which are provided to a *Prescribed Business* by a *Related Contestable Business* of that *Electricity Entity* are provided on an *arm's length* basis.

### 3.7 Marketing Staff

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must ensure that:
- (i) the *Marketing Staff* of its *Prescribed Businesses* are not also used as *Marketing Staff* for its *Related Contestable Businesses*; and
  - (ii) in the event that the *Marketing Staff* of its *Prescribed Businesses* do become or are found to become involved in a *Related Contestable Business*, the involvement immediately ceases.

### 3.8 Branding and marketing

- (a) An *Electricity Entity* that carries on a *Prescribed Business* and a *Related Contestable Business* in the Northern Territory must brand and market itself in a manner that minimises any potential for *Customer* confusion between the *Prescribed Business* and the *Related Contestable Business* of that *Electricity Entity*.

### 3.9 Claims about service standards

- (a) An *Electricity Entity* that carries on a *Prescribed Business* and a *Related Contestable Business* in the Northern Territory:
- (i) must not market to *Customers* the goods or services in the *Electricity Supply Industry* offered or provided by the *Related Contestable Business* based on the reliability, quality, safety or other attribute of the goods or services provided by a *Prescribed Business* of that *Electricity Entity*; and
  - (ii) must confine any representations it makes to *Customers* about service standards in relation to goods or services in the *Electricity Supply Industry* provided by the *Related Contestable Business* to those associated with those goods or services directly provided by the *Related Contestable Business*.

### 3.10 Websites

- (a) Where an *Electricity Entity* that carries on a *Prescribed Business* and a *Related Contestable Business* in the Northern Territory shares a website that *Electricity Entity* must:

- (i) identify on each page of the website which contains material in relation to the *Electricity Business* of that *Electricity Entity* whether the *Prescribed Business* or the *Related Contestable Business* is responsible for the contents of that page; and
- (ii) separate the contents of the website dealing with a *Prescribed Business* from the contents of the website dealing with the *Related Contestable Business* as far as practicable.

## 4. Default Terms and Conditions

### 4.1 Requirement for default terms and conditions

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must develop, and *publish in the prescribed manner, default terms and conditions* for each of the *nominated goods or services* of the *Electricity Entity*.
- (b) The *default terms and conditions* under clause 4.1(a) must set out each of the terms and conditions (including in particular prices and terms and conditions relating to prices) upon which the relevant goods or services would be provided or offered to a *Customer* (including a *Related Contestable Business* of that *Electricity Entity*) by a *Prescribed Business* of that *Electricity Entity*.
- (c) The *default terms and conditions* must:
  - (i) comply with the *third party contracting principles*; and
  - (ii) be developed by the *Electricity Entity* in accordance with, and comply with, the *Default Terms and Conditions Procedures* applying to the *Electricity Entity* from time to time.
- (d) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must also:
  - (i) comply with the Default Terms and Conditions Procedures and Principles in Schedule 1; and
  - (ii) comply with the *Default Terms and Conditions Procedures* applying to the *Electricity Entity* from time to time.

### 4.2 Nominated goods or services

- (a) For the purposes of clause 4.1(a), the *Commission* may by written notice given to each *Electricity Entity* to which the notice relates specify goods or services, or a class of goods or services, of a type provided or offered in the *Electricity Supply Industry* by a *Prescribed Business* of that *Electricity Entity* to a *Related Contestable Business* of that *Electricity Entity* as *nominated goods or services*.
- (b) The *Commission* may not nominate goods or services, or a class of goods or services, as *nominated goods or services* where the terms and conditions upon which the goods or services are to be provided by an *Electricity Entity* are wholly regulated or provided for by another *applicable law*.
- (c) For the purposes of clause 4.1(a) *nominated goods or services* includes the sale of electricity generated by *PWC* to an *Electricity Entity* issued with a *licence* authorising the selling of electricity.

#### 4.3 Commencement of operation and variation of default terms and conditions

- (a) *Default terms and conditions* which are developed and published in accordance with this *Code* by an *Electricity Entity* must be *published in the prescribed manner* at least 2 months before they take effect.
- (b) *Default terms and conditions* which are developed and published in accordance with this *Code* by an *Electricity Entity* may be varied by notice *published in the prescribed manner* not less than 2 months before the variation is to take effect.

#### 4.4 Review of default terms and conditions by the Commission

- (a) If at any time the *Commission* is of the opinion that *default terms and conditions* of an *Electricity Entity*:
  - (i) do not comply with the *third party contracting principles*; or
  - (ii) were not developed by the *Electricity Entity* in accordance with, or do not comply with, the *Default Terms and Conditions Procedures* applying to the *Electricity Entity* from time to time,  
the *Commission*:
    - (iii) may give written notice to the *Electricity Entity* of the *Commission's* opinion giving particulars of the non-compliance; and
    - (iv) may by written notice specify any steps that the *Commission* proposes to require the *Electricity Entity* to take to remedy the non-compliance which proposed steps may include (without limitation):
      - (A) requiring the *Electricity Entity* to amend, within a specified period, the *default terms and conditions* in a specified manner which, in the opinion of the *Commission*, will remedy the non-compliance; or
      - (B) requiring the *Electricity Entity* to prepare revised *default terms and conditions* in draft and submit the draft to the *Commission* for its consideration.
- (b) If the *Commission* gives notice in accordance with clause 4.4(a)(iv):
  - (i) it must give the *Electricity Entity* a reasonable opportunity, within a period to be specified by the *Commission*, to:
    - (A) take the specified proposed steps without direction of the *Commission*; or
    - (B) make representations to the *Commission* in relation to the matter;
  - (ii) it must consider any representations made to it in response to the notice; and
  - (iii) it may make any changes which the *Commission* considers should be made to the proposed steps after considering any representations made to it.
- (c) If:
  - (i) the *Commission* has complied with clause 4.4(b), and
  - (ii) the *Electricity Entity* has not taken the proposed steps without direction of the *Commission* within the period specified under clause 4.4(b)(i),

the *Commission* may by written notice direct the *Electricity Entity* to take the steps specified in the notice by the *Commission* in relation to the *default terms and conditions* to remedy the non-compliance.

- (d) An *Electricity Entity* must comply with a direction given by the *Commission* in accordance with clause 4.4(c).

## 5. Compliance with Approved Procedures

### 5.1 Introduction

- (a) In this clause 5 unless the context otherwise requires, a reference to “*Procedures*” includes in each case the *Accounting Procedures*, *Cost Allocation Procedures*, *Information Procedures*, *Arm’s Length Contracting Procedures* and *Default Terms and Conditions Procedures*.

### 5.2 Submission of final draft *Procedures* for approval by the Commission

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must within:
- (i) 3 months (in the case of the *Accounting Procedures* and the *Cost Allocation Procedures*);
  - (ii) 6 months (in the case of the *Information Procedures* and *Arm’s Length Contracting Procedures*); and
  - (iii) 9 months (in the case of the *Default Terms and Conditions 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 Development of final draft *Procedures*

- (a) The final draft *Procedures* submitted by an *Electricity Entity* under clause 5.2 must be:
- (i) designed to ensure compliance with the *Electricity Entity*’s obligations under clauses 3 and 4;
  - (ii) otherwise consistent with the principles set out in Schedule 1 to this *Code* for each type of *Procedure*; and
  - (iii) 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 Matters to which the Commission will have regard when considering draft *Procedures*

- (a) 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):
- (i) the matters set out in section 6(2) of the *Act*; and
  - (ii) whether the draft *Procedures* give effect to the principles set out in Schedule 1 to this *Code* for that type of *Procedures*.

### 5.5 Approval by the Commission may be subject to conditions

- (a) 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:
- (i) requiring that specific amendments be made to the draft *Procedures* submitted by the *Electricity Entity*;
  - (ii) approving the *Procedures* for a fixed term;



- (iii) requiring that the *Procedures* be reviewed at regular intervals by the *Commission* and the *Electricity Entity*;
- (iv) requiring that the *Procedures* must be resubmitted for approval following any change to the *Code* affecting the *Procedures* or when otherwise requested by the *Commission*;
- (v) requiring that the *Electricity Entity* report to the *Commission* concerning the implementation, application and/or compliance with the *Procedures* when requested by the *Commission*; and
- (vi) requiring that the *Electricity Entity* provide information and materials periodically to the *Commission* sufficient to enable the *Commission* to be satisfied, in the opinion of the *Commission*, that the conduct of the *Electricity Entity* in accordance with approved *Procedures* complies with the relevant *minimum ring-fencing requirements*.

#### 5.6 Compliance by Electricity Entity with *Procedures* and conditions of approval

- (a) 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 Variations to existing *Procedures*

- (a) An *Electricity Entity* may at any time apply to the *Commission* to approve a proposed variation to any existing *Procedures*.
- (b) 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 Timing

- (a) 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:
  - (i) whether the *Commission* approves those *Procedures* (or the proposed variation to the existing *Procedures*); and
  - (ii) any conditions attaching to the *Commission's* approval of those *Procedures* (or the proposed variation to the existing *Procedures*).
- (b) The *Electricity Entity* must implement any *Procedures* within 30 days after the date upon which they are approved by the *Commission*.

#### 5.9 Default by Electricity Entity

- (a) If an *Electricity Entity*:
  - (i) 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
  - (ii) 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 Compliance with requirements until *Procedures* are approved

- (a) 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 1 to this *Code* for that type of *Procedures* as if those principles were the *Procedures*.

## 6. Adding to or Amending this Code

### 6.1 Variation or revocation by the Commission under the Act

- (a) 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 Application by an Electricity Entity for variation or revocation

- (a) An *Electricity Entity* may request that the *Commission* vary or revoke any part of this *Code*.
- (b) 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 Additional or varied obligations on an Electricity Entity

- (a) 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 3, 4, and 5 above (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 Matters to which the Commission will have regard in making a decision

- (a) 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:
  - (i) the matters listed in section 6(2) of the *Act*; and
  - (ii) 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 Consultation by Commission with Electricity Entities

- (a) 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 Compliance with additional or varied obligations

- (a) 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 Notification by the Commission to interested persons

- (a) The *Commission* must, before:
- (i) varying or revoking this *Code* (or any part of this *Code*); or
  - (ii) 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:
    - (iii) states the nature of the proposed variation, revocation or additional or varied obligation; and
    - (iv) requests submissions by a date specified in the notice (not being a date earlier than 30 days after the date of the notice).
- (b) The *Commission* will also give a copy of any notice published in accordance with this clause 7.1 to each *Electricity Entity* to which the notice relates.

### 7.2 Consideration of submissions by the Commission

- (a) The *Commission* must consider any submissions received by the date specified in the notice published under clause 7.1(a) and may (but is not obliged to) consider any submissions received after that date.

### 7.3 Draft decision

- (a) 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(a), 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.
- (b) The *Commission* must:
- (i) 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
  - (ii) 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).

### 7.4 Consideration of submissions on the draft decision

- (a) The *Commission* must consider any submissions it receives by the date specified by the *Commission* under clause 7.3(b) and it may (but is not obliged to) consider any submissions received after that date.

### 7.5 Final decision

- (a) 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:

- (i) whether or not it will proceed with the proposed variation, revocation or additional or varied obligation; and
  - (ii) the final form of that proposed variation, revocation or additional or varied obligation.
- (b) A notice in relation to a variation, revocation or additional or varied obligation will have effect:
- (i) 30 days after the notice is given to each relevant *Electricity Entity* and, where required, published in the *Gazette*; or
  - (ii) on such later date as the *Commission* specifies in the notice.

## 8. Compliance Procedures and Compliance Reporting

### 8.1 Electricity Entity to establish and maintain compliance procedures

- (a) An *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory must within 6 months of the *Commencement Date* establish, document, maintain, and comply with appropriate auditable internal policies, procedures and systems (“*compliance procedures*”) for ensuring that it complies with its obligations under this *Code*.
- (b) The *compliance procedures* must include, without limitation, policies procedures and systems for:
- (i) training of *Employees* about the obligations of the *Electricity Entity* under this *Code*;
  - (ii) regular internal audit by the *Electricity Entity* of its compliance with its obligations under this *Code*;
  - (iii) regular reporting to, and consideration by, the *Directors* of the *Electricity Entity* concerning compliance with the obligations of the *Electricity Entity* under this *Code*;
  - (iv) dealing with any complaints made by a *Customer* or other third party to the *Electricity Entity* in connection with non-compliance by the *Electricity Entity* with its obligations under this *Code*; and
  - (v) detecting and reporting to the *Commission* any breach of the *compliance procedures*.
- (c) The *Commission*, upon reasonable notice being given to the *Electricity Entity*, may require the *Electricity Entity* to demonstrate to the *Commission’s* satisfaction, in the opinion of the *Commission*, the:
- (i) adequacy of; and
  - (ii) satisfactory compliance by the *Electricity Entity* with, the *compliance procedures*.
- (d) Any notification made by the *Commission* to the *Electricity Entity* concerning the *Commission’s* opinion of the adequacy of the *compliance procedures* of that *Electricity Entity* will not affect the *Electricity Entity’s* obligations under this *Code*.

## 8.2 Compliance reports

- (a) 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* (a *compliance report*).
- (b) The *compliance report*, and 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 Audit

- (a) 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*.
- (b) 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.
- (c) 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.
- (d) The *Electricity Entity* will be responsible to pay the costs of undertaking that audit if, in the opinion of the *Commission*, the auditor discovers any failure by the *Electricity Entity* to comply with a material obligation under this *Code*.
- (e) Upon notification to the *Electricity Entity* by the *Commission*, the *Electricity Entity* must pay the amount of the audit costs to the *Commission* in the amount notified by the *Commission*.

## 8.4 Notification of breaches to the Commission

- (a) 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 must advise of the remedial action that is being undertaken to rectify the breach.

# 9. Exemption from Compliance with Specified Obligations

## 9.1 Application for an exemption

- (a) An *Electricity Entity* may apply to the *Commission* for an exemption from compliance with any obligation (or component of an obligation) under this *Code*.
- (b) A notice requesting an exemption must include all information and materials necessary to support the *Electricity Entity's* application for exemption.

## 9.2 Matters to which the Commission will have regard on the application

- (a) In determining whether to grant any exemption, the *Commission* will have regard to:
  - (i) the matters listed in section 6(2) of the *Act*; and
  - (ii) 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.

## 9.3 Terms or conditions of exemption

- (a) The *Commission* may grant an exemption:
  - (i) on different terms to those sought by the *Electricity Entity*; or

- (ii) subject to such conditions as the *Commission* considers are appropriate in the circumstances, including conditions requiring that:
  - (A) the exemption be for a fixed term;
  - (B) the continuation of the exemption be subject to review by the *Commission* on such terms as the *Commission* considers appropriate in the circumstances;
  - (C) the *Electricity Entity* report to the *Commission* concerning any matter relating to the operation or impact of the exemption; and
  - (D) 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).

#### 9.4 Procedure for consideration of application

- (a) When the *Commission* receives an application under clause 9.1 the *Commission* must:
  - (i) if it considers that the application has been made on trivial or vexatious grounds, reject the application without further consideration; or
  - (ii) 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:
    - (A) identifies the *Electricity Entity* that has applied for the exemption and the nature of the requested exemption;
    - (B) states how copies of the application can be obtained; and
    - (C) requests submissions by a date specified in the notice (not being a date earlier than 30 days after the date of the notice).
- (b) 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*.
- (c) The *Commission* must consider any submissions received by the date specified in the notice published under clause 9.4(a)(ii) and it may (but is not obliged to) consider any submissions received after that date.

#### 9.5 Draft decision

- (a) Within 30 days (or such longer period as the *Commission* notifies) after the last day for submissions specified in the notice published under clause 9.4(a)(ii) the *Commission* must issue a draft decision stating whether or not it intends to grant the exemption sought in that application.
- (b) The *Commission* must:
  - (i) 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
  - (ii) 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).

- (c) The *Commission* must consider any submissions it receives by the date specified by the *Commission* under clause 9.5(b) and it may (but is not obliged to) consider any submissions received after that date.

## 9.6 Final decision

- (a) 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.
- (b) A final decision under clause 9.6(a) has effect 30 days after the decision is issued to the *Electricity Entity* or such later date as the *Commission* specifies in the notice.

## 9.7 Prescribed Business definition

- (a) 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.
- (b) A request under this clause 9.7 will be dealt with by the *Commission* in the same manner as an application for an exemption from compliance with any obligation (or component of an obligation) under clause 9.1.

# 10. Outsourcing

## 10.1 Outsourced Service Provider

- (a) If an *Electricity Entity* that carries on a *Prescribed Business* in the Northern Territory arranges for or uses another entity to perform any of its business functions in relation to a *Prescribed Business* of that *Electricity Entity* the other entity is an *Outsourced Service Provider* in relation to that *Electricity Entity*.

## 10.2 Compliance by Outsourced Service Provider

- (a) An *Electricity Entity* must ensure that an *Outsourced Service Provider* in relation to that *Electricity Entity* complies with this *Code* as if the *Outsourced Service Provider* were the *Electricity Entity*.

## 10.3 Outsourcing agreements

- (a) If an *Electricity Entity* enters into an agreement with an *Outsourced Service Provider* in relation to the performance of any of the business functions of the *Prescribed Business* of that *Electricity Entity* (including an asset management agreement) the *Electricity Entity* must ensure that the terms of the agreement are consistent with and facilitate the implementation of this *Code*.

# 11. Interpretation and determination of requirements under this Code

## 11.1 Fair and reasonable

- (a) Any question as to whether a thing is *fair and reasonable* for the purposes of this *Code* is to be decided by the *Commission* on the basis of the *Commission’s* opinion of the fairness and reasonableness of the matter.

## 11.2 Non-discriminatory

- (a) Any question as to whether a thing is *non-discriminatory* for the purposes of this *Code* is to be decided by the *Commission* on the basis of the *Commission’s* opinion of the matter.

- (b) For the purposes of this *Code*, terms and conditions upon which goods or services are provided or offered or proposed to be provided or offered, are *non-discriminatory* if the terms or conditions:
- (i) do not unreasonably discriminate, or have the effect of creating unreasonable discrimination between:
    - (A) different *Customers* or classes of *Customers*; or
    - (B) Customers and a Related Contestable Business of an Electricity Entity; and
  - (ii) do not unreasonably competitively or financially disadvantage a *Customer* relative to a *Related Contestable Business* of an *Electricity Entity*,
- in relation to the provision of the relevant goods or services.

### 11.3 Related party contracting principles

- (a) Any question as to whether a thing satisfies the *related party contracting principles* for the purposes of this *Code* is to be decided by the *Commission* on the basis of the *Commission's* opinion of the matter.

### 11.4 Arm's length

- (a) Any question as to whether a thing is at *arm's length* for the purposes of this *Code* is to be decided by the *Commission* on the basis of the *Commission's* opinion of the matter.
- (b) Any question relating to the terms and conditions that would reasonably be expected to be contained in an agreement if the *contracting parties* were dealing with each other at *arm's length* for the purposes of this *Code* is to be decided by the *Commission* on the basis of the *Commission's* opinion of the matter.
- (c) For the purposes of this *Code*:
- (i) a transaction is at *arm's length* if at a minimum the parties to the transaction are unrelated and act severally and independently in forming the transaction and none of the parties has the ability to exert personal influence or control over another party in relation to the transaction; and
  - (ii) if a transaction is between related parties, the transaction is only at *arm's length* if in fact:
    - (A) the parties to the transaction have dealt with each other in relation to negotiation and conclusion of the transaction as if the parties were unrelated to each other;
    - (B) each party, in relation to the dealings between the parties in relation to the transaction, takes no account of the commercial circumstances of or likely benefits accruing to the other parties from the transaction other than to the extent that would be prudent between unrelated parties; and
    - (C) the outcome of the dealings between the parties in relation to the transaction is a matter of real bargaining between the parties.
- (d) For the purposes of this clause 11.4 parties to a transaction are related parties, without limitation, if a party is an *Associate* of another party to the transaction.

### 11.5 Effect of disclosure of information

- (a) Any question as to whether:



- (i) information might reasonably be expected to materially affect the commercial interests of a *Competitor* of a *Related Contestable Business* of an *Electricity Entity* if disclosed to that *Related Contestable Business* for the purposes of clause 3.2(b)(iii) above; or
- (ii) information might reasonably be expected to provide a competitive advantage to a *Related Contestable Business* of an *Electricity Entity* over a *Competitor* of that *Related Contestable Business* if disclosed to that *Related Contestable Business* without also being supplied to that *Competitor* for the purposes of clause 3.2(b)(iv) above;

is to be determined by the *Commission* on the basis of the *Commission's* opinion of the matter.

#### 11.6 Determination of goods or services as *contestable* or *non-contestable*

- (a) Any question arising under this *Code* as to whether goods or services in the *Electricity Supply Industry* are *contestable* or *non-contestable* is to be determined by the *Commission* on the basis of the *Commission's* opinion of the matter.

#### 11.7 Carrying on of a business

- (a) For the purposes of this *Code* an *Electricity Entity* is to be regarded as carrying on a *Prescribed Business* or a *Related Contestable Business* (as the case may be) if :
  - (i) it is the holder of a *licence* authorising the activities for which a *licence* is required comprising all or part of the relevant *Prescribed Business* or *Related Contestable Business*; or
  - (ii) it otherwise engages in the activity of owning, controlling or operating the relevant *Prescribed Business* or *Related Contestable Business*.
- (b) Any question arising under this *Code* as to whether an *Electricity Entity* is to be regarded as carrying on a *Prescribed Business* or a *Related Contestable Business* is to be determined by the *Commission* on the basis of the *Commission's* opinion of the matter.

#### 11.8 Commission to determine matters arising under this clause

- (a) The *Commission* may from time to time in its discretion consider and decide any issue arising under this clause 11.
- (b) An:
  - (i) *Electricity Entity*; or
  - (ii) any other person who has, in the opinion of the *Commission*, a sufficient interest in the matter,

may request that the *Commission* may make such a decision.

## 12. Preservation of Other Obligations and Compliance with Applicable Laws

### 12.1 No derogation from other obligations

- (a) Nothing in this *Code* will derogate from any obligation imposed upon an *Electricity Entity* under the *Act*, the *ERA*, 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*.

## 12.2 Compliance with Applicable Laws

- (a) The *Commission* must not by:
- (i) a *guideline*;
  - (ii) a direction, notice or other instrument issued to an *Electricity Entity* under this *Code*;
  - (iii) the terms and conditions of an approval given by the *Commission* under this *Code*; or
  - (iv) any other decision made, or requirement determined by, the *Commission* under this *Code*,

impose a requirement on an *Electricity Entity* which contravenes an *applicable law*.

## 13. Decision Making, Public Consultation and Disclosure of Information by the Commission

### 13.1 Interpretation

- (a) For the purposes of this clause:
- (i) “*confidential material*” means *relevant material* which the *disclosing person* advises the *Commission* is of a confidential or commercially sensitive nature;
  - (ii) “*decision*” includes a decision, determination, approval, requirement, specification, standard, submission, obligation or request (whether draft or final) to be made, issued, given, imposed, reviewed or considered by the *Commission* under this *Code*;
  - (iii) “*decision making conduct*” means procedures or conduct of the *Commission* in connection with or for the purposes of making a *decision* or issuing a *document* under this *Code*;
  - (iv) “*disclosing person*” means a person who provides *relevant material* to the *Commission* under this *Code*;
  - (v) “*document*” includes a *guideline*, *Procedure*, *compliance procedures*, exemption, notice, direction or other instrument issued under or provided for in this *Code*.
  - (vi) “*matter for consultation*” means matters in connection with a *document* or *decision* that under this *Code* is a matter which is required to be or may be the subject of consultation under this clause; and
  - (vii) “*relevant material*” means information, material or a document provided to the *Commission* under or for the purposes of this *Code*.

### 13.2 Application of this clause

- (a) This clause 13 applies in addition to, and not in derogation of, the other provisions of this *Code*.
- (b) Where another provision of this *Code* provides that *decision making conduct* must occur in a particular manner the *Commission* must undertake the *decision making conduct* in that manner.
- (c) To the extent that it is possible to do so without acting inconsistently with another provision of this *Code*, the *Commission* may (but is not obliged to) undertake *decision making conduct* in accordance with this clause 13.

- (d) To the extent that there is inconsistency between this clause 13, or the application of this clause in any circumstances, and another provision of this *Code* in relation to *decision making conduct*:
  - (i) this clause is to be construed as operating to the fullest extent possible in the circumstances consistently with the other provision; and
  - (ii) the other provision otherwise prevails over this clause to the extent of the inconsistency.

### 13.3 Decision making process and provision of information

- (a) Where under this *Code* the *Commission* is authorised or required to engage in *decision making conduct* the *Commission* may:
  - (i) inform itself about any matter it considers relevant to the making of the *decision* or issue of the *document* in any way it thinks appropriate; and
  - (ii) by written notice require an *Electricity Entity* to provide the *Commission*, within the period specified in the notice, with *relevant material* specified in the notice in the possession or control of the *Electricity Entity* which, in the opinion of the *Commission*, is relevant to the making of the *decision* or to the issue of the *document* and which, in the opinion of the *Commission*, the *Commission* reasonably requires for the performance of its functions.
- (b) An *Electricity Entity* must comply with a notice issued under clause 13.3(a)(ii) of this *Code*.

### 13.4 Matters for consultation

- (a) Where under this *Code* the *Commission* is authorised or required to engage in *decision making conduct* the *Commission* may, to the extent to which the *Commission* considers to be appropriate in the circumstances, treat the making of a *decision* or the issue of a *document* or matters in connection with the making of the *decision* or issue of the *document* as a *matter for consultation*.

### 13.5 Powers of Commission in relation to matters for consultation

- (a) The *Commission* may take such steps as the *Commission* considers appropriate to consult in relation to a *matter for consultation* including by:
  - (i) undertaking consultation of the public and interested persons in a manner determined by the *Commission* in relation to the *matter for consultation*;
  - (ii) making disclosure to the public and interested persons of information and materials (including without limitation *relevant material* provided to the *Commission* by an *Electricity Entity*) in relation to the *matter for consultation*;
  - (iii) producing and publishing an issues paper examining the issues relating to the *matter for consultation*;
  - (iv) inviting submissions from the public and interested persons in relation to the *matter for consultation*;
  - (v) making a draft decision if, in the opinion of the *Commission*, the circumstances warrant the making of a draft decision in relation to the *matter for consultation*;
  - (vi) inviting submissions from the public and interested persons in relation to a draft decision of the *Commission* in relation to the *matter for consultation*;

- (vii) publishing submissions received by the *Commission* in relation to the *matter for consultation*;
  - (viii) making a final decision in relation to the *matter for consultation*;
  - (ix) publishing a final decision in relation to the *matter for consultation*;
  - (x) publishing the *decision* or *document* made or issued by the *Commission*;
  - (xi) publishing any document or thing referred to in a *decision* or *document* made or issued by the *Commission*; or
  - (xii) requiring an *Electricity Entity* to publish any document or thing referred to in a *decision* or *document* made or issued by the *Commission*.
- (b) Clause (a) does not limit how the *Commission* may engage in *decision making conduct* in relation to a *matter for consultation*.

### 13.6 Treatment of confidential information

- (a) Subject to clause 13.6(b), where a *disclosing person* provides *relevant material* to the *Commission* in accordance with this *Code*, the *disclosing person* may, at the time at which the *relevant material* is provided, give notice to the *Commission* that the *relevant material* or part of the *relevant material* is *confidential material*.
- (b) A *disclosing person*:
- (i) may give notice to the *Commission* that *relevant material* is *confidential material* only if the *relevant material* is in fact of a confidential or commercially sensitive nature, and where only a part or parts of the *relevant material* is *confidential material*, the *disclosing person* may give notice only in respect of those parts; and
  - (ii) must in a notice under clause 13.6(b)(i) specify in reasonable detail the basis on which the *disclosing person* makes the claim that the *relevant material* is *confidential material*.
- (c) The *Commission* must not disclose or publish any *confidential material* to any other person unless:
- (i) disclosure is authorised under section 26(2) of the *Act*; or
  - (ii) the *Commission* is of the opinion:
    - (A) that the disclosure of the *confidential material* would not cause detriment to the *disclosing person* or another person; or
    - (B) that, although the disclosure of the *confidential material* may cause detriment to the *disclosing person* or another person, either:
      - (I) the public benefit in disclosing it outweighs the detriment;
      - (II) disclosure would better promote or achieve the objectives of this *Code*; or
      - (III) disclosure is necessary or desirable in order to enable the *Commission* to perform more effectively its functions under this *Code*.
- (d) The *Commission* is authorised to disclose or publish *confidential material* to another person in the circumstances referred to in clause 13.6(c).

- (e) For the purposes of clause 13.6(c), a disclosure cannot cause detriment to a person if the thing disclosed is already in the public domain (other than by disclosure by the *Commission* in breach of clause 13.6(c)).
- (f) The *Commission* may by a *decision* or *document* made or issued by the *Commission* require an *Electricity Entity* to disclose or publish *confidential material* of the *Electricity Entity* to another person in circumstances where the *Commission* is authorised to disclose or publish that *confidential material* to another person.

## 14. Interpretation

### 14.1 Italicised terms

- (a) In this *Code*, words appearing like *this* will have the meaning set out in clause 14.2.

### 14.2 Defined terms

- (a) 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 of this *Code*;

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

“*applicable laws*” means legislation, regulations, codes or other instruments with which an *Electricity Entity* must comply under the terms of a *licence* issued to the *Electricity Entity*;

“*approved related party contract*” has the meaning in clause 3.4(e) of this *Code*;

“*arm’s length*” has the meaning in clause 11.4 of this *Code*;

“*Arm’s Length Contracting Procedures*” mean the *Procedures* of that name approved or issued by the *Commission* under clause 5 of this *Code*;

“*Associate*” means in relation to:

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

“*business day*” means a day other than a Saturday or Sunday or a day declared to be a public holiday in the Northern Territory under the *Public Holidays Act*;

“*Code*” means this Northern Territory Electricity Ring-Fencing Code;

“*Codes*” means the previous versions of the Northern Territory Electricity Ring-Fencing Codes previously made by the *Commission*.

“*Commencement Date*” means the later of 1 August 2008 or the date set out in the notice published in the *Gazette* making this *Code* as the date of commencement of this *Code*;

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

“**competition**” means either actual or potential rivalry or competition in relation to a business (or component of a business) or activity in the **Electricity Supply Industry**;

“**Competitor**” means an entity (whether identifiable, actual or notional) which either actually or potentially may be in **competition** with an **Electricity Entity**;

“**compliance procedures**” has the meaning in clause 8.1(a) of this **Code**;

“**compliance report**” has the meaning in clause 8.2(a) of this **Code**;

“**Confidential Information**” means information which is or has been provided to, or has otherwise been obtained by, an **Electricity Entity** (or **Associate** of that **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;

“**confidential material**” has the meaning in clause 13.1(a) of this **Code**;

“**contestable**” in relation to goods or services within the **Electricity Supply Industry** means goods or services in relation to which there exists or potentially exists **competition** in a market in relation to the supply of the relevant goods or services;

“**contracting parties**” has the meaning in clause 3.4(b)(i)(A) of this **Code**;

“**Corporations Act**” means the *Corporations Act 2001* (Cth.);

“**Cost Allocation Procedures**” means the procedures of that name approved or issued by the **Commission** under clause 5 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** of an **Electricity Entity** or from a **Related Contestable Business** of that **Electricity Entity**, and also means, where the context requires, a person who engages (or proposes to engage) in the activity of purchasing goods or services in the **Electricity Supply Industry** from a **Customer** who purchases goods and services from a **Prescribed Business**;

“**decision**” has the meaning in clause 13.1(a) of this **Code**;

“**decision making conduct**” has the meaning in clause 13.1(a) of this **Code**; **default contract**” has the meaning in clause 0 of Schedule 1 of this **Code**;

“**default terms and conditions**” has the meaning in clause 4.1(a) of this **Code**;

“**Director**” has the same meaning as in the *Corporations Act* and includes in the case of the **PWC** its chief executive officer from time to time and each of the persons appointed as directors of **PWC** in accordance with the *Government Owned Corporations Act*.

“**disclosing person**” has the meaning in clause 13.1(a) of this **Code**;

“**document**” has the meaning in clause 13.1(a) of this **Code**;

“**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 **ERA**;

“**Electricity Supply Industry**” has the same meaning as is given to that term in the **ERA**;

“**Employee**” means a **Director** or other officer, employee, consultant, contractor, or agent of an **Electricity Entity** and includes an **Outsourced Service Provider** of that **Electricity Entity**;

“*ERA*” means the *Electricity Reform Act*;

“*fair and reasonable*” has the meaning in clause 11.1 of this *Code*;

“*Gazette*” has the same meaning as is given to that term in the *Interpretation Act*;

“*guideline*” means a guideline published by the *Commission* under section 7 of the *Act*;

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

“*licence*” means a licence granted under the *ERA*;

“*Marketing Staff*” means an *Employee* 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* is involved in other functions) but does not include an *Employee* who is only involved in:

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

“*matter for consultation*” has the meaning in clause 13.1(a) of this *Code*;

“*minimum ring-fencing requirements*” means the requirements under clause 3 of this *Code*;

“*negotiated contract*” has the meaning in clause 6.3 of Schedule 1 of this *Code*;

“*nominated goods or services*” has the meaning in clause 4.2 of this *Code*;

“*non-contestable*” in relation to goods or services provided in the *Electricity Supply Industry* means goods or services other than *contestable* goods or services;

“*non-discriminatory*” has the meaning in clause 11.2 of this *Code*;

“*notional agreement*” has the meaning in clause 3.4(b)(i)(B)(I) of this *Code*;

“*Outsourced Service Provider*” has the meaning in clause 10.1(a) of this *Code*;

“*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 in the *Electricity Supply Industry*:
    - (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 *non-contestable* goods or services; or

- (b) the business carried on by the *PWC* of generating electricity for sale (whether to third parties or notionally to another business division of the *PWC*) carried on by the *PWC*, 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 *PWC* 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*;

“*publish in the prescribed manner*” means:

- (a) to provide the relevant thing to the *Commission*;
- (b) to publish, and keep published at all times while the relevant thing is in force, the relevant thing on the website of the *Electricity Entity*; and
- (c) to publish the relevant thing in the *Gazette*.

“*PWC*” means the Power and Water Corporation established under the *Power and Water Corporation Act*;

“*Related Contestable Business*” means, in relation to an *Electricity Entity*, any business (or component of a business), other than a *Prescribed Business*, carried on by that *Electricity Entity* or an *Associate* of that *Electricity Entity* in the *Electricity Supply Industry*;

“*related party contract*” has the meaning in clause 3.4(b)(i) of this *Code*;

“*related party contracting principles*” has the meaning in clause 3.4(b) of this *Code*;

“*relevant material*” has the meaning in clause 13.1(a) of this *Code*; and

“*third party contracting principles*” has the meaning in clause 3.3(c) of this *Code*.

### 14.3 Other interpretation principles

- (a) In this *Code*, unless the context otherwise requires:
  - (i) if a term is defined in the *ERA* or the *Act* and is not otherwise defined in clause 14.2, that term will have the same meaning as is given to that term under the *ERA* or the *Act*;
  - (ii) headings are for convenience only and do not affect the interpretation of this *Code*;
  - (iii) words importing the singular include the plural and vice versa;
  - (iv) words importing a gender include any gender;
  - (v) 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;
  - (vi) a reference to any thing includes a part of that thing;
  - (vii) 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*;
  - (viii) 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;

- (ix) other parts of speech and grammatical forms of a word or phrase defined in this *Code* have a corresponding meaning;
- (x) mentioning an example or anything after the words “include”, “includes” or “including” will not limit what else might be included;
- (xi) a period of time:
  - (A) which dates from a given day or the day of an act or event is to be calculated exclusive of that day; or
  - (B) which commences on a given day or the day of an act or event is to be calculated inclusive of that day;
- (xii) a reference to:
  - (A) a day is a reference to a period commencing immediately after midnight and ending the following midnight; and
  - (B) a month is a reference to a calendar month; and
- (xiii) a reference to an accounting term is to be interpreted in accordance with accounting standards under the *Corporations Act* 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*.

#### 14.4 Making of an instrument or decision

- (a) Where this *Code* authorises the making of an instrument or decision:
  - (i) the power includes the power to amend or repeal the instrument or decision; and
  - (ii) 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.



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## SCHEDULE 1

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### **Accounting, Cost Allocation, Information , Arm’s Length Contracting Principles, and Default Terms and Conditions Principles**

#### 1. Common Principles

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

- (a) approve any *Procedures* submitted by an *Electricity Entity* under clause 5.3(a);
- (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 *minimum ring-fencing requirements*;
- (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 1.

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 *minimum ring-fencing requirements*.

### 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 *minimum ring-fencing requirements* ;
  - (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 1.
- 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* or for other regulatory purposes, 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 Contestable 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 Contestable Business* over any *Competitor* of a *Related Contestable Business*.
- 4.3 If an *Electricity Entity* proposes to allow the disclosure of information of the type referred to in clause 3.2(b) of this *Code* to an employee, consultant, contractor or agent involved in the conduct of a *Related Contestable Business*, the *Information Procedures* must identify categories of information which will also be made available to *Competitors* of the *Related Contestable 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. Arm's Length Contracting Principles

5.1 The *Arm's Length Contracting Procedures* to be developed by an *Electricity Entity* and submitted to the *Commission* in accordance with clause 5 of this *Code*:

- (a) will be designed to ensure compliance with the relevant *minimum ring-fencing requirements*.
- (b) will comply with the principles set out in this Schedule 1.
- (c) will describe and give details of the goods and services of a *Prescribed Business* of the *Electricity Entity* which are then offered or provided by that *Prescribed Business* to a *Related Contestable Business* of the *Electricity Entity*.
- (d) will separately in respect of each *Related Contestable Business* of the *Electricity Entity* describe and give details of the goods and services of the *Prescribed Business* of the *Electricity Entity* which are then offered or provided by the *Prescribed Business* to the *Related Contestable Business*.
- (e) where the *contracting parties* are separate legal entities, will describe and give details of the processes and procedures by which the *contracting parties* have prepared and entered, or propose to prepare and enter, into each *related party contract* of the *Electricity Entity*.
- (f) where the *contracting parties* are not separate legal entities, will describe and give details of the processes and procedures by which the *contracting parties* have prepared and entered, or propose to prepare and enter, into each *notional agreement* and will:
  - (i) describe by whom in the *Prescribed Business* or the *Related Contestable Business* the draft *notional agreement* will be prepared;
  - (ii) describe the processes by which the *notional agreement* will be negotiated between the *Prescribed Business* and the *Related Contestable Business*;
  - (iii) describe the processes by which the *Electricity Entity* will ascertain and ensure that the terms and conditions of the *notional agreement* will comply with each of the *related party contracting principles*; and
  - (iv) describe the processes by which the *Prescribed Business* and the *Related Contestable Business* will deal with each other at *arm's length* in relation to the preparation and negotiation of the *notional agreement*.
- (g) where the *contracting parties* are not separate legal entities, will describe and give details of the processes and procedures by which the *Prescribed Business* and the *Related Contestable Business* will ascertain, monitor and ensure that they act at all times on the notional basis that the *contracting parties* have and must comply with each *notional agreement* and will:
  - (i) describe the processes for operating under each *notional agreement*; and
  - (ii) describe and give details of management responsibility within the *Prescribed Business* and the *Related Contestable Business* for ensuring that the *contracting parties* act in accordance with each *notional agreement*.
- (h) will describe and contain procedures:

- (i) relating to how the *Electricity Entity* will identify circumstances in which it must apply to the *Commission* for approval of a *related party contract* or proposed *related party contract*; and
- (ii) relating to how the *Electricity Entity* will make such application for approval to the *Commission*.

- (i) will describe the persons within the organisation of the *Electricity Entity* who have day to day managerial responsibility for implementing, monitoring, and ensuring compliance by the *Electricity Entity* with the *related party contracting principles*.

5.2 A *related party contract* should:

- (a) deal with each of the material terms and conditions (including in particular prices and terms and conditions relating to prices) on which the relevant goods or services are offered or provided; and
- (b) contain terms and conditions dealing with each of the matters that would reasonably be expected to be contained in the agreement if the *contracting parties* were dealing with each other at *arm's length*.

5.3 The *contracting parties*

- (a) must at all times deal with each other and act in accordance with their *related party contract*; and
- (b) must not vary a *related party contract* or waive compliance with the requirements of a *related party contract* in a manner inconsistent with either the principles set out in this Schedule 1 or the *related party contracting principles*.

## 6. Default Terms and Conditions Principles

6.1 The *Default Terms and Conditions Procedures* to be developed by an *Electricity Entity* and submitted to the *Commission* in accordance with clause 5 of this *Code*:

- (a) will be designed to ensure compliance with the relevant *minimum ring-fencing requirements*.
- (b) will comply with the principles set out in this Schedule 1.
- (c) will describe the procedures and processes to be followed by the *Electricity Entity* in preparing *default terms and conditions* when notice is given to the *Electricity Entity* nominating goods or services as *nominated goods or services* and will:
  - (i) describe by whom in the *Electricity Entity* the proposed *default terms and conditions* will be prepared;
  - (ii) describe the processes to be followed within the *Electricity Entity* for giving internal approval to the proposed *default terms and conditions* and for the subsequent issue of the internally approved *default terms and conditions*;
  - (iii) describe the processes by which the *Electricity Entity* will ascertain and ensure that the *default terms and conditions* will comply with each of the *third party contracting principles*; and
  - (iv) will provide for the *default terms and conditions* determined by the *Electricity Entity* to be provided to the *Commission* no later than the date on which *default terms and conditions* are published in the prescribed manner by the *Electricity Entity*; and



- (d) will describe and give details of the procedures and processes to be followed by the *Prescribed Business* of the *Electricity Entity* when:
  - (i) a *Customer* seeks to be provided with *nominated goods or services* on the terms of the *default terms and conditions* or on other negotiated terms; and
  - (ii) the *Prescribed Business* makes an offer of supply to or contracts with a *Competitor* of a *Related Contestable Business* of the *Electricity Entity* for the supply of *nominated goods or services* and will describe and give details of :
    - (A) the means by which the *Prescribed Business* will ensure the confidentiality of the dealings between the *Prescribed Business* and the *Competitor*; and
    - (B) the means by which the *Prescribed Business* will ensure that it will not disclose the dealings between the *Prescribed Business* and the *Competitor* to the *Related Contestable Business*.

6.2 Where:

- (a) an *Electricity Entity* has *default terms and conditions* for *nominated goods or services*; and
- (b) a *Customer* requests the *Electricity Entity* to provide goods or services of the type which are the subject of the *default terms and conditions*,

the *Prescribed Business* of the *Electricity Entity* must offer to enter into an agreement in writing with the *Customer* for the provision of the requested goods or services in the form of the relevant *default terms and conditions* (a *default contract*) within three *business days* of the request unless:

- (c) an agreement in respect of the requested goods or services between the *Electricity Entity* and the *Customer* making the request has been terminated due to a material breach by the *Customer*; and
- (d) the circumstances giving rise to that breach remain unchanged such that if that former agreement was still in force there would be an unremedied breach by the *Customer*.

6.3 The *Electricity Entity* and a *Customer* may, instead of entering into a *default contract*, negotiate an agreement for the provision of the requested goods or services (a *negotiated contract*) with terms and conditions different from those of the relevant *default terms and conditions*. Each *negotiated contract* must be in writing.

6.4 If the *default terms and conditions* of an *Electricity Entity* are varied the *Electricity Entity* must:

- (a) make an offer within three *business days* to each *Customer* with which it has a *default contract* to enter into a replacement *default contract*, for the period of the remaining unexpired terms of the existing *default contract*, in the form of the new *default terms and conditions*; and
- (b) if such offer is accepted, terminate the existing *default contract*.

6.5 The offer under clause 6.4 of this Schedule must remain open for acceptance by a *Customer* for at least 40 *business days*.

6.6 The *Electricity Entity* must notify the *Commission* as soon as practicable if:

- (a) it gives any notice to a *Customer* in connection with the proposed termination of a *default contract*; or
- (b) it terminates a *default contract* without a replacement *default contract* or *negotiated contract* immediately coming into force.

6.7 The *Electricity Entity* must not terminate a *default contract* during the term of the *default contract* if the *Commission* so directs the *Electricity Entity* specifying the duration and circumstances of the prohibition on termination.

## 7. Scope of Principles

7.1 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*.

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## SCHEDULE 2

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### Transitional provisions

#### 1. Continuation of approved *Procedures*

- (a) The *Accounting Procedures*, *Cost Allocation Procedures* and *Information Procedures* of an *Electricity Entity* which were approved by the *Commission* under the previous *Codes* and in force immediately before the *Commencement Date*:
  - (i) will continue in force and deemed to be approved *Procedures* for the purposes of clause 5 of this *Code*; and
  - (ii) will continue to be subject to any conditions relating to the *Commission's* approval of those *Procedures*.
- (b) An *Electricity Entity* referred to in clause 1(a) of this Schedule is not required to comply with the requirements of clause 5.2 of this *Code* in relation to that approved *Procedure*.