

NATIONAL GAS ACCESS (WA) AMENDMENT BILL 2016

EXPLANATORY MEMORANDUM

Overview

The National Gas Access (WA) Amendment Bill 2016 (**Bill**) is part of a legislative package that implements reforms to the scheme of access regulation that applies to Western Australia's electricity networks and gas pipelines.

These reforms will see responsibility for regulating access to Western Power's electricity network in the South West Interconnected System and gas pipelines in Western Australia shift from the State-based Economic Regulation Authority (**ERA**) to a national body, the Australian Energy Regulator (**AER**) under the National Electricity Law and National Gas Law, respectively.

The legislative package to implement these reforms consists of the following three bills:

- the National Electricity (Western Australia) Bill 2016, which adopts the National Electricity Law as an applied law scheme in Western Australia for regulation of electricity networks;
- this Bill, the National Gas Access (WA) Amendment Bill 2016, which modifies the National Gas Law already adopted in Western Australia under the *National Gas Access (WA) Act 2009* to an applied law scheme for regulation of gas pipelines; and
- the Energy Legislation Amendment and Repeal Bill 2016, which amends existing local legislation to the extent necessary to facilitate the first two bills.

The primary purpose of this Bill is to modify adoption the National Gas Law in Western Australia to an applied law scheme to enable the AER to become the economic regulator for Western Australia's regulated gas pipelines that currently include:

- the Mid-West and South-West Gas Distribution System;
- the Goldfields Gas Pipeline;
- the Dampier to Bunbury Natural Gas Pipeline; and
- the Kalgoorlie to Kambalda Pipeline.

This purpose is also supported by the Energy Legislation Amendment and Repeal Bill 2016. Accordingly, this explanatory memorandum should be read with the explanatory memorandum for the Energy Legislation Amendment and Repeal Bill 2016.

National Gas Law

In each State and Territory, gas pipelines are regulated under the National Gas Law. The National Gas Law is a cooperative national legislative scheme established by the Council of Australian Governments (**COAG**) Energy Council under the Australian Energy Market Agreement.

The Australian Energy Market Agreement is an intergovernmental agreement to which all Australian jurisdictions are a party, including Western Australia.

The National Gas Law establishes a central governance framework with unique national regulatory bodies that oversee a single set of subordinate national rules (the National Gas Rules) for the consistent regulation of the gas sector in each participating jurisdiction. The AER has the responsibility of administering the National Gas Rules as the economic regulator of gas pipelines.

Under the cooperative scheme, the National Gas Law is enacted through the South Australian Parliament as the host jurisdiction with each participating jurisdiction introducing application legislation to give effect to the South Australian legislation as applied law. The National Gas Law is a Schedule to the *National Gas (South Australia) Act 2008* (SA).

Changes to the National Gas Law in the South Australian legislation can only occur on the approval of the COAG Energy Council. Changes to the subordinate National Gas Rules are subject to approval of the Australian Energy Market Commission, which is an independent statutory body specifically set up to be the rule-maker.

When the national gas regulatory framework was first implemented, Western Australia adopted a version of the National Gas Law through the *National Gas Access (WA) Act 2009*. Contrary to the intent of the national cooperative scheme, Western Australia did not adopt the National Gas Law as an applied law scheme. The National Gas Law was adopted with such modifications as the Government at that time determined were necessary or desirable for its implementation in Western Australia, including retaining regulatory responsibility with the State-based ERA rather than the national regulator, the AER.

The Bill will amend the *National Gas Access (WA) Act 2009* to apply the National Gas Law as an applied law in Western Australia, and consequently transfer regulatory responsibility to the AER under the National Gas Law scheme.

The purpose of transferring the regulatory to the AER is because it has the scale and technical capability to be better able to undertake the regulatory role into the future. In addition, since the applied law scheme is dynamic it will ensure ongoing uniformity without the need to consider specific amendments to the Act whenever the National Gas Law is amended.

The Bill also contains consequential provisions to give effect to these reforms, and to provide for Western Australia-specific modifications where required.

Staged approach for transferring regulatory responsibility

The Bill will transfer the regulatory responsibility from the ERA to the AER in two stages.

Stage One is the transition period to commence from 1 July 2018 where the AER will take over regulatory responsibility from the ERA and administer intra-period functions for each gas pipeline under their prevailing Access Arrangements as approved by the ERA. This transition period is expected to apply until such time as each gas pipeline commences its next Access Arrangement period.

Stage Two is when the next Access Arrangement review commences, at which time the relevant regulator will be the AER. Stage Two for the Mid-West and South-West Gas Distribution System will commence on 1 September 2018; for the Goldfields Gas Pipeline and 1 January 2019; and for the Dampier to Bunbury Natural Gas Pipeline, on 1 January 2020.

There will be an overlap between the two stages as the AER will need to continue to administer intra-period functions under the ERA's approved Access Arrangements until the next Access Arrangement period under the AER's decisions commence.

Clause Notes

NATIONAL GAS ACCESS (WA) AMENDMENT BILL 2016

PART 1 – PRELIMINARY

Clause 1 Short title

The short title is *National Gas Access (WA) Amendment Act 2016*.

Clause 2 Commencement

This clause specifies the commencement of various Parts of the Act. Part 1 will come into operation on the date of Royal Assent, Part 2 will come into effect on the day after assent day, Part 3 will come into effect on 1 July 2017 and Part 4 will come into effect on 1 July 2018.

Clause 3 Act amended

This clause specifies that the Act amends the *National Gas Access (WA) Act 2009*.

PART 2 – AMENDMENTS COMMENCING ON THE DAY AFTER ROYAL ASSENT

Clause 4 Part 6 heading replaced

Deletes the heading "Part 6 – Other local provisions" and replaces it with "Part 6 – Transitional provisions".

Clause 5 Part 6 Division 1 heading replaced

Deletes the heading "Division 1 – Economic Regulation Authority" and replaces it with "Division 1 – Transitional provisions for *National Gas Access (WA) Act 2009*".

Clause 6 Section 18 deleted

Deletes section 18, which currently requires the ERA to make appropriate use of the expertise of the Director of Energy Safety under the *Energy Coordination Act 1994* in relation to safety or technical standards in the gas supply industry. Removing this requirement ensures consistency with the applied law provisions given the transfer of regulatory functions to the AER.

Clause 7 Part 6 Division 2 heading deleted

Deletes the heading "Division 2 – Miscellaneous".

Clause 8 Part 6 Division 2 inserted

- (i) Inserts "Division 2 – Transitional provisions for *National Gas Access (WA) Amendment Act 2016*", spanning sections 20A to 20G.
- (ii) Section 20A defines the terms used in Part 6 Division 2.
- (iii) Section 20B provides for regulations to be made that relate to a broad range of transitional matters. Section 20B(2) lists some, but not all, of the transitional matters that the regulations may deal with. It is intended that, amongst other things, this head of power will be used to clarify the status of the ERA's Rate of Return Guidelines made under the existing National Gas Rules and that they will be replaced with the

AER's Rate of Return Guidelines from 1 July 2018 once the transfer of functions from the ERA to the AER takes place.

- (iv) Section 20C(1) provides the AER with a discretion to perform certain functions during the transition period. Namely, the AER may, but is not obliged to serve a regulatory information notice upon a service provider under section 48(1)(a) of the National Gas (Western Australia) Law if it considers it reasonably necessary for the purposes of exercising its transitional powers, or preparing to perform a function that it will have after 1 July 2018 under the applied law scheme. If the AER serves such a notice, then under section 20C(2), the service provider must comply with the notice.
- (v) Section 20C(3) allows a service provider to request a pre-submission conference with the AER during the transition period. If a service provider makes such a request, the AER may, but is not required to comply with the request.
- (vi) Section 20C(4) makes it clear that during the transition period, when exercising those functions, the AER is taken to be the regulator for the purposes of subsections (1) to (3).
- (vii) Section 20C(5) provides that a thing done by or in relation to the AER during the transition period under the provisions that apply because of this section is taken to be done under the corresponding legislation in effect on and from 1 July 2018.
- (viii) Section 20D has the effect of allowing the exercise of powers in anticipation of provisions that are not yet in effect under the National Gas (WA) Law, the National Gas (WA) Regulations and the National Gas (WA) Rules.
- (ix) If the AER is required to take preparatory steps before the making of a decision or instrument under the applied law scheme, section 20E authorises it to do so during the transition period. The AER will be taken to have complied with the requirement. This provision is similar to section 26 of the *National Gas (South Australia) Act 2008*.
- (x) Section 20F authorises the ERA to provide the AER with such information and assistance as is reasonably required by the AER to perform its functions under the applied law scheme or during the transition period. It also provides that it is a function of the AER to receive information and assistance provided to it by the ERA under this section. This will facilitate the transfer of regulation of the gas pipelines from the ERA to the AER and is beneficial given that the ERA has the experience and understanding of the regulation of the WA pipelines. Further, section 20F(3) clarifies that the provision of information and assistance by the ERA to the AER does not constitute a breach of or default under an Act or other law, contract, agreement or undertaking, or a breach of a duty of confidence, or a civil or criminal wrong.
- (xi) Section 20G provides for the continuation of regulations made under section 21 unless specifically repealed. This applies to the *National Gas Access (WA) (Local Provisions) Regulations 2009*, which are intended to be repealed with effect from 1 July 2018.

Clause 9 Part 6A heading inserted

Inserts the heading "Part 6A – Miscellaneous".

Clause 10 Section 21 amended

Inserts sections 21(1A), 21(1B) and 21(1C). Section 21(1A) allows regulations to be made to modify the operation of the National Gas Rules, or provide for the Minister, by instrument, to do so. Under section 21(1B), the modifications cannot have effect before 1 July 2018. Modifications made under a Ministerial instrument cannot have effect after 1 July 2019 under section 21(1C).

PART 3 – AMENDMENTS COMMENCING ON 1 JULY 2017

Clause 11 Section 9 amended

Amends section 9(1) by deleting the definitions of "dispute resolution body" and "WA arbitrator". A "dispute resolution body" is currently defined to mean the "WA arbitrator" in relation to an ERA pipeline. The "WA arbitrator" is the Western Australian Energy Disputes Arbitrator. Given that the Office of the Western Australian Energy Disputes Arbitrator will be disestablished on 1 July 2017, and the transfer of its functions to the AER from 1 July 2018, these definitions are no longer required. The resolution of disputes in the interim will be in accordance with regulations made under section 21 as stated in section 20H.

Clause 12 Section 20H inserted

Inserts section 20H, which applies to disputes commencing during the transition period and notes the power in section 21 to make regulations providing for and in relation to the resolution of access disputes if the dispute resolution process has commenced before 1 July 2018.

Clause 13 Section 21 amended

Deletes sections 21(2) and 21(3). Section 21(2) allows regulations to be made that provide for the imposition and payment of fees and charges in connection to the functions of an arbitrator. Section 21(3) provides that, where it is inappropriate to prescribe set fees or charges in connection with the performance of a particular function, the regulations may instead prescribe methods of calculation. These provisions are no longer required given the disestablishment of the Office of the Western Australian Energy Disputes Arbitrator

Clause 14 Section 22 amended

Amends section 22(a) to delete the reference to the WA arbitrator to reflect the disestablishment of the Western Australian Energy Disputes Arbitrator.

Clause 15 Schedule 1 clause 3 amended

Amends Schedule 1 clause 3 to reflect the disestablishment of the Western Australian Energy Disputes Arbitrator and the transfer of its functions to the AER.

Clause 16 Schedule 1 clauses 8 and 9 replaced

Deletes Schedule 1 clauses 8 and 9 to reflect the disestablishment of the Western Australian Energy Disputes Arbitrator and the transferral of its functions to the AER. A new clause 8 is inserted, which modifies the Law to provide that Chapter 6 which deals with access disputes does not apply if the dispute resolution process for the dispute commences before 1 July 2018. It is

intended that any such disputes will be resolved in accordance with regulations made under section 21 as stated in section 20H.

PART 4 – AMENDMENTS COMMENCING ON 1 JULY 2018

Clause 17 Long title amended

Amends the long title by deleting "to amend the *Gas Pipelines Access (Western Australia) Act 1998* and various other Acts", as this has historical operation and the Act will no longer have such a function.

Clause 18 Section 1 amended

Amends section 1 by deleting "Access (WA)" and inserting "(*Western Australia*)" to amend the short title of the Act to be the *National Gas (Western Australia) Act 2009*. This ensures consistency of naming with the applied law scheme and the application Acts of the other jurisdictions.

Clause 19 Section 3 amended

Amends section 3(1) by specifying that references to the Law and Regulations will be to the "National Gas (WA) Law" and the "National Gas (WA) Regulations" respectively, as applied under the applied law scheme. It also inserts a definition of "National Gas (WA) Rules", as applied under the applied law scheme.

Clause 20 Section 4 amended

Amends section 4 to reflect the renaming to the National Gas (WA) Law and the National Gas (WA) Regulations as applied under the applied law scheme.

Clause 21 Section 5 amended

Amends section 5 to reflect the renaming of the National Gas (WA) Law and the National Gas (WA) Regulations as applied under the applied law scheme.

Clause 22 Section 6 amended

Amends section 6 to reflect the renaming of the National Gas (WA) Law and the National Gas (WA) Regulations as applied under the applied law scheme.

Clause 23 Sections 6A and 6B deleted

Deletes section 6A, which extends the operation of the National Gas Access (*Western Australia*) Law and the National Gas Access (*Western Australia*) Regulations to pipelines for hauling gas other than natural gas. This ensures a consistent application of the national scheme, as section 6A is not consistent with the applied law provisions. Section 6B, which provides that the *Interpretation Act 1984* does not apply, is also deleted and dealt with in another provision.

Clause 24 Part 2 heading replaced

Deletes the heading "Part 2 – National Gas Access (*Western Australia*) Law and its regulations" and replaces it with "Part 2 – Application of the National Gas Law and regulations" to reflect the renaming of the National Gas (WA) Law and the National Gas (WA) Regulations as applied under the applied law scheme.

Clause 25 Sections 7 to 8 replaced

This is the main amendment for implementing the applied law scheme. Section 7 is deleted and replaced with a provision applying the National Gas Law set out in the Schedule to the South Australian Act as a law of the State. Similarly, section 8 is deleted and replaced with a provision applying the South Australian regulations as a law of the State.

Clause 26 Section 9 amended

- (i) Amends section 9(1) to delete the definitions of "ERA pipeline" and "regulator". The functions of the ERA under the Act will be transferred to the AER and the Office of the Western Australian Energy Disputes Arbitrator will be disestablished and its functions transferred to the AER. Therefore, these definitions are no longer required.
- (ii) Section 9(2) is amended to reflect the renaming of the National Gas (WA) Law and the National Gas (WA) Regulations as applied under the applied law scheme.
- (iii) Section 9(3) is amended to reflect the National Gas (WA) Law and the National Gas (WA) Regulations as applied under the applied law scheme.

Clause 27 Section 10 and 11 inserted

- (i) Inserts section 10 which allows regulations to prescribe a pipeline for the purposes of the National Gas (WA) Law and the National Gas (WA) Regulations. It is intended that this head of power will be used to replicate the provisions contained in the existing *National Gas Access (WA) (Part 3) Regulations 2009* relating to designated pipelines.
- (ii) Section 11 is also inserted, which provides that the *Interpretation Act 1984* does not apply to the National Gas (WA) Law, the National Gas (WA) Regulations, the National Gas (WA) Rules or the instruments under them.

Clause 28 Part 3 deleted

Deletes Part 3 which provides regulation-making powers for the National Gas Access (Western Australia) Law.

Clause 29 Section 14 amended

Amends section 14 to ensure consistency with the applied law provisions.

Clause 30 Section 17 amended

Amends section 17 to provide that Schedule 2 clause 2 of the National Gas (WA) Law, which provides that the Law is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Legislature of this jurisdiction, has effect in relation to the operation of the Act or an instrument made under the Act.

Clause 31 Section 19 amended

Amends section 19 to reflect the renaming of the National Gas (WA) Law and the National Gas (WA) Regulations as applied under the applied law scheme, and to refer to the National Gas (WA) Rules.

Clause 32 Section 20 deleted

Deletes section 20 which contains transitional provisions for the Kalgoorlie to Kambalda pipeline. This section is no longer necessary as it is a historical transitional provision.

Clause 33 Section 20B amended

Amends a cross-reference in section 20B(4) by deleting section 21(1A) and replacing it with a reference to section 22(1)(c). This is necessary as the power to make transitional regulations will be found in section 22 after the commencement of Part 4.

Clause 34 Parts 6A and 7 replaced

- (i) Deletes Parts 6A ("Miscellaneous") and 7 ("Various Acts amended"), and inserts a new Part 7 – Regulations containing sections 21 and 22.
- (ii) Section 21 provides for a broad regulation-making power of the Governor to make regulations in relation to "all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to this Act".
- (iii) Section 22(1)(a) allows regulations to be made that amend Schedule 1, but only to the extent necessary or convenient for the purpose of enabling the effective operation of the National Gas Law as an applied law scheme in WA. The types of jurisdictional-specific modifications that are expected to be made pursuant to the power in section 22(1)(a) are not expected to deal with matters of policy. The amendments will be to address the technical workability of the applied law scheme in Western Australia generally as a response to amendments to the National Gas Law by the lead legislator (South Australia).

There is a risk that such amendments to the National Gas Law – even in a minor way such as changing a cross-reference – may render the legislation as applied in Western Australia nonsensical or the scheme unworkable. These circumstances may require a quick remedy which means the legislative process may be an inappropriate mechanism by which to implement the necessary modifications. This regulation making power will also ensure that Parliament's time is not spent passing uncontroversial amendments to the Act to ensure the applied law scheme continues to operate in Western Australia.

However, further substantive Western Australia specific modifications to the National Gas Law will need to be made by way of an Act of the Western Australian Parliament amending Schedule 1 of the *National Gas Access (WA) Act 2009*. This ensures that policy changes to the National Gas (WA) Law require parliamentary approval before they can be made.

Regulations made under section 22 are defined as modification instruments and must be provided to the Australian Energy Market Commission (**AEMC**) by the Minister as soon as practicable after the modification instrument is made.

Clause 35 Schedule 1 heading replaced

Deletes the heading to Schedule 1 ("Schedule 1 – Some modifications to National Gas Law as in Schedule to South Australian Act") and replaces it with

"Schedule 1 – Modifications to National Gas Law".

Clause 36 Schedule 1 clauses 1 and 2 replaced

Deletes Schedule 1 clauses 1 and 2 and inserts a new clause 1, which states that the purpose of the Schedule is to set out modifications to the National Gas Access (Western Australia) Law.

Clause 37 Schedule 1 clause 3 amended

- (i) Deletes Schedule 1 clause 3(1) to (3) to remove modifications relating to the "dispute resolution body", "Regulations", "regulator" and "WA arbitrator". These existing modifications are no longer required given the transfer of functions from the ERA to the AER and the implementation of the applied law scheme.
- (ii) Reinstates the existing definition of "old access law" which refers to provisions in force before the commencement of section 30 of the *National Gas Access (WA) Act 2009*. It also defines "Regulations" as the regulations made under Part 3 of the *National Gas (South Australia) Act*, as they have effect as a law of Western Australia as a consequence of section 8 of the National Gas (Western Australia) Law.
- (iii) Modifies the definition of designated pipeline to ensure that pipelines designated under regulations made under the Act (for example in regulations) are captured within the definition.
- (iv) Section 2(4) is inserted to provide that references in the definition of "initial National Gas Rules, National Gas Rules or Rules" to Rules made under this Law includes a reference to Rules made before 1 July 2018 under the applied law scheme.

Clause 38 Schedule 1 clauses 4 to 7 replaced

Deletes Schedule 1 clauses 4 to 7 and replaces them with new clause 4 to 7F:

- (i) Schedule 1 clause 4 deletes the modification to the meaning of AER as it refers to the ERA. This is replaced with a new Schedule 1 clause 4 that amends section 3 that removes the references to civil penalty provisions that do not apply in WA.
- (ii) Schedule 1 clause 5 inserted the provision postponing the operation of the Natural Gas Services Bulletin Board provisions. This is now deleted and replaced with a new modification that removes the references to conduct provisions that do not apply in WA. WA operates a Natural Gas Bulletin Board pursuant to the Gas Services Information Act 2012 so if the Natural Gas Services Bulletin Board was adopted in WA there would be a need for Parliament to pass an amending Act (defeating the intent of the provisions to postpone the operation of this section of the Law).
- (iii) Schedule 1 clause 6 refers to the ERA. This modification is no longer required given the transfer of functions from the ERA to the AER and is removed and replaced with a modification that removes the references to the National Energy Retail Law and National Energy Retail Rules as they do not apply in WA.
- (iv) Schedule 1 clause 7 refers to the ERA. This modification is deleted as it is no longer required given the transfer of functions from the ERA to the AER. The new Schedule 1 clause 7 inserts a new section 24A

("Reference tariff for small use customers etc"). This is an existing provision in the *National Gas Access (WA) (Local Provisions) Regulations 2009* which provides that the regulator must not approve an access arrangement if the reference tariffs for small use customers differ across geographic locations. The *National Gas Access (WA) (Local Provisions) Regulations 2009* will be repealed with effect from 1 July 2018.

- (v) New clauses 7A to 7C in Schedule 1 contain consequential amendments to reflect the implementation of the applied law scheme.
- (vi) New clause 7D in Schedule 1 which modifies section 84 to include a requirement on the AEMC to modify the National Gas Rules to reflect modifications provided for by a modification instrument. The new clause also includes definitions of modification, modification instrument and notified.
- (vii) New clauses 7E and 7F in Schedule 1 provides that Chapter 2 Part 6 and Part 7 of the National Gas Law do not apply in Western Australia.

Clause 39 Schedule 1 clause 8 amended

Amends the Bill insertion as a result of clause 16, to change the reference to the National Gas Access (WA) Act to the National Gas (Western Australia) Act from 1 July 2018.

Clause 40 Schedule 1 clauses 10 to 13 replaced

Clause 40 deletes the modifications in Schedule 1 clauses 10 to 13 as they are no longer required given the implementation of the applied law scheme.

Schedule 1 clause 10 is replaced with an amendment that specifies that Chapter 7 of the National Gas Law dealing with the Natural Gas Services Bulletin Board does not apply in Western Australia.

The new clause 11 in Schedule 1 modifies section 270A to reflect the references to the relevant WA legislation for dispute resolution.

The new clause 12 in Schedule 1 modifies section 290 to remove a reference to the ERA that is no longer required given the transfer of functions to the AER.

Clause 41 Schedule 1 clauses 15 to 17 deleted

Deletes Schedule 1 clauses 15 to 17 as they are no longer required given the implementation of the applied law scheme and the transfer of functions from the ERA to the AER.