

**TRADE PRACTICES ACT 1974, SECTION 44N**

**WESTERN AUSTRALIAN ACCESS REGIME FOR ELECTRICITY NETWORK SERVICES**

**DECISION ON EFFECTIVENESS OF ACCESS REGIME**

**REASONS FOR DECISION**

**Introduction**

*The certification of state access regimes*

1. Under Part IIIA of the *Trade Practices Act 1974* (TPA), if a State or Territory that is a party to the Competition Principles Agreement (CPA) has established at any time a regime for access to a service, the responsible Minister for the State or Territory may make a written application to the National Competition Council (NCC) asking the NCC to recommend that the Commonwealth Minister decide that the regime for access to the service is an effective access regime (section 44M (1) and (2) of the TPA).
2. The NCC must recommend to the Commonwealth Minister that he or she decide that the access regime is either an effective access regime for the service, or not an effective access regime for the service.
3. Section 44N of the TPA provides:

**Ministerial decision on effectiveness of access regime**

- (1) On receiving a recommendation, the Commonwealth Minister must:
    - (a) decide that the access regime is an effective access regime for the service or proposed service; or
    - (b) decide that the access regime is not an effective access regime for the service or proposed service.
  - (2) In making a decision, the Commonwealth Minister:
    - (a) must apply the relevant principles set out in the Competition Principles Agreement; and
    - (b) must, subject to section 44DA, not consider any other matters.
  - (3) The decision must specify the period for which it is in force.
  - (4) The Commonwealth Minister must publish his or her decision. At the same time, the Commonwealth Minister must give his or her reasons for the decision, and a copy of the Council's recommendation, to the responsible Minister for the State or Territory who applied for the recommendation.
4. The Western Australian Government (Western Australia) has sought certification of its third party access regime (the Western Australian regime) as it applies to services

provided by electricity networks that are ‘covered’ under the *Electricity Networks Access Code 2004*, under Part 8 of the *Electricity Industry Act 2004 (WA)*.

5. This document sets out the reasons for my decision that the Western Australian regime is an effective access regime.

### ***History of the application***

6. In July 2005, Western Australia asked the NCC pursuant to section 44M of the TPA to recommend to the Commonwealth Minister that he or she decide that the Western Australian access regime for electricity networks services in Western Australia is an effective access regime.
7. In August 2005, the NCC released a draft recommendation. No submissions were received in response.
8. In October 2005, the NCC forwarded its final recommendation to the Commonwealth Minister pursuant to the terms of section 44M of the TPA. The NCC recommended that the Western Australian regime be certified as effective for a period of 15 years.

### ***Overview of the Western Australian Regime***

9. The Western Australian regime establishes a regulatory framework allowing third parties to negotiate access to electricity network services located in Western Australia and covered by the regime.
10. The Western Australian regime is established under the Part 8 of the *Electricity Industry Act 2004 (WA)*, which received Royal Assent on 23 April 2004. The *Electricity Networks Access Code 2004* (*‘the Western Australian Electricity Network Access Code’*) was gazetted on 30 November 2004. This legal framework sets out the rights and obligations of parties involved in the Western Australian regime.
11. In particular, the regime provides a framework for the Western Australian Minister to decide which networks are covered by the regime and for the relevant regulator, the Economic Regulation Authority, to approve terms and conditions under which the owner of a covered network will allow third parties to use that network’s services. This framework also provides for a dispute resolution process.
12. Western Australia submits that its access regime is part of its broader electricity reform program aiming, amongst other things, to introduce competition to the electricity industry in Western Australia and enhance investment in infrastructure. In particular, Western Australia submits that the new regulatory framework provides for independent oversight of access arrangements and network charges.
13. As mentioned above, a central feature of the Western Australian Electricity Network Access Code is a requirement that the owner/operator of a covered network submit an

access arrangement to the relevant regulator for approval. That arrangement must include ‘reference tariffs’ for reference services. Third parties are entitled to access those reference services on the terms and conditions set out in the (approved) access arrangement. However, parties are free to negotiate access terms and conditions (except in relation to certain specified matters such as queuing policy). Any dispute about access can be notified to the relevant regulator to be resolved by arbitration, with the arbitrator being bound to apply the provisions of the relevant access arrangement (including its reference tariffs).

14. Under the Western Australian Electricity Network Access Code, an access arrangement must first be approved by the relevant regulator before it can come into effect. That Code sets out principles that reference tariffs should be designed around.
15. The NCC considers that the broad framework of the Western Australian Electricity Network Access Code largely mirrors *The National Third Party Access Code for Natural Gas Pipeline Systems* (the National Gas Code).<sup>1</sup> In 1997, the NCC undertook a review of the National Gas Access regime, including Gas Pipelines Access Law and the National Gas Code, and considered that the broad framework of that regime was consistent with the relevant principles of the CPA. Subsequently, the NCC has considered the gas pipeline access regimes of several States and Territories. Where the State or Territory regime was substantially consistent with the terms of the National Gas Access regime the NCC had considered in 1997, the NCC recommended to the Commonwealth Minister in each of those cases that the Minister decide that the regime was an effective access regime, and in each case, the Commonwealth Minister did so.<sup>2</sup>

### **The principles I must apply in making my decision**

16. Section 44N(2) provides that in making my decision, I must apply the relevant principles set out in the CPA; and must, subject to section 44DA, not consider any other matters. Section 44DA provides that when applying the relevant principles, I must treat each individual principle as having the status of a guideline rather than a binding rule.

### **Consideration of the Western Australian regime against the relevant CPA principles**

#### ***Clause 6(3)***

17. Clause 6(3) of the CPA provides:

For a State or Territory access regime to conform to the principles set out in this clause, it should:

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<sup>1</sup> *Final Recommendation on the Western Australian Access Regime for Electricity Networks*, NCC, (October 2005), page 25.

<sup>2</sup> The Commonwealth Minister has certified as effective the gas access regimes of South Australia (December 1998), Western Australia (May 2000), the Australian Capital Territory (September 2000), New South Wales and Victoria (March 2001), and the Northern Territory (October 2001).

- (a) apply to services provided by means of significant infrastructure facilities where:
    - (i) it would not be economically feasible to duplicate the facility;
    - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
    - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.
18. The NCC considers that the Western Australian regime applies to services provided by means of significant electricity networks that are ‘covered’ under the regime. The regime applies to the portions of Western Australia’s ‘South West Interconnected System’<sup>3</sup> and may apply to other electricity network infrastructure facilities in Western Australia that meet the coverage criteria.
19. Based on the recommendation of the NCC, it seems to me that the services that are covered by the Western Australian regime satisfy the requirements of clause 6(3)(a).
20. I accept that it would generally be uneconomic to duplicate the services of facilities under the regime, given there are economies of scope and scale to be gained from developing, operating and using such a comprehensive and integrated network (clause 6(3)(a)(i)). I consider that access to the network services covered under the Western Australian regime may stimulate competition at the electricity production and retailing levels (clause 6(3)(a)(ii)). Further, I understand that a system is in place under the Western Australian regime to deal with potential safety considerations related to interconnection and I am not aware of any safety issues arising under clause 6(3)(a)(iii) with regard to the Western Australian regime.
21. The NCC notes that the Western Australian Electricity Networks Access Code contains a coverage and revocation mechanism and sets out coverage criteria that the NCC regards as closely reflecting the clause 6(3)(a) principle of the CPA. The NCC notes that the Code includes an exclusion provision so that coverage need not be invoked where there is evidence of effective competition and the network is operating in a manner consistent with the code objective. The NCC considers that this conforms with the principle of clause 6(3)(ii), which seeks to apply access regulation to a service only where it is necessary to permit effective competition in a downstream or upstream market.
22. Given these features in the regime, I agree with the NCC’s analysis that the Western Australian regime is consistent with clause 6(3)(a).

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<sup>3</sup> Western Australia notes that the South West Interconnected System is the largest interconnected network in Western Australia and is largely owned by Western Power Corporation: Western Australian Government’s *Application to the NCC for a Recommendation on the Effectiveness of the Western Australian Third Party Access Regime for Electricity Networks* (June 2005), page 6.

***Clauses 6(4) (a) - (c)***

23. Clauses 6(4) (a) - (c) of the CPA provide:
- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
  - (b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.
  - (c) Any right to negotiate access should provide for an enforcement process.
24. In my view, clauses 6(4)(a)-(c) are considered together because jointly they establish a framework for negotiations to proceed in an effective access regime.
25. The principle set out in clause 6(4)(a) makes clear that, ‘wherever possible’, third party access to a service should be based on terms and conditions agreed between the owner of the facility and the person seeking access. In my view, this principle applies to terms and conditions relating to price as well as other terms and conditions.
26. Western Australia has submitted that its regime is intended to apply in circumstances where commercial negotiations between third party access seekers and the owners/operators of the covered networks are not successful.<sup>4</sup> It submits that a key principle of the regime is freedom to contract and parties are not precluded from negotiating commercial arrangements that suit their particular needs and circumstances.<sup>5</sup> Western Australia submits that this is supported by a regulatory framework that aims to provide incentives conducive to effective negotiations, including mechanisms to address information and market power asymmetry, safeguards for commercially sensitive information and procedures to enforce the right to negotiate provided by coverage.

***The NCC’s approach***

27. The NCC considers that clauses 6(4)(a)-(c) are appropriately taken together because they jointly establish a framework for negotiations to proceed in an effective access regime. Clause 6(4)(a) aims to ensure that, ‘wherever possible’, third party access to a service should be based on terms and conditions agreed between the owner of the facility and the access seeker. In the NCC’s view, where the owner of the facility and the access seeker cannot agree to terms and conditions of access, clauses 6(4)(b) and (c) recognise the need for underpinning regulatory measures where a service provider has considerable market power. In this sense, the NCC considers that clauses 6(4)(a)-(c) require an appropriate balance between commercial negotiation and regulatory intervention to facilitate credible negotiations.

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<sup>4</sup> Western Australian Government’s *Application to the NCC for a Recommendation on the Effectiveness of the Western Australian Third Party Access Regime for Electricity Networks* (June 2005), page 34.

<sup>5</sup> *Ibid*, page 33.

28. Consistent with the NCC's comments in its initial analysis of the National Gas Access Regime<sup>6</sup>, the NCC, in its assessment of Western Australia's electricity network access regime considers that independent regulatory guidance to third parties may be needed to provide an environment conducive to effective negotiations for the purposes of satisfying clauses 6(4)(a)-(c). In the NCC's view:

In the absence of such measures, an access regime may establish a right to negotiate in theory, but may put third parties in a position of negotiating blindly with a monopoly provider of or being offered potentially inappropriate prices ... on a "take it or leave it" basis. The latter may amount to a constructive denial of access, and cannot be viewed as satisfying clauses 6(4)(a)-(c). ....

The clause 6 principles recognise the need for an independent arbitration mechanism (clauses 6(4)(g)-(h)) to complement the negotiation/regulatory framework. In considering clauses 6(4)(a)-(c), the Council is conscious that the dispute resolution framework will affect the environment for negotiation. In particular, parties are more likely to engage in genuine negotiations if a robust arbitration mechanism is available to settle disputes.<sup>7</sup>

29. However, the NCC first considers whether an access regime provides appropriate guidance to market participants so as to be consistent with the relevant CPA principles.

In considering whether an access regime provides appropriate guidance to market participants, the Council focuses, in the first instance, on whether the regulatory processes are sufficiently robust to make that guidance credible. In particular, market guidance should be independent, developed through open and transparent processes that allow stakeholders to participate, and provide stakeholders with reliable information to inform their views. ....

While the clause 6 principles do not specify particular outcomes, they provide that outcomes should strike a balance between a range of factors, which taken as a whole, point to the pursuit of efficient outcomes through the regulatory process.<sup>8</sup>

30. In substance, the NCC has taken the view that it is acceptable to depart from the principle of a preference for commercial negotiation on access terms and conditions, but only where the regime which is put in place to replace that preferable state of affairs is of a sufficiently high standard of independence, and is sufficiently transparent and robust, to justify that departure. I agree with this approach of the NCC in the context of assessing a state access regime's consistency with clauses 6(4)(a)-(c) of the CPA. I also agree that where regulatory processes result in access arrangements that are binding on arbitration processes, such regulatory processes should take into account factors consistent with those set out in clause 6(4)(i) of the CPA.

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<sup>6</sup> *National Gas Access Regime - Assessment Against the Competition Principles*, NCC, September 1997, at page 17.

<sup>7</sup> *Western Australia's Access Regime for Electricity Networks, Final Recommendation*, October 2005, NCC, pages 19-20.

<sup>8</sup> *Western Australia's Access Regime for Electricity Networks, Final Recommendation*, October 2005, NCC, page 19.

### ***The Western Australian Regime***

31. I note that the NCC considers that the broad framework of the Western Australian Electricity Network Access Code largely mirrors *The National Third Party Access Code for Natural Gas Pipeline Systems* (the National Gas Code). I further note that, consistent with the comments made by the NCC in its initial analysis of the National Gas Access Regime, the NCC has previously recommended, and Commonwealth ministers have previously decided, that the broad framework of the National Gas Code is consistent with clauses 6(4)(a)-(c). The NCC considers that this model of enforceable access arrangements approved by an independent regulator provides an appropriate platform for third parties to enter commercial negotiations, with binding dispute resolution available to settle disputes.
32. I note that the Western Australian regime explicitly recognises the general principle of freedom to contract. This means access seekers and network service providers are free to negotiate on access terms and conditions, including price. I note that the regime also provides credible price guidance for third parties to enter commercial negotiations in the form of enforceable access arrangements, which including reference tariffs, set through independent and transparent regulatory processes. The regime also provides for arbitration and that the arbitrator is bound by the approved access arrangement, including the reference tariffs. I note that the relevant regulator, the Economic Regulation Authority, is an independent statutory body and that appeals are available to the Supreme Court of Western Australia.
33. I note that under the Western Australian regime, an access arrangement submitted to the regulator for approval must be accompanied by an access arrangement information package. The NCC considers that this should enable users and prospective users to understand the derivation of the elements of the proposed access arrangement and must include the categories of information identified in the Western Australian Electricity Networks Access Code. The regulator must also assess whether the access arrangement meets a range of matters which the NCC regards as embodying the clause 6(4)(i) factors.<sup>9</sup> The arbitrator must also have regard to this range of matters.
34. Consistent with the NCC's view that the broad framework of the Western Australian Electricity Network Access Code is consistent with clauses 6(4)(a)-(c), I agree with the NCC's analysis that the Western Australian regime is consistent with clauses 6(4)(a)-(c) of the CPA.

#### ***Clause 6(4)(d)***

35. Clause 6(4)(d) of the CPA provides:

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<sup>9</sup> *Western Australia's Access Regime for Electricity Networks, Final Recommendation, October 2005*, NCC, page 35.

Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

36. I agree with the NCC that the intent of this principle (clause 6(4)(d)) is to provide for a periodic review of the need for access regulation to apply to a particular service, without disturbing existing contractual rights.
37. The NCC considers that the Western Australian regime has similar coverage and revocation provisions to the National Gas Code, which the NCC and Commonwealth ministers have considered to be consistent with the relevant CPA principles. Under the Western Australian Electricity Networks Access Code, coverage provides third parties with an enforceable right to negotiate access to the services of the covered network. Any person can apply to the Western Australian Minister for Energy for coverage of a particular network to be revoked. That Minister is then required to undertake an open and transparent public process and make a decision about whether coverage should be revoked. The Minister's decision must be based strictly on the coverage provisions in the Code. The NCC notes that a decision to revoke coverage means that there would no longer be an enforceable right to negotiate access to the services of the network concerned under the Western Australian regime. However, the NCC notes that it would not disturb any existing contractual (or other) rights or obligations.
38. In addition to the provisions for reviewing and possibly revoking coverage, the Western Australian Electricity Networks Access Code requires periodic review of access arrangements.
39. Given these provisions within the Western Australian regime, I agree with the NCC that the regime is consistent with clause 6(4)(d).

***Clause 6(4)(e)***

40. Clause 6(4)(e) of the CPA provides:
- The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.
41. Clause 6(4)(e) aims to ensure that an access regime requires the use of 'all reasonable endeavours' on the part of facility owners to accommodate the needs of access seekers.
42. I agree with the NCC's view that where a regime provides that regulator-approved tariffs cannot be reassessed in arbitration, it is essential that information disclosure be sufficient to facilitate market assessments and fair and reasonable regulatory outcomes. In particular under those circumstances, I consider that a high standard of transparency in relation to the methodology for setting those tariffs should be adopted in order to address market power and information asymmetry issues in the context of negotiations and satisfy clause 6(4)(e).



43. I note that the Western Australian regime explicitly requires a service provider to use reasonable endeavours to provide access to covered services. In particular, the Western Australian Electricity Networks Access Code provides that a service provider for a covered network must use ‘all reasonable endeavours’ to accommodate an applicant’s requirement to obtain covered services and requirements in connection with the negotiation of an access contract. The regime also requires the service provider to deal with the access applications expeditiously.
44. I note that the Western Australian Electricity Networks Access Code explicitly supports the principle of reasonable endeavours, requiring that the access arrangement information for a network include sufficient information to enable prospective users and the regulator to understand the derivation of the elements in the access arrangement, including the reference tariffs. The regulator must ensure that the access arrangement information meets the requirements of the Code. The service provider must establish and maintain an information package on the covered network, including on the network’s spare capacity of the network and make it available to access seekers. I further note that the Electricity Industry Act prohibits conduct that prevents or hinders access and the NCC notes that this is intended to constrain any attempt by a network service provider to refuse to accept an application for access.
45. Given these features in the regime, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(e).

***Clause 6(4)(f)***

46. Clause 6(4)(f) of the CPA provides:
- Access to a service for persons seeking access need not be on exactly the same terms and conditions.
47. The NCC notes that the Western Australian Electricity Networks Access Code recognises the freedom of parties to negotiate access terms and conditions and that this is supported by the Code’s reasonable endeavours requirements (as discussed above). The Western Australian regime requires service providers of covered pipelines to submit to the regulator for approval, access arrangements which include terms and conditions on which a service provider will supply each reference service. Parties may, however, negotiate terms and conditions outside those specified in the access arrangement.
48. Given these considerations, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(f).

***Clause 6(4)(g)***

49. Clause 6(4)(g) of the CPA provides:
- Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

50. This clause requires that an effective access regime contain a mechanism to ensure that the parties to an access dispute have recourse to an independent dispute resolution process and that the disputing parties fund the arbitration.
51. The NCC considers that the Western Australian regime provides for an independent dispute resolution process (or parties can agree on an alternative process) and that the arbitrator has discretion on the allocation of costs. The arbitrator must take into account a range of matters which the NCC regards as consistent with the range of factors in clause 6(4)(i) and that the arbitrator's decision is subject to judicial review. However, the NCC also notes the arbitrator is constrained in its ability to resolve a dispute, as the arbitrator must apply the provisions of an approved access arrangement and therefore is not permitted to make an independent ruling on tariffs for reference services. I consider that binding the arbitrator to predetermined tariffs makes it essential that those tariffs have been rigorously determined through sufficiently robust regulatory processes.
52. As mentioned earlier, I agree with the NCC that the Western Australian regime provides for an independent regulatory process to approve reference tariffs through open and transparent processes, taking account of a list of matters that are consistent with clause 6(4)(i) considerations. The NCC has concluded that although these tariffs could not be altered in arbitration, this is not unreasonable in the context of the regulatory design of the Western Australian regime as a whole, and I agree with that conclusion.
53. Given these considerations, I consider that the Western Australian regime does not unreasonably constrain independent dispute resolution from examining the predetermined tariffs for electricity network services covered by the regime, and as such, I consider that the regime is consistent with clause 6(4)(g).

***Clause 6(4)(h)***

54. Clause 6(4)(h) of the CPA provides:
- The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.
55. The NCC considers that this principle requires that an effective access regime contain a credible dispute resolution mechanism, whereby the arbitrator's decision is binding and existing legislative rights of appeal are preserved.
56. The NCC notes that the Western Australian regime provides that the arbitrator's decision is binding unless the access seeker elects not to enter into an access contract as specified by the award of the arbitrator. In addition, the NCC notes that the Electricity Industry Act provides for regulations for the enforcement of obligations created by the access regime. Further the NCC notes that the arbitrator's decisions are subject to appeal on a question of law before the Supreme Court of Western Australia.
57. Given these provisions within the regime, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(h).

**Clause 6(4)(i)**

58. Clause 6(4)(i) of the CPA provides:

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

- (i) the owner's legitimate business interests and investment in the facility;
- (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
- (iv) the interests of all persons holding contracts for use of the facility;
- (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
- (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (vii) the economically efficient operation of the facility; and
- (viii) the benefit to the public from having competitive markets.

59. The NCC notes that the Western Australian regime requires that the arbitrator, in making a decision, have regard to the Western Australian Electricity Networks Access Code's objective and a range of other factors set out in the Code. I agree with the NCC that these matters are broadly consistent with clause 6(4)(i) considerations.

60. The NCC also notes that the Western Australian regime requires the arbitrator to take into account other factors, such as the geographical location of the network and the extent to which it is interconnected with other networks. I agree with the NCC that these other factors are not inconsistent with the relevant clause 6 principles of the CPA.

61. Under the Western Australian regime, the arbitrator is bound to apply the access arrangement, including reference tariffs, previously approved by the regulator. I consider that a restriction such as this needs to be considered in the context of the overall design of an access regime. As mentioned earlier, I consider that this constraint would be acceptable provided that an independent regulator has approved the access arrangement through sufficiently robust regulatory processes against clause 6(4)(i) factors.

62. As mentioned earlier, I agree with the NCC that the Western Australian regime provides for an independent regulatory process to approve an access arrangement, including reference tariffs, through open and transparent processes, taking account of a list of matters that are consistent with clause 6(4)(i) considerations. The NCC has concluded that although the provisions in the access arrangement could not be altered in arbitration, this is not unreasonable in the context of the regulatory design of the Western Australian regime as a whole, and I agree with that conclusion.

63. These requirements in the Western Australian regime suggest that clause 6(4)(i) matters are already reflected in the reference tariffs that bind the arbitrator, and as such, will also be reflected in the arbitrator's decision.
64. Given these considerations, I consider that the Western Australian regime does not unreasonably constrain independent dispute resolution such that the regime is consistent with clause 6(4)(i).

***Clause 6(4)(j)***

65. Clause 6(4)(j) of the CPA provides:

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

- (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
- (ii) the owner's legitimate business interests in the facility being protected; and
- (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

66. The NCC notes that the Western Australian regime requires a network owner to extend, or to permit extension (including via interconnection) of a covered network facility (and fund this) where this is necessary to facilitate access and is technically and economically feasible and consistent with the safe and reliable operation of the network. The NCC considers that the Western Australian Electricity Networks Access Code provides a means of ensuring appropriate infrastructure investment goes ahead where the network owner is expected to at least recover the costs of its investment in the network expansion or where the access seeker agrees to make an appropriate capital contribution for a required augmentation to the network.
67. Given these provisions within the regime, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(j).

***Clause 6(4)(k)***

68. Clause 6(4)(k) of the CPA provides:

If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

69. The NCC notes that the Western Australian regime specifically applies the principle contained in clause 6(4)(k) by allowing a service provider to determine in advance what constitutes a material change in circumstances or a trigger event for inclusion in an access arrangement. The NCC notes that when the conditions of a trigger event are met, the

service provider must notify the relevant regulator (the Economic Regulation Authority) and submit proposed revisions to the access arrangements to the regulator for approval.

70. The NCC also notes that under the Western Australian regime, parties may agree in advance on the circumstances under which an access contract or access arrangement may be reopened or revised. I note that the Western Australian regime does not preclude the application of common law principles (such as the doctrine of frustration) to matters of this nature once contracts have been entered into.
71. Given these considerations, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(k).

***Clause 6(4)(l)***

72. Clause 6(4)(l) provides:

The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

73. The NCC notes that the Western Australian regime places restrictions on access awards. The NCC notes that under the Western Australian Electricity Networks Access Code, the arbitrator cannot make an award that would impede the right of a user under an access contract unless the user agrees or the arbitrator is satisfied that the user is or will be appropriately compensated for the impeded right.
74. The NCC also notes that in addition, the Western Australian Electricity Networks Access Code provides that the regulator must not approve a proposed access arrangement that would have the effect of depriving a person of a contractual right that existed prior to the proposed access arrangement, but that this does not apply to an ‘exclusivity right’<sup>10</sup> that arose on or after 30 March 1995.
75. Given these provisions in the regime, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(l).

***Clause 6(4)(m)***

76. Clause 6(4)(m) provides:

The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

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<sup>10</sup> The NCC notes that exclusivity rights are contractual rights held by a third party that prevent or limit the ability of the owner/operator from offering spare capacity to other third parties and considers that such rights are fundamentally at odds with the rationale of Part IIIA of the TPA. NCC’s *Western Australia’s Access Regime for Electricity Networks, Final Recommendation, October 2005*, page 40.

77. I note that the Western Australian regime expressly prohibits conduct aimed at hindering or preventing access to a service by another person (section 115 of the Electricity Industry Act) with provision for pecuniary penalties for breaches of conduct rules.
78. Given these provisions in the Queensland regime, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(m).

**Clause 6(4)(n)**

79. Clause 6(4)(n) provides:

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

80. The NCC notes that the Western Australian regime contains ‘ring-fencing’ requirements, set out in the Western Australian Electricity Networks Access Code. Ring-fencing currently applies to Western Power Corporation (the dominant vertically integrated electricity business in Western Australia)<sup>11</sup> and could apply to any other integrated service providers that become subject to that Code. The NCC notes that the Code includes requirements in relation to ring-fenced businesses concerning separate accounting arrangements, special treatment of commercially sensitive information and arms length business dealings.
81. In addition, the NCC notes that under the Western Australian regime, the regulator may draft and approve ring-fencing rules for covered networks for the purpose of ensuring that the ring-fencing objectives are achieved. Alternatively under the regime, the regulator may grant exemptions from, variations of, or revocations of ring-fencing requirements. These regulatory processes must include public consultation.
82. The NCC also notes that the Western Australian regime provides for competitive neutrality to prevent biased treatment of affiliated and non-affiliated businesses.
83. Given these provisions, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(n).

**Clause 6(4)(o)**

84. Clause 6(4)(o) of the CPA provides:

The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

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<sup>11</sup> Western Australia notes that Western Power Corporation is “the major generator, transmitter, distributor and retailer of electricity in Western Australia”: Western Australian Government’s *Application to the NCC for a Recommendation on the Effectiveness of the Western Australian Third Party Access Regime for Electricity Networks* (June 2005), page 11.

85. The NCC notes that the Western Australian Electricity Networks Access Code provides the arbitrator (the Western Australian Gas Disputes Arbitrator) with broad information-gathering powers about any matter relevant to an access dispute concerning a covered network service. Such information may include financial statements and any other accounting information pertaining to a covered service.
86. The NCC also notes that *Economic Regulation Authority Act 2003* confers powers on the regulator (the Economic Regulation Authority) to require any person to provide it with information or documents which the regulator reasonably believes will assist it in carrying out its functions.
87. The NCC notes that failure to comply with the requirements of the regime relating to these matters can attract a fine or imprisonment.
88. Given these provisions, I agree with the NCC that the Western Australian regime is consistent with clause 6(4)(o).

***Clause 6(4)(p)***

89. Clause 6(4)(p) of the CPA provides:

Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislation scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

90. In the context of considering clause 6(4)(p), it is also relevant to consider clause 6(2) of the CPA, which provides:

The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in the clause unless:

- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
- (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

91. The NCC considers that clauses 6(2) and 6(4)(p) concern matters relating to access to services provided by facilities extending beyond the boundary of the State or Territory seeking certification.
92. The NCC notes that Western Australia's existing electricity network currently does not exceed the State's boundaries. Western Australia has submitted that although feasibility studies (for example, for the purpose of interconnection with the National Electricity

Market) have not been carried out, it is considered unlikely that such interconnections would be technically or economically viable.<sup>12</sup> Western Australia has also submitted that given the isolated nature of the electricity networks in its State, the Western Australian regime, as it applies in Western Australia, would not have an influence upon networks beyond the borders of Western Australia.

93. The NCC considered these views and concluded that - as Western Australian electricity network has negligible influence, if any, beyond Western Australia's borders - there is no basis for determining that the Western Australian access regime is ineffective under clause 6(2) and the regime does not need to satisfy clause 6(4)(p).
94. Given these considerations, I consider that the Western Australian regime is currently not inconsistent with clause 6(4)(p).

**Period for which this decision is in force**

95. According to section 44N(3) of the TPA, my decision must specify the period for which it is in force. Consistent with the NCC's recommendation on this matter, I have decided that my decision should remain in force for a period of 15 years.
96. I consider that the duration of my decision appropriately provides infrastructure owners/operators and users with a degree of certainty in the regulatory environment, especially when developing new infrastructure. I note that the coverage and revocation provisions of the regime will provide the opportunity for review of the regime's application to specific facilities within the certification period.

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<sup>12</sup> Western Australian Government's *Application to the NCC for a Recommendation on the Effectiveness of the Western Australian Third Party Access Regime for Electricity Networks* (June 2005), page 65.



## ATTACHMENT

**Abbreviations used in this statement of reasons**

CPA	Competition Principles Agreement
NCC	National Competition Council
TPA	<i>Trade Practices Act 1974 (Cth)</i>
Western Australia	Government of Western Australia
The Western Australian regime	The Western Australian Third Party Access Regime for Electricity Networks, established under the Part 8 of the <i>Electricity Industry Act 2004 (WA)</i> and includes the <i>Electricity Networks Access Code 2004</i>
The Western Australian Minister	The Western Australian Minister for Energy
The Western Australian Electricity Network Access Code	The <i>Electricity Networks Access Code 2004</i> , established under the Part 8 of the <i>Electricity Industry Act 2004 (WA)</i>
Electricity Industry Act	<i>Electricity Industry Act 2004 (WA)</i>
National Gas Code	The National Third Party Access Code for Natural Gas Pipeline Systems which is Schedule 2 to the <i>Gas Pipelines Access (South Australia) Act 1997 (SA)</i> and applies as a law in all States and Territories under their respective application laws.
Western Power Corporation	Western Power Corporation, established on 1 January 1995 under the <i>Electricity Corporation Act 1994 (WA)</i> .