

Agreement – Conferral of  
functions on the  
Australian Energy  
Regulator under the  
*Electricity Infrastructure  
Investment Act 2020*  
(NSW)

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The Commonwealth of Australia

The State of New South Wales

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## Agreement

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Date ►

Between the parties

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Commonwealth      **The Commonwealth of Australia**

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NSW                      **The State of New South Wales**

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### Recitals

1. The AER is established by section 44AE of the CC Act.
2. The NSW Minister has decided to appoint the AER to the position of Regulator under the EII Act.
3. The Commonwealth supports the AER being appointed as Regulator under the EII Act.
4. This agreement sets out the conferral of functions, duties and powers on the AER in accordance with the CC Act.
5. The AER's functions under the EII Act will be undertaken on a cost-recovery basis.

## Definitions

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The meanings of the terms used in this agreement are set out below.

<b>Term</b>	<b>Meaning</b>
<b>AER</b>	the Australian Energy Regulator as established by section 44AE of the CCA
<b>Appointment Agreement</b>	the Appointment Agreement between the NSW Department of Planning, Industry and Environment, the AER and the ACCC outlining the terms and conditions of the AER's appointment to the position of Regulator under the EII Act.
<b>ACCC</b>	the Australian Competition and Consumer Commission as established by section 6A of the CC Act
<b>CC Act</b>	the <i>Competition and Consumer Act 2010</i> (Cth)
<b>CC Regulations</b>	the <i>Competition and Consumer Regulations 2010</i> (Cth)
<b>Commonwealth</b>	the Commonwealth of Australia
<b>Department</b>	The Department of Planning, Industry and Environment
<b>EII Act</b>	the <i>Electricity Infrastructure Investment Act 2020</i> (NSW)
<b>NSW Minister</b>	The Minister for Energy and Environment of New South Wales
<b>Regulator</b>	A person or body authorised under section 64 of the EII Act to exercise the functions, powers and duties of a regulator

## Conferral of functions, powers and duties

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For the purposes of section 44AI of the CC Act:

- (a) The parties agree to the conferral of the Regulator functions, powers and duties in the EII Act on the AER as outlined in Part A of the Schedule or otherwise conferred under this agreement.
- (b) For any regulations enacted or orders made or amended under the EII Act that directly relate to the AER's performance of the Regulator functions, powers and duties outlined in Part A of the Schedule, the parties agree to the conferral of those functions, provided that:
  - i. they are consistent with the functions outlined in Part A of the Schedule; and
  - ii. the Department has consulted with the AER regarding any functions, duties and powers that the Department considers directly relate to the AER's performance of the Regulator functions, and/or may give rise to validity issues concerning the application of the Commonwealth Constitution and/or the CC Act prior to the making of any such regulations or orders.
- (c) For any regulations enacted or orders made under the EII Act that purport to confer functions, powers and duties on the AER not covered by paragraphs (a) or (b) of this agreement, and specified in Part B of the Schedule, the parties acknowledge these regulations or orders will require agreement for the conferral of the functions, powers and duties on the AER. The process for such agreement is:
  - i. the NSW Minister must seek in writing the agreement of the relevant Commonwealth Minister, to confer the additional function, power or duty, and
  - ii. unless the Commonwealth Minister responds to the NSW Minister within two weeks regarding the proposed conferral, the Commonwealth Minister is taken to have agreed to the conferral.
- (d) Where Regulator functions, powers or duties are conferred under (c)(ii) of this agreement under a law that is not a 'State/Territory energy law' within the meaning of section 4(1) of the CC Act, the Commonwealth must take necessary steps to prescribe that law as a "State/Territory energy law" as soon as practicable.
- (e) This clause comes into effect once this agreement is executed, the EII Act and regulations and orders made under the EII Act are prescribed as a 'State/Territory energy law' within the meaning of section 4(1) of the CC Act, and the AER is appointed as Regulator under s.64 of the EII Act.

## Cost recovery

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The parties agree that the AER will carry out the functions, powers and duties conferred under this agreement on the basis that the AER (through its accountable authority) will recover its actual costs for undertaking the agreed functions and related obligations from the State of New South Wales.

## Schedule

### A. AER Functions under the EII Act

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#### Primary Functions

<b>Function</b>	<b>EII Act reference</b>
The functions of the regulator in relation to an access scheme, as specified in a declaration made by the Minister under s 24(1)	s 24
The functions of the regulator in respect of network infrastructure projects	Division 3, Part 5
The power of the regulator to authorise the consumer trustee not to conduct a competitive tender for LTES agreements	s 47(1)
The functions of the regulator in respect of the risk management framework	s 51
The functions of the regulator in respect of making annual contribution determinations	s 56
The functions of the regulator in respect of varying a contribution determination	s 57
The functions: (a) to issue guidelines in relation to the exercise of functions by the persons and bodies appointed under the EII Act, and (b) other functions prescribed by the regulations (that directly relate to the performance of functions, duties or powers conferred under Part A or those otherwise conferred under this agreement).	s 64(4)(a) and (b)
The regulator must prepare an annual report on the exercise of its functions under the EII Act.	s 70(2)
The functions of the regulator in respect of penalty notices	s 76

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### Consultation Functions

<b>Function</b>	<b>EII Act reference</b>
Consultation with the Minister in relation to directing a network operator to carry out a priority transmission infrastructure project.	s 34(1)
Consultation with the Minister in relation to network operator authorisations under s 36(2) of the EII Act.	s 36(3)
Consultation with the Consumer Trustee in relation to rules under s 47(5) of the EII Act with respect to competitive tenders for LTES agreements.	s 47(6)

### **B. Regulator functions in the EII Act not conferred on the AER, and requiring specific conferral as described in cl.2(c) in this agreement**

For the avoidance of doubt, the following Functions are not conferred on the AER.

<b>Function</b>	<b>EII Act reference</b>
Functions relating to the making of the NSW Renewable Energy Sector Board Plan	s 8
Audit performance functions	s.67
Annual reporting functions (other than the application of s 70(2) to the AER's preparation of an annual report on the exercise of its functions)	s.70
The functions: (b) other functions prescribed by the regulations (that have not been conferred under Part A or otherwise conferred under this agreement). (c) other functions conferred or imposed on the regulator by or under this or another Act or law (that have not been conferred under Part A or otherwise conferred under this agreement).	64(4)(b) and (c)

## Signing page

Executed as an agreement

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Signed sealed and delivered by )  
**The Minister for Energy and** )  
**Environment of New South Wales** )



Signature



Witness signature

The Honourable Matthew Kean MP, Minister  
for Energy and Environment



Name of witness

Signed sealed and delivered by the )  
**Treasurer of the Commonwealth of** )  
**Australia** )



Signature



Witness signature

The Honourable Josh Frydenberg MP,  
Treasurer



Name of witness