



**DLA Piper Australia**  
140 William Street  
Melbourne VIC 3000  
PO Box 4301  
Melbourne VIC 3000  
Australia  
**DX** 147 Melbourne  
**T** +61 3 9274 5000  
**F** +61 3 9274 5111  
**W** www.dlapiper.com

Mr Chris Bell  
Manager Regulatory Affairs  
ActewAGL Distribution

**Your reference**

**Our reference**

FCG/FCG/354593/4  
AUM/1206903687.1

11 July 2014

**By Email Only : [chris.bell@actewagl.com.au](mailto:chris.bell@actewagl.com.au)**

Dear Chris

## **NER COMPLIANCE OF REVISED SRP PROPOSAL FOR NOMINATION OF DEBT AVERAGING PERIODS**

Thank you for your request that DLA Piper Australia (**DLA Piper**) provide a legal opinion on whether ActewAGL Distribution's (**AAD's**) revised regulatory proposal for the subsequent regulatory control period (**SRP**) in respect of the nomination of debt averaging periods complies with the National Electricity Rules (**NER**).

On 17 June 2014, the AER notified AAD under clause 6.9.1(a) of the NER that it:

- considered AAD's Regulatory Proposal for the SRP dated 2 June 2014 (**Regulatory Proposal**) in respect of the nomination of debt averaging periods was not compliant with the NER, in particular the requirements of clauses 6.3.1(c)(3) and S6.1.3(9); and
- required resubmission of that Regulatory Proposal in an amended form that complies with those NER requirements,

**(the AER's Notice).**

Clause 6.9.2(a) requires AAD to resubmit its Regulatory Proposal in an amended form that complies with the NER requirements set out in the AER's Notice. With a view to discharging this NER obligation, AAD has prepared a revised version of Chapter 10 of its Regulatory Proposal in respect of the nomination of debt averaging periods.

Against this background, you have requested that DLA Piper provide you with a legal opinion on whether the revised version of Chapter 10 that you have instructed us AAD intends form part of the Regulatory Proposal resubmitted to the AER in accordance with clause 6.9.2(a) (**Revised Chapter 10**) complies with the NER in respect of the nomination of debt averaging periods.

DLA Piper has reviewed Revised Chapter 10 in respect of the nomination of debt averaging periods and confirms that it complies with the NER, including the requirements of clauses 6.3.1(c)(3) and S6.1.3(9) referred to in the AER's Notice. Our detailed reasoning and conclusions are set out in the Attachment to this letter.

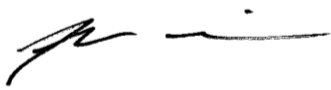
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In performing our review and reaching this conclusion, DLA Piper has had regard to the views expressed by the AER on the NER compliance of AAD's Regulatory Proposal in respect of the nomination of debt averaging periods in both the AER's Notice and its subsequent letter to the AAD dated 25 June 2014 providing further reasons.

If you have any questions or would like to discuss any aspect of this opinion further, please give us a call.

Kind regards



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**FLEUR GIBBONS**  
**Partner**  
**DLA PIPER AUSTRALIA**

Direct +61392745840

Fleur.Gibbons@dlapiper.com



**LEANNE HANNA**  
**Special Counsel**  
**DLA PIPER AUSTRALIA**

Direct +61392745809

Leanne.Hanna@dlapiper.com

## ATTACHMENT

### REQUEST FOR OPINION

1. You have requested that DLA Piper provide you with a legal opinion on whether Revised Chapter 10 complies with the NER in respect of the nomination of debt averaging periods.

### BACKGROUND

#### Relevant NER requirements

2. A distribution network service provider's (**DN**SP's) regulatory proposal must include a building block proposal for direct control services classified under the proposal as standard control services (clause 6.8.2(c)(2)). This building block proposal must, in turn, comply with the requirements of Schedule 6.1 of the NER (clause 6.3.1(c)(3)).
3. The provisions of Schedule 6.1 of the NER of relevance to a DN

*A building block proposal* must contain at least the following additional information and matters:

...

- (9) the *Distribution Network Service Provider's* calculation of the proposed return on equity, return on debt and *allowed rate of return*, for each *regulatory year* of the *regulatory control period*, in accordance with clause 6.5.2, including any departure from the methodologies set out in the *Rate of Return Guidelines* and the reasons for that departure;
  - (9A) if the *Distribution Network Service Provider* proposes that the return on debt for a *regulatory year* of the *regulatory control period* is not to be determined using the methodology referred to in clause 6.5.2(i)(2), the formula it proposes should be applied in accordance with clause 6.5.2(l).
4. Clause S6.1.3(9A) of the NER contains a manifest error, in that the word 'not' is erroneously included as a result of a simple drafting error.<sup>1</sup> As a consequence, clause S6.1.3(9A) should be read as though that word 'not' were omitted.<sup>2</sup>
  5. In addition, as the proposed rate of return is an input to the DN

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<sup>1</sup> This is evident from clause 6.5.2(l), which expressly states that it is only where the return on debt *is* to be estimated using a methodology of the type referred to in clause 6.5.2(i)(2) that the formula referred to therein is required.

<sup>2</sup> Consistent with judicial authority establishing that, if it is obvious that a simple mistake in the form of a printing or drafting error has been made in the text of legislation, the legislation will be read in its correct form: see Pearce and Geddes, *Statutory Interpretation in Australia*, Seventh Edition, pp50-51 at [2.28].

to require that a building block proposal contain details and an explanation of the DNSP's proposed rate of return, and a demonstration that that proposed rate of return complies with the relevant requirements of the National Electricity Law (**NEL**) and the NER.

6. The NER requirements of relevance to the rate of return are set out in clause 6.5.2. The requirements of particular relevance to the nomination of debt averaging periods are as follows:

- (i) The return on debt may be estimated using a methodology which results in either:
  - (1) the return on debt for each *regulatory year* in the *regulatory control period* being the same; or
  - (2) the return on debt (and consequently the *allowed rate of return*) being, or potentially being, different for different *regulatory years* in the *regulatory control period*.
- ...
- (l) If the return on debt is to be estimated using a methodology of the type referred to in paragraph (i)(2) then a resulting change to the *Distribution Network Service Provider's annual revenue requirement* must be effected through the automatic application of a formula that is specified in the distribution determination.

### **AER's Rate of Return Guideline**

7. In respect of debt averaging periods, the AER's Rate of Return Guideline dated December 2013 (**Rate of Return Guideline**) (at pp 21-22) states as follows:

For each regulatory year in the regulatory control period, the AER proposes to estimate the prevailing rate of return on debt as a simple average of the prevailing rates observed over a period of 10 or more consecutive business days up to a maximum of 12 months. Such an averaging period should satisfy the following conditions:

- it should be specified prior to the commencement of the regulatory control period
- at the time it is nominated, all dates in the averaging period must take place in the future
- it should be as close as practical to the commencement of each regulatory year in a regulatory control period
- an averaging period needs to be specified for each regulatory year within a regulatory control period
- the proposed averaging periods for different regulatory years are not required to be identical but should not overlap
- the nominal return on debt is to be updated annually using the agreed averaging period for the relevant regulatory year

- each agreed averaging period is to be confidential.

The averaging periods can be determined as follows:

- proposed by the service provider in the Framework and Approach process or in its initial regulatory proposal, and agreed by the AER; or
- if the AER does not agree to the averaging periods proposed by a service provider, the averaging period would be determined by the AER, and notified to the service provider within a reasonable time prior to the commencement of the regulatory control period.

### **The AER's Notice and Further Reasons**

8. The AER's Notice states that AAD's Regulatory Proposal in respect of the nomination of debt averaging periods does not comply with the NER because clauses 6.3.1(c)(3), 6.5.2(1), 6.8.2(c)(2) and S6.1.3(9) together operate to require that:

...ActewAGL should set out its calculation of the proposed return on debt for each regulatory year of the regulatory control period in a manner that will allow any resulting change to ActewAGL's annual revenue requirement to occur through the automatic application of a formula that is specified in the distribution determination. In the AER's views, this calculation should include the proposed averaging periods for the regulatory years 2016-17, 2017-18 and 2018-19.

Further, ActewAGL's proposed approach to nominating the averaging periods for 2016-17, 2017-18 and 2018-19 is a departure from the Guideline. In particular, the Guideline states that an averaging period should satisfy certain conditions including that:

- it should be specified prior to the commencement of the regulatory control period; and
- proposed by the service provider in the Framework and Approach process or in its initial regulatory proposal.

ActewAGL's proposal does not clearly identify its proposed approach as a departure from the Guideline, and it does not provide reasons for this departure...

The lack of detail in ActewAGL's proposal means that it is unclear whether or not ActewAGL is proposing a departure from any other conditions specified in the Guideline.

9. From the AER's Notice, DLA Piper understands the AER to maintain that AAD's Regulatory Proposal for the SRP does not comply with clauses 6.3.1(c)(3) and S6.1.3(9) of the NER because:

- 9.1 Whereas clauses 6.1.3(c)(3) and S6.1.3(9) of the NER require that AAD's calculation of the return on debt for each regulatory year of the regulatory control period in the Regulatory Proposal be 'in accordance with clause 6.5.2', AAD's failure to propose debt averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years in that calculation is contrary to clause 6.5.2(1); and

- 9.2 Whereas clauses 6.1.3(c)(3) and S6.1.3(9) require that the Regulatory Proposal include 'any departure from the methodologies set out in the *Rate of Return Guidelines* and the reasons for that departure', the Regulatory Proposal does not identify AAD's proposed approach to the nomination of debt averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years as a departure from the Rate of Return Guideline or provide reasons for this departure.
10. By letter to the AER dated 20 June 2014, AAD requested that the AER provide a statement of reasons as to why it considers clause 6.5.2(1) of the NER requires the specification of debt averaging periods for all regulatory years of a regulatory control period in the calculation of the return on debt included in a DNSP's regulatory proposal.
11. By letter dated 25 June 2014, the AER provided an explanation of the basis on which the AER maintains this view (**Further Reasons**). In the Further Reasons, the AER relevantly stated as follows:
1. As set out in the notice, clause S6.1.3(9) of the NER is relevant. It requires a building block proposal to contain (amongst other matters) AAD's calculation of the proposed return on debt for each year of the regulatory control period, in accordance with clause 6.5.2. This must include any departure from the methodologies set out in the Guideline and the reasons for that departure.
  2. Under clause 6.5.2(i)(2), the return on debt may be estimated using a methodology which results in the return on debt (and consequently the allowed rate of return) being, or potentially being, different for different regulatory years in the regulatory control period. The AER understands that AAD considers that it is proposing this type of methodology for estimating the return on debt.
  3. Under clause 6.5.2(1), if the return on debt is to be estimated using a methodology of the type referred to in paragraph (i)(2) then a resulting change to the Distribution Network Service Provider's annual revenue requirement must be effected through the automatic application of a formula that is specified in the distribution determination. Clause 6.5.2(1) applies to AAD's distribution determination.
  4. Accordingly, in order to effect a resulting change in AAD's annual revenue requirement, a formula must be specified in AAD's distribution determination that is capable of being automatically applied.
  5. In order for the formula to be automatically applied, all elements of the formula need to be specified in the distribution determination. This does not mean that all inputs, i.e. values, to the formula can or need to be specified. The elements can be specified by way of a methodology. However, there needs to be certainty regarding how the values for each element of the formula will be calculated in accordance with the methodology. If the methodology for each element of the formula does not provide sufficient certainty, clarity and specificity for subsequently identifying the value/s, then the formula itself cannot be specified and, ultimately, automatically applied.

6. The methodology for estimating the return on debt for each regulatory year of the regulatory control period is one element of the formula to be specified in the distribution determination.
7. In turn, the specification of the debt averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years forms part of the methodology for estimating the return on debt for each of those years. Without specification of these periods, the AER would not have sufficient information to specify the methodology for estimating the return on debt for each of those years. Accordingly, the AER would not have sufficient information to specify a formula capable of automatic application in the distribution determination.
8. AAD's current proposal would require more than automatic application of a formula in order to effect a resulting change in AAD's annual revenue requirement. It would require assessment and determination on part of the return on debt methodology on an annual basis prior to each relevant regulatory year in AAD's pricing proposal. That is, it would be dependent upon AAD nominating the averaging period for each of those years at a future point in time and providing reasons for the nomination. Assuming that AAD provided this information, it would then require the AER to assess and conduct a fresh analysis of AAD's proposed averaging period for each of those years, well after the distribution determination is made. This proposal cannot be said to be a methodology which can be part of a formula that is capable of automatic application.
9. In addition, in its proposal, AAD did not detail the process by which an averaging period will be nominated in its pricing proposal. In this regard, the proposal did not identify the NER clause/s under which the AER could perform functions or exercise powers to make an annual assessment and determination of an averaging period.
- ...
11. AAD's proposal states that '...while the forecast and actual allowed return on debt for one or more regulatory years may be terms of the formula for the calculation of the resulting change in a DNSP's annual revenue requirement referred to in clause 6.5.2(1), it does not follow from the requirement in that clause that that formula be capable of automatic application that the value of those terms must also be capable of mechanistic calculation using a formula specified in that determination.' We disagree. The interpretation set out in the notice and explained further in this letter promotes the purpose or object of the NER clauses referred to above. The Australian Energy Market Commission's (AEMC) Rule Determination relevantly states:

The final rule includes a provision to allow an annual adjustment to the allowed revenue for the service provider in circumstances where the regulator decides to estimate the return on debt using an approach that requires the return on debt to be updated periodically during the regulatory period. The formula for calculating the updated return on debt must be specified in the regulatory determination... and must be capable of applying automatically.
12. This confirms the legislative intent that the determination must specify the formula for calculating the updated return on debt itself and that it must be capable of applying automatically. The AEMC did refer to a 'formula' for return on debt. however, the AER's view in the notice does not change whether the return on debt calculation is described as a 'methodology' or a 'formula'.

## DLA PIPER'S OPINION

12. DLA Piper is of the opinion that, in respect of the nomination of debt averaging periods, Revised Chapter 10 complies with the relevant requirements of the NER, being clauses 6.3.1(c)(1), 6.5.2(1), 6.8.2(c)(2) and S6.1.3(6), (7), (9) and (9A). Our reasons for this are as follows.
13. Clauses 6.3.1(c)(3), 6.5.2(1) and S6.1.3(9) together require that a DNSP's regulatory proposal contain the DNSP's calculation of the proposed return on debt for each regulatory year of the regulatory control period, which is to be in accordance with clause 6.5.2, together with any departures in that calculation from the proposed methodologies set out in the Rate of Return Guideline and the reasons for those departures.
14. To the extent that the AER maintains, in the AER's Notice and Further Reasons, that clause S6.1.3(9) operates to require the proposed method for estimation of the return on debt to comply with clause 6.5.2(1), DLA Piper disagrees. As discussed further below, the subject of clause 6.5.2(1) is the resultant change to the DNSP's annual revenue requirement, not the methodology for estimating the return on debt. It is for this reason that clause S6.1.3(9A) establishes a discrete, express requirement (discussed further below) that, where a DNSP proposes the annual updating of the return on debt, a building block proposal contain the formula the DNSP proposes should be applied in accordance with clause 6.5.2(1).
15. DLA Piper is satisfied that Revised Chapter 10 specifies the method for the nomination of debt averaging periods, being an element of the methodology for estimation of the return on debt, and that this method is in accordance with the applicable requirements of clause 6.5.2. Revised Chapter 10 (in section 10.6.6.2) sets out a detailed process for the nomination of averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years, including in particular proposed conditions for the nominated and agreed averaging periods for those regulatory years.
16. Insofar as the AER asserts, in the Further Reasons (at [7]), that the method for estimation of the return on debt cannot be specified unless averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years are also specified, DLA Piper disagrees. The specification of the method for estimation of the return on debt requires only that the proposed method for nomination and agreement of debt averaging periods in those regulatory years be specified. For the reasons discussed above, we consider that AAD's proposed method for the nomination and agreement of debt averaging periods is so specified in Revised Chapter 10.
17. Revised Chapter 10 (in sections 10.6.1, 10.6.3 and 10.6.6.1) identifies that AAD's proposal for the nomination of debt averaging periods departs from the Rate of Return Guideline insofar as that proposal does not involve nomination of the debt averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years in the Regulatory Proposal as revised or, in the case of the 2017-18 and 2018-19 regulatory years, in advance of the commencement of the regulatory control period.



18. Revised Chapter 10 (in sections 10.6.3 and 10.6.6.1) sets out the reasons for this proposed departure from the Rate of Return Guideline.
19. It is evident from the discussion in Revised Chapter 10 (in section 10.6.6.2) of AAD's proposed process for the annual nomination of averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years, including in particular the proposed conditions for the nominated and agreed averaging periods for those regulatory years that form part of that process, that the Regulatory Proposal as revised is otherwise consistent with the Rate of Return Guideline in respect of debt averaging periods.
20. Clauses 6.3.1(c)(3), 6.5.2(l) and S6.1.3(9A) together require that, if a DNSP proposes a methodology for estimation of the return on debt that results in that return on debt being, or potentially being, different for different regulatory years of the regulatory control period, that its regulatory proposal also contain a proposed formula of automatic application for effecting the resultant change in the DNSP's annual revenue requirement.
21. Clause 6.5.2(l) requires only that the change in the DNSP's annual revenue requirement, and not the estimation of the return on debt, be effected through a formula of automatic application. The language of this clause underlines that the estimation of the return on debt is not subject to this requirement. Rather, it is the change to the annual revenue requirement *resulting* from the annual updating of the return on debt - that is, the change in the annual revenue requirement taking the estimate of the return on debt or the method for its estimation as given - that is the subject of the formula of automatic application. The obligation of a DNSP to specify its proposed methodology for the estimation of the return on debt in its regulatory proposal arises as a consequence of the discrete requirement, discussed above, to include in a building block proposal the DNSP's calculation of the proposed return on debt.
22. Revised Chapter 10 sets out the formula AAD proposes should be applied in accordance with clause 6.5.2(l) of the NER. Specifically, section 10.6.6.3 sets out the formula for effecting the resulting change in AAD's annual revenue requirement as a consequence of the annual updating of the return on debt pursuant to its proposed methodology for estimation of the return on debt. All elements of that formula or the methodology for their ascertainment (including the methodology for ascertaining the value of  $\Delta\text{cod}$ ) are specified in Revised Chapter 10 (in sections 10.6.6.2 and 10.6.6.3). In addition, the formula is one of mechanistic application.
23. While Revised Chapter 10 does not specify averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years, clauses 6.3.1(c)(3), 6.5.2(l) and S6.1.3(9) and (9A) do not, in our view, operate to require this. To the extent that the AER maintains otherwise, we disagree.
24. As already noted, clause 6.5.2(l) requires only that the change in the DNSP's annual revenue requirement, and not the estimation of the return on debt, be effected through a formula of automatic application. It is the change to the annual revenue requirement *resulting* from the annual updating of the return

on debt - that is, the change in the annual revenue requirement taking the estimate of the return on debt as given - that is the subject of such a formula.

25. It follows that the AER is incorrect in contending in the Further Reasons (at [8]) that AAD's Regulatory Proposal in respect of the nomination of debt averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years is contrary to clause 6.5.2(1) insofar as it follows from that Proposal that something more than automatic application of a formula would be required to effect the change in AAD's annual revenue requirement in those regulatory years. Clause 6.5.2(1) does not establish any such requirement. It is silent on what may be required for the estimation of the return on debt and requires only that the formula for effecting the resultant change to the annual revenue requirement be one of automatic application.
26. For the formula for effecting the resultant change to a DNSP's annual revenue requirement included in its regulatory proposal to be one of automatic application, it is not necessary for either the value of the terms of that formula to be specified in that regulatory proposal or for their value to also be capable of formulaic expression or mechanistic application. This follows from the following:
  - 26.1 It is readily apparent from the annual updating of the return on debt with which clause 6.5.2(i)(2) and (1) are concerned that at least the value of the return on debt term of the formula for effecting the resultant change to a DNSP's annual revenue requirement need not be specified in the DNSP's regulatory proposal.
  - 26.2 The language of clause 6.5.2 further discloses that the method for estimation of the return on debt is not required to be capable of formulaic expression. Whereas clause 6.5.2(1) refers to the resultant change to a DNSP's annual revenue requirement being effected through the application of a 'formula', it and other paragraphs of clause 6.5.2 refer to the estimation of the return on debt using a 'methodology'. A change in meaning must be assumed from this use of different words; the change in language would otherwise be rendered meaningless.<sup>3</sup> This difference in language is properly understood as evidencing a statutory intent that the method of estimation of the return on debt need not be capable of formulaic expression.
  - 26.3 Finally, the language of clause 6.5.2(1) is plain. It is the formula there referred to that must be of automatic application, not the method for estimation of the return on debt or the method of ascertainment of the value of the terms of the formula more generally.

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<sup>3</sup> *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 75; *O'Sullivan v Barton* [1947] SASR 4; *Bell v Day* (1886) 2 QLJ 180.

27. The AER asserts in the Further Reasons (at [11]) that construing clause 6.5.2(1) as requiring that the value of the terms of the formula for effecting the resultant change in the annual revenue requirement be capable of mechanistic calculation using a formula specified in the distribution determination promotes the purpose or object of the NER provisions in issue. While the AER is correct in stating that the NEL requires a purposive construction of the NER and that, in applying such an approach to construction, the purpose need not be expressly stated in the NER<sup>4</sup>, the purpose of a statutory provision is properly deduced by reading the statutory instrument, here the NER, as a whole and the provision in issue in context. The AER does not explain how a reading of the NER as a whole or clause 6.5.2(1) in its context evidences an intent that the method of estimation of the return on debt be capable of formulaic expression and mechanistic application.
28. Instead, in contending that its construction of clause 6.5.2(1) promotes the purpose or object of the NER provisions in issue, the AER calls in aid the statement by the Australian Energy Market Commission (AEMC) in making the 2012 Rule Amendments that '[t]he formula for calculating the updated return on debt must be specified in the regulatory determination ... and must be capable of applying automatically'<sup>5</sup>. However, this AEMC statement does not assist the AER.
29. The ordinary meaning of clause 6.5.2(1) is plain. It requires the formula for calculating the updated annual revenue requirement, not the updated return on debt, to be specified in the distribution determination and capable of automatic application. To the extent that the AEMC intentionally stated that this was required in respect of the *return on debt* (rather than doing so as a consequence of an accidental slip), that statement is not consistent with the ordinary meaning of clause 6.5.2(1). While it is permissible to give consideration to 'Rules extrinsic material' to provide an interpretation of a NER provision that is ambiguous or obscure, to ascertain an interpretation that avoids a result that is manifestly absurd or unreasonable or to confirm the interpretation conveyed by the ordinary meaning of the provision<sup>6</sup>, the NEL does not permit the AER to depart from the ordinary meaning of clause 6.5.2(1) in reliance on such material in the present circumstances where the ordinary meaning of that clause is plain and results in no absurdity.
30. To the extent that the AER, in its Further Reasons, queries its statutory power to agree the averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years, we consider that the AER has power to perform the functions contemplated by the process for the nomination of debt averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years set out in Revised Chapter 10.

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<sup>4</sup> NEL, Schedule 2, clauses 7 and 41.

<sup>5</sup> AEMC, *Rule Determination National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p91.

<sup>6</sup> NEL, Schedule 2, clause 8(1) and (2a).

31. The only AER function contemplated by this process that does not fall within the limits of the AER's express distribution determination making and pricing proposal approval functions and powers under clauses 6.11.1 and 6.18.8 of the NEL is the acceptance of the nominated averaging periods through the application of the specific conditions set out in Revised Chapter 10. The AER's incidental power under section 15(2) of the NEL suffices for the performance by the AER of this function because:
- 31.1 The process for the nomination of debt averaging periods for the 2016-17, 2017-18 and 2018-19 regulatory years set out in Revised Chapter 10 is, on AAD's proposal, to be set out in the distribution determination.
- 31.2 Section 15 of the NEL empowers the AER to:
- perform 'AER economic regulatory functions or powers' which, in turn, include the economic regulation of services provided by a regulatory distribution system operator by means of, or in connection with, a distribution system, or the making of a distribution determination (section 15(1)(f) and section 2 definition of 'AER economic regulatory function or power'); and
  - do all things necessary or convenient to be done for or in connection with the performance of its functions (section 15(2)).
- 31.3 While Chapter 6 of the NEL does not expressly provide for the AER to perform functions or exercise powers in relation to the annual updating of the return on debt now permitted by the NEL during the course of a regulatory control period in accordance with the relevant distribution determination, the performance of such functions or exercise of such powers can properly be said to be necessary or desirable where the discretion under clause 6.5.2(i) of the NEL for the AER to determine on the annual updating of the return on debt is exercised. Accepting averaging periods through the application of specific conditions for those periods is just one example.
32. Consistent with our conclusion, the AEMC in making its 2012 Rule Amendments expressly contemplated the performance of functions or exercise of powers *during a regulatory control period*, as a necessary consequence of the new NEL provisions providing for the annual updating of the return on debt.<sup>7</sup> It stated, for example, that:<sup>8</sup>

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<sup>7</sup> AEMC, *Rule Determination National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p91; AEMC *Draft Rule Determination National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p91.

Additional consequential amendments have been made in Chapters 6 and 6A of the NER to remove any impediments [so as] to allow the regulator to adjust its revenue/pricing determination during the regulatory period from the application of an annually updating [sic] return on debt estimate.

33. Finally, we consider that, insofar as concerns the nomination of debt averaging periods, Revised Chapter 10 contains details and an explanation of AAD's proposed rate of return and (when read together with this legal opinion which we understand will be attached to the Regulatory Proposal resubmitted to the AER pursuant to clause 6.9.2(a)) a demonstration that that proposed rate of return complies with the relevant requirements of the NEL and NER, as is required by clauses 6.3.1(c)(3) and S6.1.3(6) and (7).

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<sup>8</sup> AEMC, *Rule Determination National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p91.