

## **EXPLANATORY STATEMENT**

### **SELECT LEGISLATIVE INSTRUMENT NO. 106, 2015**

#### **Issued by authority of the Minister for Small Business**

*Competition and Consumer Act 2010*

*Competition and Consumer Amendment (National Energy Laws) Regulation 2015*

Section 172 of the *Competition and Consumer Act 2010* (Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act (other than Schedule 2) to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act (other than Schedule 2).

The National Electricity Law (NEL), the National Gas Law (NGL) and the National Electricity Retail Law (NERL) are three Commonwealth-State-Territory cooperative legislative schemes (national energy laws) in the energy sector, established as part of the Council of Australian Governments' energy market reform program. Together, the national energy laws provide for matters including the economic regulation of monopoly electricity and natural gas transmission and distribution businesses, third party access to their infrastructure, and the regulation of the retail sale of energy to small customers. Each national energy law is set out in the schedule to a statute of South Australia, which is the lead jurisdiction for these cooperative schemes. The national energy laws are then applied as law by legislation in force in those states and territories participating in each cooperative scheme and by the Commonwealth as provided for in the *Australian Energy Market Act 2004*.

The relevant regulator for the national energy laws is the Australian Energy Regulator (AER), a Commonwealth body established under the Act. The Act also provides for the AER's functions and powers and certain other matters including, relevantly, its obligations with respect to confidentiality. The AER's functions include functions conferred pursuant to a relevant 'State/Territory energy law' subject to satisfaction of the requirements of the Act.

What constitutes a 'State/Territory energy law' is defined in the Act and includes, amongst other things, provisions of a law of a state or territory that relate to energy and are prescribed by regulations for the purposes of that definition. Under the Act, the AER may make an application to the Federal Court for certain orders, including for breach of a 'State/Territory energy law'.

Recently, the Northern Territory and Queensland have embarked on reform of their energy sectors. This has resulted in the Northern Territory seeking to apply the NEL in part from 1 July 2016 and with full effect from 1 July 2019 (with transitional arrangements commencing on 1 July 2015); and Queensland seeking to apply the NERL from 1 July 2015.

The *Competition and Consumer Amendment (National Energy Laws) Regulation 2015* (the Regulation) provides for the necessary amendment of the *Competition and Consumer Regulations 2010* for the following purposes:

- identify the relevant Northern Territory legislation as a 'State/Territory energy law' for the purposes of the Act, to provide for the conferral of functions under that Northern Territory legislation on the AER in accordance with the Act; and enable the Federal Court to make certain orders under the Act in respect of breaches of that legislation;
- prescribe the Utilities Commission of the Northern Territory for the purposes of the Act, as well as a staff member or consultant assisting the Utilities Commission (or assisting the National Competition Council, the Australian Competition Tribunal or state and territory regulators, tribunals, or energy ombudsmen which are already prescribed), to provide for the authorised disclosure of information by the AER to that person or body in accordance with the Act;
- correctly identify the date and relevant parts of the *National Energy Retail Law (Queensland) Act 2014* (Qld) (and regulations made under it) as a 'State/Territory energy law' for the purposes of the Act, for analogous reasons as those mentioned above in relation to the Northern Territory;
- identify as a 'State/Territory energy law' for the purposes of the Act, the relevant parts of other Queensland legislation to be consequentially amended by the *National Energy Retail Law (Queensland) Act 2014* (Qld). This other Queensland legislation includes relevant parts of (and regulations made under) the *Electricity – National Scheme (Queensland) Act 1997* (Qld) and the *National Gas (Queensland) Act 2008* (Qld), which respectively apply the NEL and the NGL as laws of Queensland.

Details of the Regulation are set out at [Attachment A](#).

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Statement of Compatibility with Human Rights is set out at [Attachment B](#).

The amendments in this Regulation will form part of the Australian energy market legislative arrangements which support the three national cooperative legislative regimes in the energy sector. Consequently, the Regulation has been consulted on and approved by the COAG Energy Council in accordance with the requirements of the Australian Energy Market Agreement. The AER and all Commonwealth, state and territory government departments responsible for energy policy have also been consulted.

The Regulation will commence in accordance with the commencement information provided in section 2 of the Regulation. This provides for items in Schedule 1 of the Regulation to commence on the commencement of the corresponding parts of either the *National Electricity (Northern Territory) (National Uniform Legislation) Act 2015* (NT) or the *National Energy Retail Law (Queensland) Act 2014* (Qld), as relevant.

**Details of the Competition and Consumer Amendment (National Energy Laws) Regulation 2015**

**Section 1 – Name**

This section provides that the title of the Regulation is the *Competition and Consumer Amendment (National Energy Laws) Regulation 2015* (Regulation).

**Section 2 – Commencement**

This section provides that sections 1 to 4 and anything in this instrument not elsewhere covered by this table commences on the day after this instrument is registered.

Items in Schedule 1 each commence on the later of the start of the day after this instrument is registered; and immediately after the commencement of the corresponding part of either the *National Electricity (Northern Territory) (National Uniform Legislation) Act 2015* (NT), or *National Energy Retail Law (Queensland) Act 2014* (Qld), as relevant. However, the items will not commence at all if the relevant part of those Acts do not commence.

**Section 3 – Authority**

This section provides that this instrument is made under the *Competition and Consumer Act 2010* (Act).

**Section 4 – Schedules**

This section provides that each instrument that is specified in a schedule to this instrument is amended or repealed as set out in the applicable items in the schedule concerned, and any other item in a schedule to this instrument has effect according to its terms.

**Schedule 1 – Amendments**

**Items [1]-[2] – Various amendments to Regulation 7**

Item [1] amends the table in existing subregulation 7(1), to provide that, for paragraph 44AAF(3)(e) of the Act, the Utilities Commission of the Northern Territory is relevantly a prescribed body for the purposes of that paragraph of the Act, to which the Australian Energy Regulator (AER) may disclose information in accordance with section 44AAF of the Act.

Item [2] is consequential to the amendment made to regulation 7 under item [1] of Schedule 1. The item amends existing regulation 7 to insert new subregulation (1A) to clarify that a staff member or consultant assisting a person or body mentioned in

items 1.1 to 8A.1 of the table in subregulation (1) in the performance of a function, or the exercise of a power, of the person or body is also a prescribed person for paragraph 44AAF(3)(e) of the Act, to which the AER may disclose information in accordance with section 44AAF of the Act. This includes relevant staff members or consultants assisting the Utilities Commission of the Northern Territory, or assisting the National Competition Council, the Australian Competition Tribunal or state and territory regulators, tribunals, and energy ombudsmen already prescribed in regulation 7. This amendment is for consistency with s 44AAF(3)(d) of the Act and, insofar as it relates to existing people and bodies, constitutes a minor clarification to confirm the previously understood operation of, and policy intention for, the existing prescription of those bodies in the table in subregulation 7(1).

**Item [3]-[7] – Various amendments to Regulation 7A, table**

Items [3]-[7] make amendments to the table in existing regulation 7A to prescribe specified state and territory provisions relating to energy for the purposes of paragraph (c)(ii) of the definition of ‘State/Territory energy law’ in s 4(1) of the Act.

The provisions prescribed are key parts of (including regulations made under) Northern Territory and Queensland legislation which relevantly operate to:

- modify the National Electricity Law as it applies as a law of the Northern Territory;
- modify the National Energy Retail Law as it applies as a law of Queensland and which also, consequentially, modify the National Electricity Law and National Gas Law as they apply in Queensland;
- provide additional local matters for which the AER has enforcement responsibility; or
- provide for transitional matters. This includes making the AER the responsible regulator under existing Northern Territory legislation (the *National Electricity (Third Party Access) Act* (NT)) for a limited period until 30 June 2019, when the current electricity distribution determination period ends. The AER will make the next distribution determination for the relevant Northern Territory distribution network service provider under the National Electricity Law applied as a law of the Northern Territory on 1 July 2019.

The effect of prescribing the relevant State/Territory energy laws is to:

- extend the Federal Court’s jurisdiction under section 44AAG of the Act to proceedings for breach of those provisions; and
- provide that those provisions may operate to confer functions, powers and duties on the AER, subject to satisfaction of the requirements of section 44AI of the Act.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**COMPETITION AND CONSUMER AMENDMENT (NATIONAL ENERGY LAWS) REGULATION 2015**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of Legislative Instrument**

The National Electricity Law (NEL), the National Gas Law (NGL) and the National Electricity Retail Law (NERL) are three Commonwealth-State-Territory cooperative legislative schemes (national energy laws) in the energy sector, established as part of the Council of Australian Governments' energy market reform program. Together, the national energy laws provide for matters including the economic regulation of monopoly electricity and natural gas transmission and distribution businesses, third party access to their infrastructure, and the regulation of the retail sale of energy to small customers.

Each national energy law is set out in the schedule to a statute of South Australia, which is the lead jurisdiction for these cooperative schemes (see the *National Electricity (South Australia) Act 1996* (SA), the *National Gas (South Australia) Act 2008* (SA) and the *National Energy Retail Law (South Australia) Act 2011* (SA)). The national energy laws are then applied as law by legislation in force in those states and territories participating in each cooperative scheme and by the Commonwealth as provided for in the *Australian Energy Market Act 2004*.

The relevant regulator for the national energy laws is the Australian Energy Regulator (AER), a Commonwealth body established under the Act. The Act also provides for the AER's functions and powers and certain other matters including, relevantly, its obligations with respect to confidentiality. The AER's functions include functions conferred pursuant to a relevant 'State/Territory energy law' subject to satisfaction of the requirements of the Act.

What constitutes a 'State/Territory energy law' is defined in the Act and includes, amongst other things, provisions of a law of a state or territory that relate to energy and are prescribed by regulations for the purposes of that definition. Under the Act, the AER may make an application to the Federal Court for certain orders, including for breach of a 'State/Territory energy law'.

Recently, the Northern Territory and Queensland have embarked on reform of their energy sectors. This has resulted in the Northern Territory seeking to apply the NEL in part from 1 July 2016 and with full effect from 1 July 2019 (with transitional

arrangements commencing on 1 July 2015); and Queensland seeking to apply the NERL from 1 July 2015.

The amendments to the *Competition and Consumer Regulations 2010* (the primary Regulations) in the *Competition and Consumer Amendment (National Energy Laws) Regulation 2015* are consequential to the application of the National Electricity Law in the Northern Territory and the National Energy Retail Law in Queensland and for the following purposes:

- identify the relevant Northern Territory legislation as a 'State/Territory energy law' for the purposes of the Act, to provide for the conferral of functions under that Northern Territory legislation on the Australian Energy Regulator in accordance with section 44AI of the Act; and enable the Federal Court to make certain orders under section 44AAG of the Act in respect of breaches of that legislation;
- prescribe the Utilities Commission of the Northern Territory for the purposes of paragraph 44AAF(3)(e) of the Act, as well as a staff member or consultant assisting the Utilities Commission (or the National Competition Council, the Australian Competition Tribunal or state and territory regulators, tribunals, or energy ombudsmen which are already prescribed), to provide for the authorised disclosure of information by the Australian Energy Regulator to that person or body in accordance with that section;
- correctly identify the date and relevant parts of the *National Energy Retail Law (Queensland) Act 2014* (Qld) (and regulations made under it) as a 'State/Territory energy law' for the purposes of the Act, for analogous reasons as those mentioned above in relation to the Northern Territory;
- identify as a 'State/Territory energy law' for the purposes of the Act, the relevant parts of other Queensland legislation to be consequentially amended by the *National Energy Retail Law (Queensland) Act 2014* (Qld). This other Queensland legislation includes relevant parts of (and regulations made under) the *Electricity – National Scheme (Queensland) Act 1997* (Qld) and the *National Gas (Queensland) Act 2008* (Qld), which respectively apply the NEL and the NGL as laws of Queensland.

## **Human rights implications**

### **Implications for the AER**

The Legislative Instrument operates to prescribe as a 'State/Territory energy law' for the purposes of the Act, relevant provisions of state or territory legislation which confer functions or powers, or impose duties, on the AER. This clarifies that the AER may perform or exercise those functions, powers or duties under state or territory law.

### ***National energy laws***

The Commonwealth already consents under s 44AI of the Act to the conferral of functions on the AER under a 'State/Territory energy law' that is a 'uniform energy

law that applies as a law of a State or Territory’ for the purposes of paragraph (a) of the definition of ‘State/Territory energy law’. This would include the NEL, NGL and NERL, as set out in the relevant South Australian statutes, when applied by a state or territory.

It is not clear, however, that paragraph (a) of the definition of State/Territory energy law would extend to substantive provisions in the application legislation of a jurisdiction that either modify a national energy law insofar as it applies as a law of that jurisdiction, or that otherwise provide for additional matters. It is arguable that such provisions come within the scope of paragraph (b) of the definition, which relates to a law of a State or Territory that applies a law mentioned in paragraph (a) as a law of its own jurisdiction. Nevertheless, paragraph (c) of the definition of State/Territory energy law provides a means for the identification of additional State/Territory energy laws, being provisions of a law of a State or Territory that relate to energy and are prescribed by the regulations for the purposes of that paragraph.

Accordingly, the prescription of such provisions in jurisdictional application legislation under paragraph (c) of the definition puts beyond doubt that those provisions constitute a State/Territory energy law for the purposes of the Act. This will therefore clarify the AER’s role as regulator under those state or territory laws extends to those modified or additional provisions. This approach has been taken previously in respect of the application legislation of other jurisdictions.

None of the modified or additional provisions in the Northern Territory or Queensland application legislation for the national energy laws as relevantly prescribed by the Legislative Instrument, operate to engage or restrict any of the applicable rights or freedoms.

For example, the Northern Territory’s legislation applies the NEL with modifications necessary because of the factual circumstances that the Northern Territory’s electricity system is not interconnected to the national electricity system in the Eastern and Southern states and the Australian Capital Territory and because it does not currently have a wholesale electricity market and to provide scope for necessary transitional provisions to be prescribed by regulation if required.

Further, Queensland applies the NERL with some modifications to the national law (and rules) and some additional Queensland provisions which the AER will be responsible for regulating. For example, under the national provisions a distributor must give at least 4 business days’ notice to affected customers for a planned interruption to the supply of energy. Queensland’s application legislation also provides scope for distributors to vary that notice period, by written agreement with a customer.

The provisions in Queensland’s NEL and NGL application legislation that are prescribed by the Legislative Instrument are consequential to Queensland’s application of the NERL and for consistency of approach in clarifying that substantive provisions in state or territory application legislation are identified as a State/Territory law for the purposes of the Act.

Therefore, to the extent the Legislative Instrument relates to the application of the national energy laws by a state or territory, it is compatible with human.

***Electricity Networks (Third Party Access) Act (NT)***

The Commonwealth's consent under s 44AI of the Act to the conferral of functions on the AER is being extended under the Legislative Instrument to functions conferred under the Northern Territory's *Electricity Networks (Third Party Access) Act* (EN(TPA) Act).

The *National Electricity (Northern Territory) (National Uniform Legislation) Act 2015* (NT) will consequentially amend the EN(TPA) Act to provide for the AER to be conferred with transitional regulatory functions under that Northern Territory Act to administer and enforce the existing electricity distribution determination in the Northern Territory until it expires on 30 June 2019. This statement of compatibility deals with the EN(TPA) Act as amended by that Act.

The EN(TPA) Act does not come within paragraph (a) of the definition of State/Territory energy law, as it is not relevantly a 'uniform energy law' for the purposes of the Act. For the Commonwealth's consent under s 44AI of the Act to be extended to the conferral of the transitional functions under the EN(TPA) Act it is necessary to prescribe the EN(TPA) Act as a State/Territory energy law for the purposes of paragraph (c) of that definition in the Act. The Legislative Instrument achieves that outcome.

The functions conferred on the AER under the EN(TPA) Act will include, but are not limited to:

- a) monitoring and enforcing compliance with the EN(TPA) Act, including the Networks Access Code set out in its schedule, including by:
  - i) investigating breaches or possible breaches of the EN(TPA) Act and Code (including entry, search and seizure);
  - ii) accepting undertakings;
  - iii) serving infringement notices for breaches of civil penalty provisions;
  - iv) instituting and conducting proceedings and appeals;
  - v) applying to the court for orders;
  - vi) seeking injunctions;
  - vii) seeking declarations;
- b) the economic regulation of the electricity network industry in the Northern Territory, including by means of economic regulatory determinations and price regulation determinations;
- c) gathering, using and disclosing information as authorised by the EN(TPA) Act and Code; and
- d) making guidelines and preparing reports.



To the extent the Legislative Instrument prescribes the EN(TPA) Act as a State/Territory energy law for the purposes of the conferral of functions on the AER, the EN(TPA) Act may engage the following human rights:

- the protection against arbitrary interference with privacy; and
- the right to a fair trial.

*The right to privacy and reputation*

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

The EN(TPA) Act protects against arbitrary abuses of power as the entry, monitoring, search, seizure and information gathering powers provided in it are conditional upon prior authorisation by a magistrate. Under Division 1 of Part 3A of that Act, before issuing a search warrant to enter premises, the magistrate must be satisfied by evidence, on oath or by affidavit, of a person authorised by the regulator (an authorised person) that there are reasonable grounds for suspecting that there is, or may be within the next 7 days, a thing or things of a particular kind connected with a breach or possible breach of a provision of the Act.

A search warrant that is issued by the magistrate must state the purpose for which the search is required and the nature of the suspected breach of the provision of the Act; any conditions to which the warrant is subject; whether entry is authorised to be made at any time of the day or night or during stated hours of the day or night; and a day, not later than 7 days after the issue of the warrant, on which the warrant ceases to have effect.

Such constraints on the power to issue warrants ensures adequate safeguards against arbitrary uses of the power limiting the right to privacy.

An authorised person must carry an identity card at all times when exercising powers or performing functions as an authorised person and must produce his or her identity card for inspection before exercising a power as an authorised person, or at any time during the exercise of a power as an authorised person, if asked to do so.

An authorised person executing a warrant issued by a magistrate under the Act is not entitled to exercise any powers under the warrant in relation to premises, unless the authorised person:

- identifies himself or herself to the occupier; and
- announces that he or she is authorised by the warrant to enter the place; and
- before using force to enter, give the occupier an opportunity to allow entry; and
- give the occupier a copy of the warrant.

These requirements do not apply if immediate entry is required to ensure safety of any person or to prevent frustration of the effective execution of the warrant.

These requirements provide for the transparent utilisation of the Act's powers and mitigates arbitrariness and risk of abuse.

If an authorised person executing a warrant retains possession of a document seized from a person in accordance with the warrant, the authorised person must give that other person, within 21 days of the seizure, a copy of the document certified as correct.

The regulator must take reasonable steps to return seized documents or things to the person from whom it was seized if the reason for its seizure no longer exists. The regulator must take reasonable steps to return seized documents or things within 3 months after it was seized unless proceedings for the purpose for which the document or thing was retained have commenced within that period and those proceedings (including any appeal) have not been completed, or a magistrate makes an order extending the period during which the document or thing may be retained.

Such constraints on the powers to investigate breaches or possible breaches of the EN(TPA) Act and Code, through use of entry, search and seizure powers, ensures sufficient oversight and constraint on the exercise of the powers, transparency of process and adequate safeguards against arbitrary limitations on the right to privacy.

#### *The right to a fair and public hearing*

Article 14 of the ICCPR ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

It is possible the EN(TPA) Act may engage the right to a fair and public hearing through:

- the regulator's powers to gather information by notice or instrument and to use and disclose information;
- enforcement of compliance with the Act, including through:
  - enforceable undertakings;
  - infringement notices;
  - a regime for the enforcement of civil penalties;
  - a limited number of offence provisions; and
- in respect of the arbitration of access disputes.

These matters are discussed briefly in turn below.

#### *Regulator's powers to gather information by notice or instrument and to use and disclose information*

Division 2 of Part 3A of the EN(TPA) Act provides the regulator with the power to obtain information and documents it requires for the exercise of a power or performance of a function under the Act by serving a notice in writing on a person capable of providing the information or document. Failure to comply with a relevant notice without a reasonable excuse attracts a civil penalty.

The regulator also has power under Division 3 of Part 3A of the Act to issue regulatory information notices and general regulatory information orders (regulatory information instruments) to compel the provision of information to the regulator specified in the notice or order, or to prepare maintain or keep such information, if the regulator considers it reasonably necessary for the exercise of a power or performance of a function under the Act.

Certain restrictions apply to the regulator in relation to the purposes for which a regulatory information instrument may be made. The regulator must not, for example, issue such an instrument solely for the purpose of investigating breaches or possible breaches of provisions of the Act, including offences against the Act; or for instituting and conducting proceedings (or appeals from such proceedings) in relation to breaches of provisions of the Act, including offences against the Act.

The regulator must consult with the public in relation to the general information order it proposes to make before it makes that order. As soon as practicable after it is made, a general regulatory information order must be published on the regulator's website and a notice of its making must be published in a newspaper circulating generally throughout Australia. Further, before serving a regulatory information notice on a network provider, the regulator must provide an opportunity to the provider to be heard in relation to the notice. This requires that the regulator must: notify the provider that the regulator intends to service such a notice; give the provider a draft of the notice it intends to serve; and invite the provider to make written representations to the regulator in reply. The regulator must consider the written representations made by the provider before making its decision to serve the regulatory information notice.

Failure to comply with a regulatory information instrument attracts a civil penalty. However, the Act provides for certain protections to a network provider in complying with such an instrument. While a person must not refuse to comply with a regulatory information instrument on the ground of any duty of confidence, compliance does not give rise to any liability for breach of contract, breach of confidence or any other civil wrong. Further, a regulatory information instrument is not to be taken as requiring a person to provide information or produce a document that is the subject of legal professional privilege. It is a reasonable excuse for an individual to whom a regulatory information instrument applies not to comply with it, if to do so might tend to incriminate the person, or make the person liable to a criminal penalty, under a law of the Territory or another jurisdiction in Australia.

The process for making and issuing a regulatory information instrument, or a notice under the regulator's general information gathering power, is a clear, transparent and fair one that requires procedural fairness. These protections are reasonable and proportionate protections and ensure that the privilege against self-incrimination and legal professional privilege are not abrogated by the EN(TPA) Act.

The regulator is authorised to use and disclose information in accordance with Part 3B of the EN(TPA) Act. The disclosure of information is subject to express restrictions related to the protection of confidential information. For example, the regulator is authorised to disclose information given to the regulator in confidence:

- with prior written consent
- for the purposes of civil or criminal proceedings and to accord natural justice
- if confidential information is omitted
- if the information given in confidence does not identify anyone
- if the information is already in the public domain
- if the detriment does not outweigh public benefit (where before disclosing the information the regulator must comply with express procedural fairness requirements).

These protections are reasonable and proportionate to achieving the legitimate objective of ensuring the regulator may use and disclose information for the purposes of performing its functions, while safeguarding the interests of regulated entities by protecting confidential information.

Additionally, administrative decisions of the AER under the EN(TPA) Act, such as to issue regulatory information instruments or to disclose information, will be made subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which is consistent with the approach taken to ensuring judicial review under that Act of decisions of the AER under the national energy laws.

#### *Enforcement of compliance with the Act*

Part 6 of the EN(TPA) Act provides for enforcement of compliance with that Act, including through civil proceedings in the Supreme Court for breach of a provision of that Act that is not an offence proceeding and through other means including enforceable undertakings, infringement notices and civil penalties.

#### Civil proceedings

Proceedings for breaches of provisions that are not offences may be instituted by the regulator under Division 3 of Part 6, within 6 years of the date on which the breach occurred. The Supreme Court may make an order declaring that a person is in breach of a provision that is not an offence provision and may make various orders, including that the person pay a civil penalty, the person cease the activity or practice constituting the breach, that the person take action to remedy the breach, or implement a specified program for compliance. The Supreme Court may also grant injunctions and make various additional orders in relation to a network participant that has been declared to be in breach of a provision that is not an offence provision. The Supreme Court may make an order for the physical disconnection of a network participant's connection points in certain circumstances where there is a breach of the EN(TPA) Act. Double jeopardy applies to proceedings under the EN(TPA) Act, so that the Court must not make a declaration that a person is in breach of a provision of the act that is not an offence provision, if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the breach.

The right of a person to a fair and public hearing by a competent, independent and impartial tribunal is preserved by the EN(TPA) Act through its provision for

proceedings to be brought in the Supreme Court for breaches of provisions that are not offences. The EN(TPA) Act does not regulate the process or procedure of the Supreme Court in hearing such matters and so does not impact on the right to a fair and public hearing by the Supreme Court.

#### Enforceable undertakings

The regulator may accept a written undertaking under Division 2 of Part 6 of the EN(TPA) Act in connection with a matter in relation to which the regulatory has a function or power under that Act. If the regulator considers the person who gave the undertaking has breached any of its terms, the regulator may apply to the Supreme Court for orders. The Supreme Court may make various orders including directing the person to: comply with the undertaking, pay the Territory an amount up to the amount of any financial benefit obtained that is attributable to the breach, pay compensation to another person for loss or damage caused as a result of the breach, or any other order the Supreme Court considers appropriate.

Enforceable undertakings provide flexibility to the regulatory regime by administratively addressing potential misconduct and providing a pathway to greater compliance, while still ensuring adequate oversight of non-compliant behaviour by the Supreme Court. The EN(TPA) Act does not regulate the process or procedure of the Supreme Court in hearing such matters and so does not impact on the right to a fair and public hearing by the Supreme Court.

#### Infringement notices

Division 5 of Part 6 of the EN(TPA) Act provides for an infringement notice regime. The regulator may serve an infringement notice on a person that it has reason to believe has breached a civil penalty provision that is enforceable under the Act. The regulator must, however, serve an infringement notice not later than 12 months after the date on which the regulator forms a belief that there has been a breach of a civil penalty provision.

An infringement notice must state various matters as specified in the EN(TPA) Act, including the nature, and a brief description, of the alleged breach, the relevant infringement penalty and manner of payment, and that payment of the amount of the infringement penalty before the end of the time specified in the notice will mean that proceedings will not be instituted in respect of the alleged breach by the regulator unless the notice is withdrawn before the end of that time in accordance with the Act.

The right of a person to a fair and public hearing by a competent, independent and impartial tribunal is preserved by the EN(TPA) Act as its provisions make it clear that a person is entitled to disregard an infringement notice and defend any proceedings in respect of the civil penalty provision, rather than pay the amount specified in the notice. Additionally, the Act provides this right must be stated in an infringement notice, ensuring that a person with an infringement notice is aware of their right to have the matter heard by a court.

The regulator cannot institute proceedings while an infringement notice is on foot. The regulator may accept payment of the infringement penalty even after the expiration of the time for payment stated in the notice, or may withdraw an infringement notice, in certain circumstances. Payment of the infringement penalty

within the time stated in an infringement notice expiates breach of the civil penalty provision and no proceedings may then be taken by the regulator against a person on whom the notice was served.

### Civil penalties

Subdivision 2 of Division 3 of Part 6 of the EN(TPA) Act creates a regime for the enforcement of civil penalty provisions. The Act expressly provides that a breach of a civil penalty provision is not an offence. The Act therefore does not give rise to a penal consequence for breaches of a civil penalty provision. Rather, the civil penalties are exclusively pecuniary in nature and are payable to the Northern Territory.

It is important to note that civil penalties add to the flexibility of regulatory law by allowing for the punishment of misconduct without the need to impose criminal liability. They provide an alternative to the unnecessary extension of the criminal law into regulatory areas while preserving the role of the courts in ensuring a fair and public hearing.

### Offence provisions

Division 4 of Part 3A of the EN(TPA) Act provides for two offence provisions, being a provision the breach or contravention of which by a person exposes that person to a finding of guilt by a court. It is an offence for a person to give information that is misleading in a material particular to the regulator under the Act. The maximum penalty for this offence is 200 penalty units or imprisonment for 2 years. It is also an offence for a person (person A) to cause, or threaten to cause, harm to another person (person B): with intent to discourage person B from cooperating with the regulator, or in retribution for person B's having cooperated with the regulator. The maximum penalty for this offence is 400 penalty units or imprisonment for 2 years.

Section 51 of the EN(TPA) Act also prohibits a person who obtains information in the course of performing functions connected with the administration of the Act to disclose that information other than in accordance with that section, the breach of which attracts a maximum penalty of 200 penalty units or imprisonment for 2 years. However, that section does not apply in relation to a person that is a Commonwealth officer for the purposes of the *Crimes Act 1914* (Cth).

These offences are limited in number and reasonable, necessary and proportionate to the effective operation of the regulatory scheme provided for by the EN(TPA) Act. The EN(TPA) Act does not regulate the process or procedure of any proceedings relating to these offence provisions, which would occur in accordance with other Northern Territory law, and does not impact on the right to a fair trial or fair hearing rights.

### Arbitration of access disputes

Part 2 of the Network Access Code in the schedule to the EN(TPA) Act establishes the terms and conditions under which access to an electricity network is to be granted to third parties and lays down the processes to be followed in negotiating and implementing access agreements and for resolving access disputes.

Under Chapter 4 of Part 2 of the Code, an access applicant with respect to an access application or a network user with respect to an access agreement or award may request the regulator to refer an access dispute to arbitration. On receiving such a request, the regulator must attempt to settle the dispute by conciliation, or appoint an arbitrator and refer the dispute to the arbitrator. An arbitrator must be independent of the parties to the dispute, not subject to the control or direction of the government, properly qualified to act in the resolution of the dispute, and with no direct or indirect interest in the outcome of the dispute. The regulator must consult with each of the parties to the dispute before appointing an arbitrator. An arbitration hearing is to be in private, unless the parties agree the hearing, or part of the hearing, may be conducted in public (cl 43).

The procedure of an arbitrator in an arbitration of an access dispute is set out in the Chapter 4 of Part 2 of the Code. This includes an obligation on the arbitrator to make a written award on access to the electricity network by the access applicant (cl 52). Procedural fairness would be required to be afforded to the parties to an arbitration. Before making an award, the arbitrator must give a draft award to the parties to the arbitration and the regulator and may take into account representations that any of them may make on the proposed award. When the arbitrator makes an award, the arbitrator must give the parties and the regulator written reasons. The arbitrator must prepare a version of the award suitable for publication, which excludes commercial information that should not be made public on confidentiality or other grounds.

The powers of an arbitrator appointed under the Network Access Code are provided for in Part 4 of the EN(TPA) Act, and include giving directions in the course of, or for the purposes of an arbitration hearing; summoning persons to appear and give evidence or produce documents; hearing and determining the arbitration in the absence of a person who has been summoned or served with a notice to appear; giving oral or written orders to a person not to divulge or communicate information given to the person in the course of an arbitration; generally giving directions for the speedy hearing and determination of the access dispute.

An award made by the arbitrator takes effect as a contract between the network user and network provider and is binding on the parties (s 15(6) of the Act; cl 52(6) of the Code). An award has effect 21 days after it is made unless the access applicant, before that time, elects not to be bound by it. An access applicant may, within 7 days after an award is made, elect not to be bound by the award by giving written notice of the election to the regulator. If the access applicant elects not to be bound by an award, the award is rescinded (cl 56 of the Code).

An appeal lies to the Supreme Court in respect of an award made by the arbitrator under the Network Access Code, or a decision not to make an award, on a question of law (s 18 of the Act).

Part 5 of the EN(TPA) Act provides for the enforcement of access agreements and awards, including providing power for the Supreme Court to grant injunctive relief to restrain a person from contravening a provision of an access agreement or award, or requiring a person to comply with a provision of an access agreement or award, or suspending rights under, or terminating, an access agreement or award. Further, if a

person fails to comply with an order, direction or requirement of an arbitrator under the Network Access Code, the arbitrator may certify the failure to the Supreme Court, which can inquire into the case and make orders that it considers appropriate in the circumstances.

These requirements for the arbitration of an access dispute and the making of an award are consistent with the right to a fair hearing by a competent, independent and impartial tribunal. The need for such arbitration hearings to be in private, unless the parties agree otherwise, is necessary and appropriate given the need for commercial confidentiality to be maintained for each of the parties to the dispute. However, the capacity for the parties to agree for the arbitration hearing, or part of the hearing, to be held in public is consistent with ensuring transparency and fairness of that process. Procedural fairness applies in the process of making the award, which once made does not unreasonably, or disproportionately limit the right to a fair hearing, given an appeal lies to the Supreme Court on questions of law. The Supreme Court's role in the enforcement of access agreements and awards is appropriate given it may impact competing rights and interests of the parties. The EN(TPA) Act does not regulate the process or procedure of any such proceedings in the Supreme Court and does not impact on fair hearing rights.

To the extent the prescription of the EN(TPA) Act as a State/Territory energy law for the purposes of the Act may engage the right to a fair and public hearing, there is no incompatibility with that right. This is because any potential limitation under the EN(TPA) Act on the right is reasonable, necessary and proportionate and within the range of reasonable means to achieve the objectives of the effective regulation of monopoly electricity distribution service providers in the Northern Territory and the provision of third party access to their infrastructure.

#### ***Disclosure of information by the AER***

The Legislative Instrument provides for the disclosure of information by the AER pursuant to section 44AAF of the Act, however this is highly unlikely to involve the disclosure of personal information. The information disclosed will concern distribution and retailer businesses regulated under the National Electricity Law and National Energy Retail Law, which will be incorporated entities. In respect of this issue, the Legislative Instrument is compatible with human rights.

#### ***Implications for the Federal Court***

The prescription of the above state or territory legislation as a State/Territory energy law for the purposes of the Act will also ensure that the AER may apply to the Federal Court under s 44AAG for orders relating to breaches of that legislation. However, the state or territory laws prescribed do not purport to regulate the process or procedure of any proceedings that may be brought in the Federal Court under s 44AAG of the Act, or any appeals from such proceedings, and do not impact on the right to a fair trial or fair hearing rights. In respect of this issue, the Legislative Instrument is compatible with human rights.

#### **Conclusion**

To the extent that the Legislative Instrument may indirectly operate to engage human rights, through the prescription of state or territory legislation as a State/Territory



energy law for the purposes of the Act, there is either no incompatibility with the right engaged or any potential limitation are otherwise reasonable, necessary and proportionate. The Legislative Instrument is therefore compatible with the relevant human rights.

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