ELECTRICITY INDUSTRY AMENDMENT BILL 2019

EXPLANATORY MEMORANDUM

Table of contents

1. Introduction

1.1 Overview of the Bill

Part 1 of the Electricity Industry Amendment Bill 2019 (Bill) sets out the short title and commencement.

Part 2 of the Bill implements its main purpose, which is to amend the *Electricity Industry Act 2004* (Act) to implement two groups of reforms:

- reforms to the regulation of electricity networks in the Pilbara, implementing a light regulation access regime and an independent system operator (outlined in section 2 of this Memorandum); and
- reforms regarding stand-alone power systems (SPS) and electricity storage (outlined in section 3 of this Memorandum).

Part 3 of the Bill makes consequential changes to the *Electricity Corporations Act 2005* and the *Energy Operators (Powers) Act 1979* (section 11 of this Memorandum).

1.2 Structure of this Memorandum

This Memorandum is structured as follows:

- Section 2 provides an overview of the Pilbara electricity reforms;
- Section 3 provides an overview of the SPS and electricity storage reforms;
- Sections 4 to 10 provide the clause-by-clause discussion of the changes to the Act and, in particular:
  - Section 7 describes new Part 8A of the Act, which contains the main body of the new Pilbara provisions (clause 19 of the Bill); and
  - Section 9 describes new Part 9B of the Act, which implements the temporary access contribution (TAC) (clause 26 of the Bill); and
- Section 11 describes the amendments being made to other Acts.

1.3 Abbreviations and Glossary

Term	Description
Act	*Electricity Industry Act 2004* (WA), the principal Act being amended by the Bill

Term	Description
AEMO	the Australian Energy Market Operator, which currently acts as system operator and administers the wholesale electricity market in the South West Interconnected Network which covers the south west of the State, and is contemplated to be appointed as the Pilbara Independent System Operator
Bill	the Electricity Industry Amendment Bill 2019
ENAC	*Electricity Networks Access Code 2004* (WA) made under existing section 104 of the Act
covered NSP	the network service provider (NSP) of a covered network
ERA	Economic Regulation Authority
interconnected Pilbara network	any group of Pilbara networks which are interconnected with each other.[1] At present, the only interconnected Pilbara network is the coastal network centred around Port Hedland and Karratha (see "NWIS")
interconnected Pilbara system	an interconnected system comprising an interconnected Pilbara network and all the associated generation, loads and other facilities.[2] At present, the only interconnected Pilbara system is the NWIS
ISO	see "Pilbara ISO"
NEL	National Electricity Law
NGL	National Gas Law
NGR	National Gas Rules made under the NGL
NSP	Network Service Provider
NWIS	the North West Interconnected System, which is the interconnected Pilbara system around Karratha and Port Hedland, the network components of which are owned and operated by, primarily, Rio Tinto, Horizon Power and Alinta Energy
Pilbara ISO	the independent system operator for Pilbara networks created under new Part 8A Division 6 of the Act
PNAC	Pilbara Networks Access Code

[1] See proposed new section 120 of the Act

[2] See proposed new section 120 of the Act

Term	Description
PNR	Pilbara networks rules
Regulations	regulations to be made under the Act in respect of Pilbara networks
SPS	stand-alone power system, being an electric supply system that is not physically connected to the grid
SWIS	the South West Interconnected System, which is the main regulated network in the State's south west, spanning from Geraldton to Kalgoorlie and Albany, the network components of this are operated by Western Power, and within which the Wholesale Electricity Market (WEM) is operated by AEMO

1.4 Clause summary

Clause	Description of clause	Section in this Memorandum
Clause 1	Short title	Not applicable
Clause 2	Commencement	Not applicable
Clause 3	*Electricity Industry Act 2004* amended	Not applicable
Clause 4	Section 3 of Act amended	4
Clause 5	Section 11 of Act amended	5.1.1
Clause 6	Sections 23 and 24 of Act amended	5.1.2
Clause 7	Section 30 of Act amended	5.1.3
Clause 8	Section 39A of Act amended	5.1.4
Clause 9	Section 102 of Act amended	6.1.1
Clause 10	Section 103 of Act amended	6.1.2
Clause 11	Section 104 of Act replaced with new sections 104, 104A and 104B	6.2.2, 6.2.3, 6.2.4
Clause 12	Section 105 of Act amended	6.2.5
Clause 13	Section 107 of Act amended	6.3.1
Clause 14	Section 108 of Act amended	6.3.2

Clause	Description of clause	Section in this Memorandum
Clause 15	Section 111 of Act amended	6.3.2
Clause 16	Section 115 of Act amended	6.3.3
Clause 17	Section 116 of Act amended	6.3.4
Clause 18	Sections 119 and 120 deleted	6.3.5
Clause 19	New Part 8A inserted into the Act to provide for the light-handed access regime (Pilbara Networks Access Code) and independent system operator (including Pilbara networks rules)	7
Clause 20	Section 126 of Act amended	8.1.1
Clause 21	Section 127 of Act amended	8.1.2
Clause 22	Section 128 of Act amended	8.1.3
Clause 23	Section 129 of Act amended	8.1.3
Clause 24	Section 129B of Act amended	8.1.4
Clause 25	Section 129F of Act amended	8.1.5
Clause 26	New Part 9B inserted into Act to allow for Temporary Access Contribution	9
Clause 27	Section 130 of Act amended	10.1.1
Clause 28	Section 131B inserted into Act	10.1.2
Clause 29	Section 133 of Act amended	10.1.3
Clause 30	*Electricity Corporations Act 2005* amended	11.1
Clause 31	*Energy Operators (Powers) Act 1979* amended	11.2

2. Overview of the Pilbara reforms

2.1 Introduction

These reforms amend the *Electricity Industry Act 2004* (Act) to improve the efficiency and effectiveness of electricity services in the Pilbara, to support economic growth and development in the region through the implementation of:

- a light-handed access regime to facilitate third party access to designated electricity network assets in the Pilbara; and
- an independent system operator (Pilbara ISO) for interconnected Pilbara networks, which will also have certain limited functions in respect of other Pilbara networks.

These reforms build on the Minister for Energy's (Minister) decision in February 2018 to "cover" Horizon Power's network in the North West Interconnected System (NWIS) under existing Part 8 of the Act, i.e. to open it up for third party access. Under these reforms, coverage will also be extended to the Alinta DEWAP network. This will, for the first time, enable retail competition for contestable customers[3] in the Pilbara supplied through these networks. This is expected to place downward pressure on prices for those customers.

2.1.1 Parallels with Parts 8 and 9 of the Act

These reforms have been developed specifically for the Pilbara context but, at a high level, they are broadly comparable to existing regimes for the South West Interconnected System (SWIS), being respectively the network access arrangements under Part 8 of the Act, and the system management and operations components of the wholesale market regime under Part 9 of the Act.

As a result, the Bill inserts new Part 8A into the Act, which has been developed by adapting and merging existing Part 8 (for access) and Part 9 (for system operations).

As with previous energy reforms in Western Australia, and consistent with the current structure of the Act, new Part 8A will set high-level principles and empower the making of subordinate instruments, notably the:

- Pilbara Networks Access Code (PNAC) for the light regulation access regime. The PNAC, like the existing *Electricity Networks Access Code 2004* (ENAC) under Part 8, will be made by the Minister directly under the Act;
- Pilbara networks rules (PNR) for system operation arrangements. The PNR, like the Wholesale Electricity Market (WEM) Rules empowered by Part 9, will largely be made under regulations, which in turn will be made under the Act; and
- regulations.

[3] From 1 July 2020, customers consuming more than 1,200 megawatt hours per annum will be contestable.

The Bill also makes consequential changes to Parts 1, 2, 8, 9, and 10 of the Act, and to the *Electricity Corporations Act 2005* and the *Energy Operators (Powers) Act 1979*.

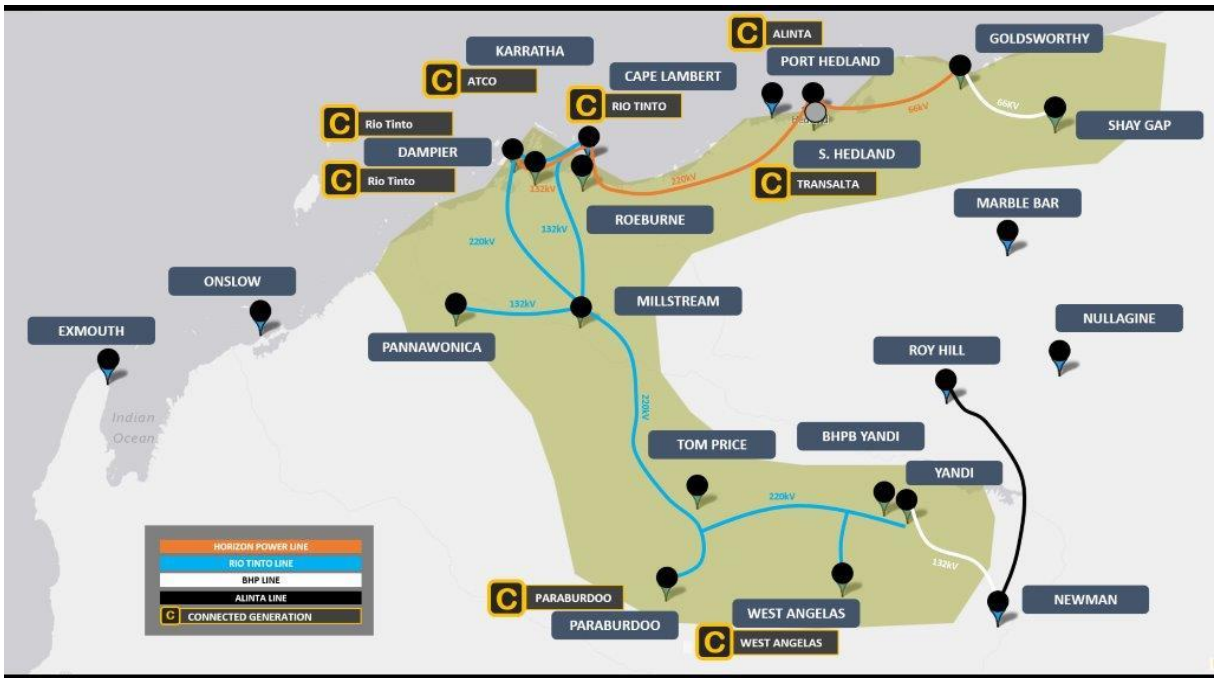
2.2 The Pilbara electricity landscape

The Pilbara region is a significant driver of Western Australia's economic and export performance, yet the electricity infrastructure that is vital to support the region is becoming increasingly fragmented, high-cost and uncompetitive.[4]

The electricity landscape in the Pilbara comprises the NWIS and other non-interconnected (i.e. islanded) systems supporting the iron ore, gas, minerals and tourism industries and residential communities in Western Australia's Pilbara region.[5] The NWIS comprises interconnected electricity generation, transmission and distribution assets, including the major towns of Port Hedland and Karratha, and extending inland through Rio Tinto's network (see Figure 1 below[6]).

The NWIS consists of both privately and publicly owned assets. Although the transmission infrastructure is somewhat interconnected, the interconnections are electrically weak, with a range of different voltages, multiple points of transformation and constrained capacity at many points in the system.

Figure 1. North West Interconnected System



Source: Compiled from publicly available information by the then Public Utilities Office. Note: BHP and Alinta lines from Newman are not connected to the NWIS.

[4] Department of Treasury, Public Utilities Office, 'Regulatory frameworks for the Pilbara electricity networks' (Design Report, 29 March 2018), pp 11 (Design Report).

[5] Department of Treasury, Public Utilities Office, 'Regulatory framework for the Pilbara electricity networks: System operations arrangement' (Detailed Design Consultation Paper, 15 March 2019), pp 1 (DDCP).

[6] Department of Treasury, Public Utilities Office, 'Improving access to, and operation of, the Pilbara electricity network – the North West Interconnected System' (Issues Paper, 14 November 2017), pp 5

The Pilbara's electricity system has evolved in an uncoordinated manner over several decades, and is materially different from that in the south west of the State in several important respects.

The NWIS, which is the primary focus of the Pilbara ISO reforms, presently has no single system operator with legislated powers to undertake a system operator's typical functions and activities, as there is in the SWIS. Each of the three main network service providers (NSPs) is responsible for maintaining system security and reliability on its own network, with no one person responsible for conducting and reporting the findings of post-incident investigations.

Instead, the NSPs collaborate informally and in a relatively ad hoc manner regarding the operation of the system as a whole. As a result, there has been little potential for shared use of common electricity infrastructure to avoid wasteful duplication. This has meant that the cost of electricity supply has been higher, which risks affecting the future economic development of the region.[7]

There are other key differences between the SWIS and the NWIS, for example:

- the NWIS network operators are vertically integrated – meaning that they also generate and sell electricity;
- the NWIS network operators self-supply, which accounts for a significant volume of electricity consumption in the NWIS; and
- there is no established wholesale market for electricity as exists in the south west of the State.

2.3 Recognising the Pilbara context while maintaining regulatory alignment

Australia's electricity and gas sectors generally operate under a uniform statement of policy intent, set out in the national electricity objective (NEO)[8] and the similar national gas objective (NGO),[9] which both focus on the long-term interests of consumers in relation to price, quality, safety, reliability and security of supply of electricity and gas, and (for electricity) on network reliability, safety and security.

To ensure that the Pilbara reforms are guided by the same high-level policy objectives, the Bill inserts a new Pilbara electricity objective, which is a restatement of the NEO in the context of the Pilbara networks (see section 7.1.2):

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[7] Design Report, pp 11.

[8] *National Electricity (South Australia) Act 1996* (SA), s 7: "The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to: (a) price, quality, safety, reliability and security of supply of electricity; and (b) the reliability, safety and security of the national electricity system.". The NEO does not apply in Western Australia. However the ENAC, which governs access to Western Australian electricity networks under Part 8 of the Act, contains an earlier version of the same objective (ENAC s 2.1): "The objective of this Code is to promote the economically efficient: (a) investment in; and (b) operation of and use of, *networks* and *services* of *networks* in Western Australian in order to promote competition in markets upstream and downstream of the networks. The Act also sets out the objectives of the wholesale market in the SWIS, which have a similar effect to the NEO.

[9] See s 23 of the NGL. The NGL and the NGO do apply in Western Australia, under the "Western Australian National Gas Access Law text", having effect under s 7 of the *National Gas Access (WA) Act 2009*.

> "The objective of this Part (the Pilbara electricity objective) is to promote efficient investment in, and efficient operation and use of, services of Pilbara networks for the long-term interests of consumers of electricity in the Pilbara region in relation to —
>
> (a) price, quality, safety, reliability and security of supply of electricity; and
>
> (b) the reliability, safety and security of any interconnected Pilbara system."

Adopting a nationally-consistent objective in this manner helps create a degree of regulatory uniformity and certainty between the Pilbara and other electricity markets in Australia. This assists both industry participants and regulators, which in turn helps to facilitate investment and promote employment growth.

However, although it is prudent to align these regimes with the uniform national objective, it is also important to recognise the unique context within which Pilbara electricity networks operate, when compared with most other Australian electricity networks.

The Pilbara's infrastructure and economy are critical contributors to Western Australia's prosperity. Compared with other regulated networks in Australia and elsewhere, network use in the Pilbara is disproportionately focused on the high-value resources sector, large end-users, vertically-integrated suppliers and significant quantities of self-supply. The Government considers it important to recognise this context in the Bill.

Accordingly, new section 119(3) permits the subordinate instruments to set out matters to which a decision maker must have regard to in determining whether the performance of a function meets the Pilbara electricity objective. New section 119(4) contains a non-exhaustive list of these "have regard to" factors.

This approach will allow the subordinate instruments to emphasise the role the Pilbara resource sector plays in the Western Australian economy, the scale of investment in that industry, and the importance to the resources sector of maintaining a secure and reliable electricity supply. In addition, any matters that are prescribed will not limit the matters which a decision-maker may take into account.

2.4 Network access

2.4.1 Context – the existing Part 8 regime

Existing Part 8 of the Act, and the ENAC made under it, provide for mandatory third party access to certain electricity networks in Western Australia, through a two-step process.

2.4.1.1 Step 1 – Coverage

The first step in the existing regime is a process called "coverage".

Under the existing Part 8, Western Power's SWIS[10] was "covered" by prescription from the ENAC commencement date.[11]

For all other networks the ENAC sets out a formal public process by which the Minister determines whether it is appropriate to compel the NSP to let third party users access the services of its networks, thus opening up competition in the upstream (generation) and downstream (retail) markets served by that network.[12]

The current reforms do not change this coverage process.

2.4.1.2 Step 2 – Full regulation (approved access arrangement)

Part 8 of the Act, and the ENAC made under it, implement a traditional model for providing third party access, including regulation. Under this model, the NSP proposes an access arrangement to the Economic Regulation Authority (ERA) (referred to in the Act and Bill as the Authority) which sets out, among other things,[13] standard terms and prices for access.

The ERA undertakes a comprehensive assessment and formal public consultation process, at the end of which it responds with either an approval of the NSP's proposal, usually as amended following this consultation, or its own modified version of that document. Once approved, the access arrangement guides negotiations and arbitrations for access to covered networks, until the next regulatory reset, which typically occurs every three to five years. The process of preparing, then lodging an access arrangement and going through the formal consultation and approval process will typically take up to two years.

This process is known as "full regulation". It involves considerable up-front cost for the NSP, the ERA, and other stakeholders such as existing and prospective network users, before access negotiations can begin.

At present, when the Minister makes a coverage decision to cover a network, this is the only regulatory option available. However, this form of regulation is considered unnecessarily burdensome for the size, composition and maturity of electricity networks in the Pilbara region.

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[10] Strictly speaking, coverage relates only to the network components of the SWIS, known as the **"**SWIN**"** for South West Interconnected Network, i.e. excluding generation assets and loads. Nothing turns on this distinction, for the purposes of this Memorandum, and for simplicity "SWIS" is used throughout.

[11] Section 3.1 of the ENAC.

[12] Section 3.2 of the ENAC.

[13] An access arrangement will also set out things like an applications and queuing policy, an extension and expansion policy, a policy governing capital and non-capital contributions, and the like – see section 5.1, ENAC as at 23 December 2016

(available < https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a7017_subsidiary.html >).

2.4.2 Light-handed access regime

The Pilbara electricity reforms will create a “light regulation” option for covered Pilbara networks.

2.4.2.1 Overview

The light regulation model is designed to avoid the time and costs associated with full regulation by deferring various issues (e.g. pricing structure and access terms and conditions) from up-front determination by the ERA, to negotiation and, if necessary, arbitration, between the access seeker and NSP.

Light regulation will not be mandatory. It is intended to always allow a covered NSP to choose to remain under full regulation.[14]

2.4.2.2 The PNAC

In place of the ENAC, new Part 8A to be inserted into the Act will empower the Minister to establish, amend or replace a PNAC, broadly mirroring the current ENAC governance arrangements.

The PNAC is discussed in further detail at section 7.2.4 of this Memorandum.

2.4.2.3 A light regulation model

The light regulation model being adopted for Pilbara networks is being adapted from Part 23 of the National Gas Rules (NGR), which was introduced in 2017 to provide a simpler path for access to non-scheme (i.e. not covered) pipelines in Western Australia and elsewhere.

In parallel with the development of the Pilbara electricity reforms, the Minister was considering an application from Alinta Energy for coverage of Horizon Power’s network.[15] Through this process, the Government determined that the current Part 8 full regulatory model may not be fit-for-purpose for Pilbara electricity networks. The proposed new light-handed regulatory framework is intended to balance the need for facilitating open access, whilst minimising the regulatory burden and costs on market participants.

The PNAC will contain a process for NSPs to voluntarily opt-in to light regulation (and subsequently to voluntarily opt-out of light regulation if circumstances change). The effect of opting in will be to protect the network from subsequent coverage applications, i.e. to protect it from full regulation under Part 8 of the Act.

[14] This proposal mirrors NGL s 117, under which the operator of a light regulation pipeline can elect at any time to revert to being fully regulated.

[15] *Coverage of the Horizon Power electricity network in the North West Interconnected* System, 2 February 2018 (Hon. Ben Wyatt MLA, Treasurer; Minister for Finance; Energy; Aboriginal Affairs). Under the ENAC, the Minister’s discretion is limited – if the coverage criteria are satisfied, the Minister must decide in favour of coverage (ENAC section 3.5).

2.5 A Temporary Access Contribution to preserve Horizon Power's financial viability

With the commencement of third party access to Horizon Power's network, it is likely that some of Horizon Power's customers will move from existing market contracts or tariffs to a lower market price (either with Horizon Power or a third party). This will restrict Horizon Power's ability to recover fixed generation costs to which it has already committed, particularly those costs associated with high-cost take-or-pay contracts.

New Part 9B inserts a temporary access charge (TAC) mechanism into the Act to address this. It is modelled closely on the existing tariff equalisation contribution (TEC) mechanism in existing Part 9A of the Act which has operated successfully since 2005.

The TAC relates to those generation costs to which Horizon Power was committed as at 19 August 2019,[16] being:

- costs incurred before that date; plus
- costs to be incurred after that date under commitments made before that date, if those cannot reasonably be avoided by Horizon Power acting as a prudent supplier and seeking to reasonably minimise costs.

To create a level playing field for competition, the TAC will be recoverable from all users of Horizon Power's network, including Horizon Power's own retail business.

The TAC will not recover costs from Alinta Energy's existing customers or customers with dedicated connection points such as Roy Hill. For the avoidance of doubt, the TAC will also not be recovered from networks other than Horizon Power's network in the NWIS. It will not apply to Rio Tinto's network or any islanded network in the Pilbara region.

The TAC will not increase the existing cost of electricity, because the generation costs to be recovered by the TAC are already factored into Horizon Power's cost-reflective tariffs and market contracts. Rather, the TAC is a mechanism to ensure that these costs continue to be recovered, regardless of which retailer supplies the customer. The TAC will do this by, in effect, apportioning the contestable portion of Horizon Power's historical generation costs on Horizon Power's Pilbara network as part of the network charges. Then, if the customer migrates to a new retailer, its pro-rata share of the historical generation costs will migrate with it.

This will ensure that all retailers, new entrants and Horizon Power alike, can compete fairly in the marketplace, and share fairly in the burden of recovering those historical commitments.

TAC payments will only be levied in respect of contestable customers,[17] and so will recover only the contestable proportion of Horizon Power's historical generation costs.

[16] 19 August 2019 is the date on which the Government decided to implement the TAC.

[17] The initial contestability threshold is proposed to be 1,200 megawatt hours per annum from 1 July 2020, which (as with the contestability threshold in the SWIS) will be implemented through a Ministerial Order issued under section 54 of the *Electricity Corporations Act 2005*.

The TAC is intended to be a temporary charge. Government has the flexibility to amend or remove the contribution as market activity improves and new loads come on line, or when Horizon Power's fixed contracts start to expire.

2.6 Independent System Operator

2.6.1 Introduction

The ISO component of the reforms is primarily focussed on the interconnected system centred around Port Hedland and Karratha (defined in new Part 8A as the interconnected Pilbara system, and generally known as the NWIS). The three main NSPs in this interconnected system are Rio Tinto, Horizon Power and Alinta Energy, although BHP, Fortescue Metals Groups (FMG) and others also have small networks linking their operations to this interconnected system.

A Pilbara network may be:

- interconnected with other Pilbara networks, and covered for the purposes of access regulation – an example of this is Horizon Power's covered network in the NWIS, and it is proposed to also cover the Alinta DEWAP network within the NWIS;
- interconnected with other Pilbara networks, but not covered – an example is Rio Tinto's network within the NWIS;
- not interconnected and not covered – for example BHP's, FMG's and Alinta Energy's inland networks; or
- not interconnected, but covered – there are currently none of these.

The Pilbara ISO is proposed to have a smaller role in respect of non-interconnected networks (also known as islanded systems). The Pilbara ISO's functions are summarised in the following table.

	Interconnected	**Not interconnected**
Covered	All ISO functions	Functions necessary to support access, including acquisition of essential system services, independent assessment of access applications, management of technical rules and data collection.
Not Covered	All ISO functions	Limited functions, related to the collection and reporting of information by the ISO.

2.6.2 Pilbara ISO's role in interconnected Pilbara networks (i.e. the NWIS)

2.6.2.1 Introduction – the role of a system operator

Section 2.2 described the general electricity landscape, including the diverse ownership and currently informal and ad hoc operation of the NWIS.

Interconnected systems such as the NWIS and the SWIS operate as a single electrical machine, every part of which (network elements, generators and loads) can influence every other part, almost instantaneously. To operate securely and reliably, an interconnected system needs to be managed, to ensure that voltage, frequency and other technical parameters remain within certain operational bounds, and to respond to faults, outages and other incidents (in the industry, these are collectively called contingencies) as they occur.

For example, if a generator trips off (i.e. disconnects itself from the system in order to protect itself or the system during an equipment failure), voltage and frequency on the system will start to fall. Other generation will need to increase output to fill the gap left by the disconnected generator.[18] Otherwise, the grid can become unstable and blackouts or equipment damage could occur.

Such responses to contingencies involve a mixture of automated systems and human intervention. In many networks, such as the SWIS, a single system operator is tasked with maintaining system security, determining how the automatic response systems should be configured, and making or directing the human interventions as necessary. This operator has the power to direct other system participants, e.g. telling generators to increase or decrease their output, or change their machine settings.

Under current arrangements in the NWIS, there is no single system operator. The individual network operators manage their own networks and have limited or no visibility of what happens on other networks. Given its central geographic location and the composition of its customer base, Horizon Power has to some extent assumed the role of de facto system operator, endeavouring to keep the electricity system operating reliably using both formal and informal agreements. However, it has no direct control over other generators or network operators.

Formalising a role for an independent system operator for the interconnected Pilbara system (Pilbara ISO) will enable a whole-of-system approach to power system operations, and also to other matters such as outage and contingency management, procurement of essential system services (formerly known as ancillary services), and cost allocation and recovery.

2.6.2.2 The regulatory framework

The Pilbara ISO model will be implemented under new Part 8A, Divisions 3 and 6. The ISO will be given the primary function of maintaining and improving system security in the interconnected Pilbara system. Subject to final agreement, it is proposed to appoint AEMO to undertake this role.

[18] The amount of electricity being generated on a grid must always match the amount being consumed. If a generator trips off, there are always two possible responses to restore the balance – increase other generation or reduce load. The former is usually preferred, but the latter (load shedding) can be used as well or instead.

The primary subordinate instrument governing the ISO will be the PNR**.** In addition, the PNR will be supplemented by a new set of harmonised technical rules. The likely content for the PNR has been the subject of considerable detailed design work including extensive industry consultation.[19] This will continue as the PNR are developed and finalised.

For more information on the PNR and the harmonised technical rules (see sections 7.3 and 7.4 respectively).

2.6.3 Recovering the ISO's costs

A central objective of the reforms is to keep to a practical minimum the cost of establishing and operating the Pilbara ISO and associated agencies.

As with the WEM Rules in the SWIS, the PNR will provide for the ISO to run on a not-for-profit, cost-recovery basis, in which system participants bear that cost.

The process for dealing with these costs is intended to be broadly the same as that contained in the WEM Rules, but simplified.

As in the WEM, the ISO will prepare a three-year Allowable Revenue and Forecast Capital Expenditure proposal. This will be subject to ERA oversight. The ERA will be required to ensure that the ISO's planned expenditure is prudent and efficient and designed to achieve the lowest sustainable cost of providing the services in accordance with the Pilbara electricity objective and the PNR. However, to reduce costs, it is proposed that the PNR will provide that ERA approval is automatic if the proposal has the consent of participants.

As the ISO's primary function under the administrative ISO model is system security, from which all system participants benefit, and also because the ISO's operations and costs will occur on a relatively small scale, costs are proposed to be divided equally between the three main NSPs of the main interconnected networks.

2.7 Statutory immunity for the Pilbara ISO and related entities

Division 9 of new Part 8A of the Act establishes an immunity for the Pilbara ISO and other persons who perform functions under the new arrangements. The unique circumstances of the NWIS, particularly the prevalence and significance of mining operations in the Pilbara, have required a different approach than the comparable or corresponding arrangements in the National Electricity Market (NEM) under the National Electricity Law (NEL) and in the SWIS under Part 9 of the Act.

[19] 'Improving access to, and operation of, the Pilbara electricity network – the North West Interconnected System – Issues Paper' (14 November 2017), 'Regulatory framework for the Pilbara electricity networks – Design Consultation Paper' (9 February 2018), 'Regulatory framework for the Pilbara electricity networks: System operations arrangements – Detailed Design Consultation Paper' (15 March 2019).

Copies of these papers and non-confidential stakeholder submissions in response to these papers are available at https://www.wa.gov.au/government/document-collections/pilbara-electricity-reforms. The Government has also conducted extensive group and one-on-one meetings. This consultation will continue through the development of the PNR.

New Division 9 recognises the extent to which the Pilbara ISO will, under the administrative ISO model, perform substantial elements of its functions through delegates, and indeed not just a single delegate, but potentially multiple NSPs and/or other industry participants. Close attention has been given to ensure that the Pilbara ISO, its employees and officers, and also those who assist it in performing those functions, whether they be delegates or contractors, receive the appropriate protections, while at the same time ensuring that those protections do not have unintended consequences or inappropriately disrupt commercial arrangements.

The provisions themselves are described in section 7.9 of this Memorandum. This section sets out the background to immunities generally, some particular issues raised by the Pilbara context, and a high-level description of the approach being taken in Division 9 of new Part 8A.

2.7.1 Statutory immunities in the electricity sector

Statutory immunities are relatively common in the electricity sector. Existing section 126 of the Act provides a statutory immunity to protect the WEM operator and other market participants, and is modelled on similar provisions in the NEL.[20] Both regimes, broadly speaking, protect the system/market operator, and also other entities performing functions under the regime. Both enable the regulations to adjust when persons might be liable, and both allow liability to be capped, with the cap able to be 'sculpted' to suit different circumstances.

2.7.1.1 Summary of the regime

The immunity regime in Division 9 of new Part 8A to be inserted into the Act has been designed as follows:

- the starting point was the existing immunity granted to the AEMO and other SWIS market governance participants in existing section 126 of the Act;
- this was expanded to recognise the greater role to be played in the Pilbara regime by persons to whom the ISO delegates or contracts its functions;
- under new section 120ZD, and as in section 126, the immunity extends to negligent acts for the first 12 months, after which parties can be liable for negligence unless the immunity is reinstated by regulations, and the regulations can impose caps on this liability;
- this basic structure is augmented by a new regulation-making power in new section 120ZC which permits the immunity to be sculpted as necessary, for example to fit within existing commercial arrangements, or to enable complexities to be managed; and
- where an entity is protected, its employees and officers will also be protected.

[20] NEL s 119, see also NEL ss 120-122. The NGL contains a similar immunity: NGL s 91K; see also NGL ss 91BQ, 91BR, and 91FED.

2.7.2 Particular issues for the Pilbara

Three aspects of the Pilbara electricity market make the statutory immunities more complex than in some other jurisdictions.

- First, NSPs are vertically integrated (i.e. they also engage in generation and/or retail businesses), meaning that their commercial relationships are more complex than if they were simply providing network services. An immunity which might appropriately be granted to a network business in certain circumstances, may not be as appropriate in connection with an electricity retail contract. In a vertically-integrated supplier, these two relationships might be combined into a single agreement.

- Second, some Pilbara NSPs are self-supplying, i.e. generating and transporting electricity through their own and others' networks, for self-consumption or consumption by other members of their corporate group. Introducing an immunity into the arrangements through which they transport the electricity through other networks may create similar or different complexities.

- Third, the proposed administrative ISO model, in which most of the ISO's day-to-day activities in maintaining system security are to be delegated to the NSPs, will exacerbate the difficulty of determining when an NSP is acting as an NSP, as the ISO's delegate, or as a retailer. The appropriateness of a statutory immunity may be different in each case.

It is recognised that these reforms are being introduced into an existing contractual landscape, where every contract reflects a negotiated allocation of risks and rewards. Changing the risk allocation by superimposing a statutory immunity may change the commercial balance or value in unexpected or inappropriate ways. Therefore, new section 120ZC allows the immunity to be sculpted to reflect the existing commercial balance where appropriate.

2.8 Impact of these reforms on existing participants

This Bill implements a new regulatory regime over Pilbara networks which are already in operation. Some of the affected networks are operated under State Agreements. The Government has liaised closely with the operators of these networks while preparing this Bill and will continue to do so as it develops the subordinate instruments. The intent is to interfere as little as possible with the existing businesses of these operators.

2.8.1 Grandfathering of technical compliance

In developing the new harmonised technical rules, careful consideration is being given to how the new rules should be applied to existing facilities. There has been considerable stakeholder engagement to date, which will continue as the PNR and harmonised technical rules are developed and finalised. As a result the position described in the following paragraphs remains subject to refinement.

Clearly, changing the compliance requirements after a facility has been commissioned can cause the facility owner to incur additional cost or risk. This should not be done unless there is a clear benefit and even then, it is usually appropriate to grandfather historic requirements applying to the facility for some time.

Importantly, stakeholders generally did not support indefinite grandfathering, when the non-compliances are such as to pose a threat to power system security and reliability and/or to other entities' facilities or operations.

One common mechanism is to provide that a facility is grandfathered until it undergoes major maintenance or an upgrade. However, this can create a perverse incentive against upgrading facilities, if the upgrade could cause an existing exemption to be lost.

Weighing these factors, the current proposal is that the PNR will grandfather existing arrangements for existing connected facilities for five years, after which new or materially upgraded facilities must demonstrate compliance. This approach is considered to provide the optimal balance between compliance and risk to power system security, noting that the risk of non-compliance is primarily borne by the NSP.

However, the grandfathering arrangements will be open to review in less than five years, if the ISO considers that a plant's exemption or non-compliance is jeopardising system security.

After five years, it is proposed that the facility's compliance with the harmonised technical rules will be assessed, and any non-compliances will be dealt with on a case-by-case basis, balancing efficiency and the goal of avoiding unnecessary costs, against the need to ensure system security.

2.8.2 Grandfathering of existing contracts

In addition to technical standards, all Pilbara networks are presently operating within existing commercial arrangements. The NSPs have existing contracts with network users, who in turn have existing contracts with end users or other parties. Except for the smallest end-users, each contract will represent a commercially-negotiated arrangement, including an agreed allocation of responsibilities and risks which will be reflected in the contract's price or other consideration. The general policy intent is to disrupt these existing arrangements as little as possible.

New section 120ZI(1) reflects this intention, establishing the default position that nothing in the PNAC or PNR is intended to affect the operation of, or frustrate, any existing network access contract or electricity supply (or related) agreement.

However, as with previous reforms, such as the introduction of Part 8 and the ENAC (see existing section 106(2)), it may prove necessary to adjust this default position in certain circumstances, for example, if an existing grandfathered contract is presenting an unacceptable barrier to network access (for a covered network) or other implementation of these reforms. Any such changes would be the subject of consultation with affected parties.

2.8.3 State Agreements

The intent of the Bill is to minimise any impact on State Agreement operations, including by making no change to the current coverage determination process or criteria. State Agreement operators have been closely consulted during the development of this Bill.

Should a State Agreement network become covered under existing Part 8 of the Act, its operator will be permitted, but not obliged, to request light regulation under new Part 8A in place of the existing full regulation. Similarly, if a State Agreement operator anticipates a coverage application under existing Part 8, it will be entitled but not obliged to opt-in to light regulation. The NSP will be free to opt-out again, after a minimum period (likely 12 months) (see discussion of new section 120B(f) of the Act, in section 7.2.3 of this Memorandum).

The administrative ISO model of system operation is designed to minimise interference in existing NSP operations, including State Agreement operations. However, interconnected NSPs will be required to adhere to the PNR. An interconnected NSP will retain the right to disconnect from the network at any time should they determine this to be in their best interests.

The ISO arrangements will not hinder the ability of State Agreement proponents to develop new electricity network infrastructure, save for it to be developed in accordance with the technical rules for interconnected or covered networks. Nor will it authorise State Agreement proponents to supply electricity to third parties that they are not authorised to supply under the terms of their State Agreements, except in the limited circumstances of maintaining system stability or responding to emergencies.

2.9 Management of confidential information

This is an important area, in which several competing objectives must be balanced. Not all of the objectives can be fully realised.

Any business will of course wish to protect its commercially sensitive and confidential information wherever possible. This is especially so in the global, high-value and fiercely competitive markets within which many Pilbara energy users compete.

On the other hand, the more transparently information can be shared about Pilbara networks (including matters such as reserve capacity, expansion plans, incident responses, plant capabilities and utilisation), the better equipped the ISO will be to undertake its functions of maintaining and improving system security and facilitating overall network co-ordination and planning. More transparent information sharing will also increase the prospect of achieving the overall Pilbara electricity objective of promoting the long-term interests of Pilbara electricity consumers in relation to price, quality, safety, reliability and security of supply, and network reliability, safety and security.

In an access context, one of the key barriers to access is the information asymmetry between the NSP and the access seeker. However, with vertically integrated NSPs there is a risk that the NSP and access seeker will be competitors in an upstream or downstream market, so access-related information flows, in either direction, may have broader implications in those other markets.

Balancing the need for transparency while respecting confidentiality of information is a challenging aspect of these reforms. However, this is not dissimilar to the challenge faced in other jurisdictions in similar contexts. Publicly available or non-confidential information, data aggregation, and scenario analysis are common approaches to providing useful information for developers and others while still preserving commercial secrets.

Both the PNAC and the PNR will contain provisions dealing with the confidentiality of participants' information, the circumstances in which participants can be compelled to disclose information, and the uses to which that information may then be put. These rules are not yet developed in detail.

Wherever possible, consistent with achieving the reform objectives, including the need for the ISO to build and share effective and accurate models, the intention will be to protect confidential information. There will be detailed consultation with stakeholders as the subsidiary instruments are drafted, to fine-tune the provisions and to balance as far as possible the competing interests noted above.

3. Overview of stand-alone power systems and storage reforms

The Bill also contains amendments related to stand-alone power systems (SPS) and storage devices. An SPS is an electricity supply system that is not physically connected to the grid. The term encompasses both microgrids, which supply electricity to multiple customers, and individual power systems, which relate only to single customers. Storage primarily relates to batteries and their ability to absorb excess energy and release that energy when it is needed to stabilise the electricity system.

3.1 Overview of these amendments

The objective of these amendments is to ensure that Western Power can provide SPS, and that Western Power may exercise a right of entry onto land in relation to an SPS. The amendments are also to enable provisions which, in circumstances to be prescribed by the ENAC:

- permit SPS to be deployed by a network business regulated under the ENAC (including Western Power's network); and

- permit the cost of SPS to be recovered through the regulated network tariffs of that business.

This policy intent will be achieved primarily by amendments to the ENAC. Western Power's ability to deploy SPS will not exist separately from its function of being a network operator in the conventional poles and wires sense. It is the operation of that network which gives rise to the possibility that SPS may be deployed. Western Power's ability to provide SPS is intended to supplement (or, in the words of the Bill, "be an adjunct to")[21] its network operator function and enhance the efficiency with which it can be carried out, not to otherwise exist in its own right.

In terms of third-party access to Western Power's network, the regime established under Part 8 of the Act creates a framework within which access seekers may obtain access to services that are covered by the ENAC. The Bill amends the Act to allow third parties to have access to services provided by SPS, where the ENAC provides that SPS may be treated as part of the covered network. If permitted, an SPS is effectively treated as if it formed part of the covered network even though (by definition) it is not connected to it. However, an access seeker will not be able to apply for coverage of an SPS that is not already being treated as part of an existing covered network.

[21] paragraph (b) of the new definition of "network infrastructure facilities", inserted by the Bill in section 3 of the Act

The Bill also introduces amendments to the Act to facilitate deployment of distribution connected storage devices in the SWIS. The objective of this amendment is similar to those relating to SPS, that is, to ensure that Western Power may provide storage devices deployed within its distribution network, and that the costs of those assets, or a portion of them, are (subject to approval by the ERA in the usual way) able to be recovered through regulated network tariffs under the ENAC.

3.2 Western Power's participation in these new markets

The ENAC is intended to set clear boundaries around when Western Power may provide SPS and provide regulated network services using distribution connected storage devices. The intention is to enable Western Power to operate its existing business efficiently and with a view to providing least cost network services. The intention is not to create new lines of business for Western Power to compete with private sector SPS and storage providers.

To this end, new section 105(1)(cb) will insert a power for the ENAC to manage Western Power's (and, if necessary, Horizon Power's) use of SPS and storage and their participation in these new energy markets.

Importantly, the Government's policy is that Western Power should be enabled and permitted to deploy SPS and storage in response to an identified network need of its primary network business, to reduce network costs and improve the security and reliability of electricity supply to consumers. The Government does not intend that Western Power will look to develop new lines of business in the provision of SPS and storage more generally. It is intended that ENAC provisions made under this new head of power will include, but not necessarily be limited to the following.

a) Restricting provision of storage works to distribution connected storage. The Government does not intend to enable Western Power to deploy transmission connected storage (grid scale storage) as part of its regulated covered network, such that its costs could be recovered through regulated network tariffs.

b) Preventing Western Power from using storage works for other purposes unrelated to the primary purpose of serving a network need. The Government does not intend for Western Power to use storage works for the purposes of participating in the WEM (including in respect of the provision of essential system services or providing retail energy services to customers).

   If Western Power incurs prudent and efficient costs of storage works, but under the ENAC, the ERA will not permit it to recover some part of those costs through regulated tariffs,[22] then it is intended that, without relaxing the policy position described in the previous paragraph, the ENAC will permit Western Power an opportunity to earn a return on that unrecovered investment. This could take the form of leasing the capacity of the distribution connected storage works to retailers or others for the purposes of those other persons providing services to retail customers or participating in the WEM.

[22] This could occur, for example, if the costs in question satisfy the "prudence" test in ENAC section 6.52(a), but do not satisfy one of the "justified" tests in ENAC section 6.52(b).

c) Restrictions to make it clear that power stations deployed to serve large mining loads will not be able to be classified as SPS, even if there is only a single customer and they are not otherwise connected to another network.

d) Imposing requirements and/or conditions in relation to the exercise of powers to access land under the *Energy Operators (Powers) Act 1979* (WA) for the purposes of SPS (see also the section 11.2 of this Memorandum).

e) Imposing any necessary safety requirements in relation to SPS (to the extent such requirements are not addressed within the existing network safety regime under the *Electricity Act 1945* and regulations made under that Act).

These SPS and storage works amendments were primarily developed to enable Western Power to consider and use these technologies as a solution for identified network needs.

Horizon Power's use of stand-alone power systems as part of its everyday business as an integrated provider of an electricity supply to communities and places that are not otherwise connected to the NWIS or SWIS will not be affected by these reforms.

However, given Horizon Power's network in the NWIS will be covered under the new light-handed access regime, the Government did not wish to preclude the possibility of Horizon Power similarly considering the use of SPS as an alternative solution in response to an identified network need on Horizon Power's covered network in an appropriate future circumstance. As a result, the SPS and storage amendments implemented by the Bill are mirrored for Horizon Power, to the extent necessary, to make it clear that adding these powers for Western Power, does not imply that similar powers do not already exist for Horizon Power as a vertically integrated utility.

It is anticipated that the PNAC will not initially make any provision for the treatment of SPS as part of Horizon Power's covered Pilbara network.

Under amendments to be made to the ENAC, the intent is for Western Power to be required to develop a business case for deployment of SPS and storage works for submission to the ERA, as part of the access arrangement revision process. The business case would address available alternatives, including procurement of an SPS or storage works solution to an identified network need from a third party as an operational rather than capital expense. The provision of SPS or storage works by Western Power itself would not be a forgone conclusion but would depend on the business case.

The SPS and storage works amendments to the Act and the more detailed amendments to the ENAC that will follow them, will comprise a substantial but not complete picture of all regulatory changes (to subsidiary legislation) that the Government intends to make in order to ensure the appropriate deployment of these new technologies. Issues relating to safety have been mentioned. Other issues that will be addressed include, but are not limited to:

- the obligations of a NSP to connect certain customers under the *Electricity Industry (Obligation to Connect) Regulations 2005;*

- restrictions on the areas in which Western Power and Synergy may perform their respective functions;
- metering; and
- consumer protections and requirements for customer contracts.

4. Amendments to Part 1 of the Act (Clause 4)

Clause 4

4.1 Definitions moved from Part 8 to section 3

Some of the definitions previously located in Part 8 have been moved to section 3 of the Act, sometimes with consequential or other changes, because they are now also used in Part 8A.

This applies to the following definitions:

- *access*. The definition has also been updated to reflect the fact that the old *Trade Practices Act 1974* (Cth) has been renamed the *Competition and Consumer Act 2010* (Cth) (CCA);

- *Code*. This definition still refers to the *Electricity Networks Access Code 2004* in effect under Part 8 (generally referred to as the ENAC), as distinct from the PNAC to be made under new Part 8A;

- *Competition Principles Agreement;*

- *network infrastructure facilities*. This definition has also been amended under the SPS and storage related amendments; and

- *services.*

4.2 New definitions to facilitate the Pilbara reforms

Section 2 of this Memorandum gives an overview of the Pilbara reforms.

4.2.1 Key concept: Pilbara network

The Pilbara reforms apply to networks located in the Pilbara region. Thus, new definitions are inserted for:

- *Pilbara region*, which adopts the standard definition for this region from Schedule 1 of the *Regional Development Commissions Act 1993* (WA) – being the local government districts of Ashburton, East Pilbara, Port Hedland and Roebourne.

and

- *Pilbara network*, which refers to *network infrastructure facilities* located in the Pilbara. These are the networks to which the new Part 8A of the Act applies.

4.2.2 Key concept: Coverage (covered network)

The concept of coverage already exists in the Act under Part 8, and covered network is already a defined expression in the ENAC, but that expression was not previously defined in the Act.

As discussed in section 2.4.1.1 of this Memorandum, coverage is the process under Part 8 by which the Minister determines that a network should be regulated.[23]

As a matter of drafting convenience, the Bill inserts a new definition of *covered network*, to capture this existing concept. There will now be four ways a network can become covered, which are reflected in the paragraphs of this definition:

- paragraph (a) (existing): Western Power's SWIS was covered by prescription from the commencement of the ENAC – the current reforms do not affect this;

- paragraph (b) (existing): under existing Part 8 and the ENAC, there is a mechanism for a person to apply to the Minister to cover (i.e. regulate) a presently unregulated network, as was done in 2018 for Horizon Power's coastal network. The current reforms do not affect this mechanism, with the exception that the NSP of an uncovered Pilbara network will be able to protect itself against full regulation, by opting-in to light regulation;

- paragraph (c) (new): under new Part 8A to be inserted into the Act, the PNAC will be able to prescribe a network as covered by light regulation from the commencement of the PNAC – this is proposed to be applied to the Alinta DEWAP network; and

- paragraph (d) (new): as noted at section 2.4.2.3 of this Memorandum, the NSP of an uncovered Pilbara network can opt-in to light regulation, thus protecting itself against full regulation.

The Bill also inserts the related definition of *covered Pilbara network*, being a *Pilbara network* (i.e. a network located wholly or partly in the Pilbara) which is a *covered network*.

4.2.3 The two main subordinate instruments

The Bill inserts definitions of the two main new instruments which will give effect to the Pilbara reforms under the new Part 8A to be inserted into the Act:

- the PNAC, which will implement the optional light regulation access regime for covered Pilbara networks; and

- the PNR, which will implement the Pilbara ISO regime, governing the operation, management, security and reliability of (primarily) interconnected Pilbara networks.

[23] Refer to the description under network access in the overview section as to the difference between a full regulation and a light regulation concept.

For comparison with the existing regime in effect for the SWIS, the PNAC fills a role broadly analogous to the ENAC (or Code in the Act) and the PNR fill a role broadly analogous to the system management components of the WEM Rules.

4.2.4 Interpretation: "regulation" of networks means access

Clause 4(4) of the Bill introduces a new clause 3(2) into the Act which clarifies that references to regulation of covered networks and covered Pilbara networks are references to access to the services of those networks. This change is of no substantive effect but simplifies the drafting used throughout the remainder of the Bill.

4.3 New and amended definitions to facilitate the SPS and storage reforms

Section 3 of this Memorandum gives an overview of the SPS and storage reforms.

These amendments introduce two important new concepts, and then make a series of consequential amendments to fit the new concepts into the existing family of definitions in the Act.

4.3.1 Key concept: Stand-alone power system (SPS)

The first new definition to be inserted in section 3 of the Act is *stand-alone power system*. These systems are being increasingly deployed to replace ageing or damaged rural feeder lines. SPS can offer consumers more secure and reliable electricity supply for less than the cost of replacing the poles and wires.

The definition is intended to describe an SPS as an integrated system comprising generation capability (usually a mix of conventional and renewable), a small distribution system and often electricity storage works (for example a lithium-ion battery) for delivering electricity to the customer. Electricity storage works may (and often will) form part of an SPS, but need not be present in order for the system to qualify as an SPS.

Often an SPS installation will serve a single customer, e.g. a rural property. However, the definition allows for the possibility that an SPS might serve a small group of customers. An SPS serving a group of customers might also be called a microgrid, but it has not been necessary to expressly introduce that concept for the purposes of these reforms.

The defining characteristic of an SPS is that it and the customer it supplies is not connected to any other electricity network, other than the customer's own network (i.e. the wires and associated equipment within the customer's premises).

A property with a high degree of energy self-sufficiency, perhaps containing solar PV or other generation and storage, will not be an SPS if it remains connected to the grid, even if it is capable of meeting all of its electricity needs using power generated and stored onsite.

Regulations will prescribe the maximum number of customers that can be served by such a system and still have it classified as an SPS, rather than as a conventional distribution network with generating works. The Government will be able to assess the appropriate setting for an upper-bound on the number of customers to be served by SPS as the need arises.

Fixing the size of an SPS by reference to the number of customers it serves means that, in principle, an SPS could describe an electricity supply arrangement serving a large customer, for example a mining load. It is not intended that Western Power offer services to be provided by SPS in such a circumstance (see also s105(1)(cb) in sections 4.3.3 and 6.2.5 of this Memorandum).

Similarly, although Horizon Power will not be precluded from offering a solution to a mine site, it will not be permitted to classify it as an SPS. These provisions will appear in the ENAC.

4.3.2 Key concept: Storage works

The other new definition to be inserted in section 3 of the Act is *storage works*. This definition is expressed in technology-neutral language, and is capable of capturing all forms of electricity storage including batteries of all types, thermal such as molten salt, pumped hydro, capacitors, hydrogen conversion and reconversion systems, flywheels, and others.

A two-stage approach has been taken, creating a definition that can catch all storage types but not any other facility. Storage works is defined as all apparatus, equipment, etc. which is to be used in connection with a storage activity. An activity will only qualify as a *storage activity* if it comprises all three of the following:

a) receiving energy in the form of electricity;

b) storing the received energy; and

c) discharging the energy as electricity.

Importantly, in the middle step, the energy can be stored in any form, such as chemical (batteries), thermal (molten salt), kinetic (flywheel) and others.

An activity will not be a storage activity unless it comprises *all three* of these stages. Thus, for example, a pumped hydro scheme will involve a storage activity because it involves:

a) receiving electrical energy – the pumps which move the water up to the reservoir;

b) storing that energy in the gravitational potential of the water in the reservoir; and

c) releasing that energy as electricity by running the water down through the hydro generator, and discharging the electricity it generates.

In contrast, a normal elevated water reservoir, into which water is pumped to maintain a town's mains water pressure, will not involve a storage activity because it involves only the first two of these. Similarly, a normal rain-fed hydroelectric scheme will not involve a storage activity because it involves only the last two.

Although a storage activity must comprise all three of receiving, storing and discharging the energy, and hence an assembly of apparatus, equipment etc. will not be storage works unless all three elements of the activity are present, it is not necessary for each individual component to be involved in all three activities. Thus, in a pumped hydro storage facility, the reservoir will form part of the storage works even though it merely stores the energy, and is not itself involved in its receipt or discharge.

Storage works come in all sizes, from small individual battery systems servicing single residences, to very large grid-scale battery (such as the Hornsdale battery in South Australia) or pump hydro systems (such as the Snowy hydroelectric scheme) which can be connected directly to a transmission system. The new definitions are intentionally designed to catch all such facilities, to ensure that the ENAC and PNAC can regulate them adequately as these technologies become increasingly prevalent and important over the next few years, for example, for grid stabilisation, peak management and firming of intermittent renewable power.

The Government does not propose to empower Western Power to engage in the full range of storage activities. Provisions included in the ENAC under new section 105(1)(cb) will be used to limit Western Power's use of storage works to those connected to one of its distribution systems, and only as an adjunct to its traditional poles and wires business. See also the explanation of network infrastructure facilities in section 4.3.3 of this Memorandum.

The immediate policy intention is that the ENAC will permit Western Power to deploy storage works, but only where Western Power can justify that owning the storage works is the least cost, prudent and efficient investment option.

The connection and access framework under the ENAC will be amended to require Western Power to signal distribution network constraints and/or limitations, in conjunction with a demand side engagement strategy and a register of non-network service providers. If a network limitation could necessitate the installation of storage works, Western Power would then be required under the ENAC to undertake a transparent process to procure any necessary network support services to alleviate the constraint in the most least cost, prudent and efficient manner.

The intent of the process under the ENAC is for Western Power to test the market for the appropriate investment option, whether it be a capital investment or non-network solution each time it seeks to make an investment in its network.

4.3.3 Refining "network infrastructure facilities"

The core objective of the SPS and storage amendments is to allow the ENAC and PNAC to deal properly with SPS and storage works.

To do this, it is necessary to regulate:

- whether and how SPS and storage works can form part of a covered network;

- whether and how users (for example, electricity retailers) may access the services provided by SPS and storage works; and

- when and how NSPs' expenditure on SPS and storage may be recovered through network tariffs.

Most of this detail will be set out in amendments to the ENAC for Western Power, and in the PNAC for covered Pilbara networks. It is anticipated that the PNAC will not initially make any provision for the treatment of SPS as part of Horizon Power's covered Pilbara network.

To facilitate the integration of these new technologies, the definition of *network infrastructure facilities* has been amended to include these new technologies when they are used as an adjunct to the conventional poles and wires network.

The previous definition of network infrastructure facilities from existing section 103 of the Act, read as follows:

> "***network infrastructure facilities*** means —
>
> (a) the electrical equipment that is used only in order to transfer electricity to or from an electricity network at the relevant point of connection including any transformers or switchgear at the relevant point or which is installed to support or to provide backup to that electrical equipment as is necessary for that transfer; and
>
> (b) the wires, apparatus, equipment, plant and buildings used to convey, and control the conveyance of, electricity,
>
> which together are operated by a person (a ***network service provider***) for the purpose of transporting electricity from generators of electricity to other electricity networks or to end users of electricity;"

To simplify the drafting, paragraphs (a) and (b) of the original definition have been extracted and used to create a new defined term *electricity infrastructure*. Some minor technical amendments were made in that process to obtain greater consistency across the range of concepts the Act uses in referencing electricity network infrastructure.

This new defined term of *electricity infrastructure* is used in the revised definition of *network infrastructure facilities*, and also in the updated definitions of *distribution system* and *transmission system* (see section 4.3.4 of this Memorandum).

The definition of *network infrastructure facilities* was restructured into two limbs:

a) The first limb, which adopts the new defined term *electricity infrastructure*, and focuses on the use of that infrastructure to transport electricity, is intended to have essentially the same ambit as the original definition in Part 8.

b) The second limb brings in SPS and storage works. Importantly, to qualify as part of network infrastructure facilities, the SPS and storage must be used as an adjunct to electricity infrastructure (e.g. the poles and wires).

The expression “as an adjunct”, in this context, is intended to make it clear that SPS and storage works are not network infrastructure facilities in or of themselves. It is their use in supplementing or enhancing a conventional poles and wires network and, by extension, the services that it provides, that allows them to be included within the scope of network infrastructure facilities.

It is also intended to serve as a marker that the deployment of these technologies by the NSP of a covered network like Western Power is intended to take place as a response to an identified network need. That is, as what is sometimes described as an alternative solution to a network issue. It may also operate to effectively limit or prevent the potential misclassification of power stations built to serve large isolated customers (for example mining loads) as SPS. See also the explanation of new section 105(1)(ca) in section 6.2.5 of this Memorandum.

Having incorporated SPS and storage into the definition of network infrastructure facilities, these assets will automatically be caught by other key definitions (e.g. services, and hence access, and network service provider) and by most of the provisions in Parts 8 and 8A of the Act.

4.3.4 Consequential amendments

Moving the definition of network infrastructure facilities to section 3 of the Act highlighted some inconsistencies of language in various parts of the Act’s definitions. In particular, the definitions of *transmission system* and *distribution system* were slightly different from, but essentially co-extensive with, the second limb of what was originally network infrastructure facilities in Part 8, and is now the first limb of *electricity infrastructure*, when there was no substantive or intended difference between the expressions.[24]

These inconsistencies have been removed. The distinction between things used to transfer electricity in old paragraph (a) of the definition of network infrastructure facilities and to transport (convey) electricity in paragraph (b) was reframed such that what was paragraph (b) now embodies or includes the things used to transfer electricity into and out of a network. The end result is:

- a definition of electricity infrastructure that essentially describes the same class of things that were described in the first two limbs of the old definition of network infrastructure facilities; and

- a new definition of network infrastructure facilities that retains the link between the class of things now described in electricity infrastructure and the purpose for which they are used.

Similarly, the Act in several places used the undefined expression *electricity network* to refer generally to transmission systems and distribution systems. A definition has been added to this effect, to remove possible ambiguity.

[24] For example, the definitions of “transmission system” and “distribution system” omitted a reference to “wires”, despite that being the very essence of these systems.

5. Amendments to Part 2 of the Act (Clauses 5 to 8)

The following amendments to Part 2 of the Act are consequential on the Pilbara reforms.

Clause 5

5.1.1 Amendment to section 11: Authority may determine licence terms and conditions

Section 11(4) of the Act provides that terms and conditions of a licence must not be inconsistent with other terms and conditions in the Act, regulations that apply to the licence or the ENAC.

Clause 5 of the Bill makes a consequential change to this section in the Act to also provide that the terms and conditions of a licence relating to a Pilbara network must not be inconsistent with the PNAC or the PNR, if those instruments apply to the Pilbara network.

Clause 6

5.1.2 Amendment to sections 23 and 24

For consistency with language used in the substantive reforms discussed below, clause 6 of the Bill deletes the redundant word “internet” from the expression “internet website” in sections 23 and 24 of the Act.

Clause 7

5.1.3 Amendment to section 30: Trade practices authorisation

Clause 7 of the Bill updates the reference to the *Trade Practices Act 1974* to refer to the legislation’s current title, the *Competition and Consumer Act 2010*. This is tidying-up and has no substantive effect.

Clause 8

5.1.4 Amendment to section 39A

For consistency with language used in the substantive reforms discussed below, clause 8 of the Bill deletes the redundant word “internet” from the expression “internet website” in section 39A of the Act.

6. Amendments to Part 8 of the Act (Clauses 9 to 18)

The amendments to Part 8 of the Act are consequential upon the new Part 8A reforms. However, some restructuring of provisions has been required as a result of:

- the use of new defined terms, and moving some defined terms to section 3 of the Act; and

- the need to integrate the existing coverage and revocation regime and full regulation regime under Part 8 of the Act, with the new light regulation option for Pilbara networks in Part 8A.

These Pilbara reforms are not changing the coverage or revocation process under existing Part 8, except for minor consequential changes to integrate the existing coverage mechanism with the new form of regulation process to enable a light regulation option for Pilbara networks.

The Pilbara reforms are not changing the current full regulation process under Part 8.

6.1 Amendments to Division 1 – Preliminary

Clause 9

6.1.1 Amendment to section 102: Full regulation

These reforms introduce “light regulation” in new Part 8A of the Act, and as a consequence introduce the expression “full regulation” to describe regulation under existing Part 8. Clause 9 of the Bill amends the purposes of existing Part 8 in section 102 of the Act to insert a reference to full regulation, thus mirroring the reference in new section 119(1)(a) to light regulation (see section 7.1.1 of this Memorandum).

Clause 10

6.1.2 Amendments to definitions in section 103

Clause 10 amends definitions in existing section 103 of the Act.

Section 103 sets out definitions used only in existing Part 8. The introduction of new Part 8A, has meant that some definitions are now used not only in Part 8 but also in Part 8A. Those definitions are being moved to section 3 of the Act (see section 4 of this Memorandum).

Two apparently new definitions are inserted into section 103:

- The definition of *network service provider* was previously embedded in the definition of "network infrastructure facilities". The latter definition has been moved to section 3, but this definition is retained in section 103 to preserve the original scope of this definition (capturing only operators) compared with the broader concept being introduced for "Pilbara network service provider" in Part 8A (capturing owners, operators and controllers – see section 7.1.4 of this Memorandum).

- The definition of *network user* was previously embedded in the definition of "access agreement" in this section. It has been split out for clarity.

Both of these definitions are otherwise unchanged. However, they will now be of slightly different ambit, given the SPS and storage amendments, because both of them directly or indirectly pick up the expanded meaning of "network infrastructure facilities" which now incorporates SPS and storage works when used as an adjunct to providing services (see section 4.3 of this Memorandum).

6.2 Amendments to Division 2 – Establishment of Code

6.2.1 Overview

Division 2 of Part 8 of the Act deals with the establishment, amendment and replacement of the ENAC.

The ENAC will continue to govern the coverage process, and the process for revoking coverage. It will also continue to provide for full regulation of access to services of covered networks.

Division 2 has been restructured, to allow easier integration of the new light regulation regime under new Part 8A of the Act. There are also some consequential amendments arising from the creation of the new Part 8A regime.

Clause 11

6.2.2 Section 104(1) repealed and replaced: Minister to make Code (ENAC)

Clause 11 of the Bill replaces section 104 of the Act with new sections 104, 104A and 104B. Former section 104(1) of the Act, which directs the Minister to establish the ENAC, is retained and renumbered as simply section 104.

Previously, section 104(2) of the Act set out a single list of the ENAC's main subject-matter. This is now split into two lists:

- new section 104A deals with the coverage and revocation process, and also integration between full regulation under Part 8 and light regulation under new Part 8A;

- new section 104B deals with full regulation itself, and contains most of the original list of heads of power from section 104.

The table below shows how the provisions have been repealed and replaced, sometimes with amendments.

Repeal and replacement of former section 104	
Repealed provision	**Replaced by provision**
104(1)	104
104(2)(a)	Not replaced, see discussion below
104(2)(b)	104A(1)
104(2)(c)	104B(a)
104(2)(d)	104B(b)
104(2)(e)	104B(c)
104(2)(f)	104B(d)
104(2)(g)	104B(e)
104(2)(h)(i)	104B(f)
104(2)(h)(ii)	104B(g)
104(2)(h)(iii)	104B(h)
104(h)	104B(i)
104(2)(i)	104B(j)
104(2)(j)	104B(k)
104(2)(k)	104B(l)
104(2)(l)	104B(m)
[There is no 104(2)(m)]	—
104(2)(n)	104B(n)
104(2)(o)	104B(o)
104(3)	104A(3)

6.2.3 New section 104A: Code to provide for coverage of networks

The amendments to previous section 104 of the Act, which are gathered under this new section 104A, are as follows:

- previous section 104(2)(a) has been repealed. This was the provision which allowed the original ENAC to prescribe certain networks as covered from the ENAC's commencement. This was done for Western Power's SWIN. This section is repealed as a matter of convenience. It was spent, and repealing it has no effect on either:

  – the ongoing coverage of the SWIN – this is preserved by paragraph (a) of the definition of "covered network" (see section 4.2.2 of this Memorandum); or

  – the ongoing ability of the Minister, on suitable application, to revoke coverage for the SWIN if the coverage criteria are ever not satisfied – this is preserved by section 104A(1)(b) (see immediately below).

- previous section 104(2)(b) has been retained and restated in a clearer form as new sections 104A(1)(a), (b) and (c). These provisions still deal with the ENAC's process under coverage and revocation of coverage. The language has been simplified to accommodate the use of the new defined term "covered network".

- previous section 104(3) of the Act has been relocated and renumbered as new section 104A(3). It continues to provide that coverage decisions are only reviewable under the existing section 130.

New section 104A(2) determines which of Parts 8 and 8A applies to a covered network. It provides that the default position will be full regulation under Part 8 and the ENAC, unless a form of regulation decision is made under Part 8A that the covered Pilbara network should be lightly regulated under Part 8A. See section 7.2.3 of this Memorandum for a discussion of the form of regulation decision.

As there will be two options for covered Pilbara networks, full regulation and light regulation, the Bill needs to specify how the form of regulation decision will be made under new Part 8A of the Act. New clause 104A(2) provides the groundwork for this decision by providing that full regulation under the ENAC is the default position, unless a form of regulation decision is made which means that covered Pilbara network is lightly regulated under new Part 8A.

New section 104A(4) exists to clarify the position in respect of coverage of SPS for the purpose of access. The first limb of this new section confirms that SPS cannot be subject to coverage on their own. This prohibition reflects the policy intent that access to services provided by SPS under an access regime should only occur where those systems are being regulated together with a significant infrastructure facility that largely consists of the conventional poles and wires network. That is, where services provided by SPS supplement the services provided by the conventional network services.

This intent is confirmed by the second limb of section 104A(4) which makes it clear that SPS may be treated a part of a covered network even though they are, by definition, not physically interconnected with a covered network. This is necessary to ensure that covered network service providers are able and incentivised to consider SPS solutions as an alternative to building poles and wires in appropriate circumstances, and thereafter recovering their costs of doing so through regulated network tariffs. See also the explanation below regarding new section 105(1).

Section 104A(4) is intended to apply in relation to an SPS forming part of a network covered under the ENAC or the PNAC. When the associated larger network is subject to full regulation under the ENAC, access to the SPS services will also be regulated under the ENAC under new section 105(1)(ca) (see section 6.2.5). When the associated network is subject to light regulation under the PNAC, access to the SPS will be regulated in the PNAC, under new section 120C(i) (see section 7.2.4 of this Memorandum).

6.2.4 New section 104B: Code to provide for full regulation of access to services of covered networks

This new section heading preserves but renumbers existing sections 104(2)(c) to (o) of the Act which comprise the list of matters that the ENAC may deal with.

These provisions are preserved unchanged, except for minor consequential amendments to incorporate new defined terms such as “covered network”, and other inconsequential refinements.

Clause 12

6.2.5 Amend section 105 to allow ENAC to regulate SPS and storage

Clause 12 of the Bill makes two amendments to section 105(1) of the Act, which lists other matters the ENAC may deal with.

First, new section 105(1)(ca) sets out an explicit power for the ENAC to deal with access to SPS services. This section is intended to supplement and confirm the ENAC’s ability to regulate access to SPS services when they are taken to form part of a covered network under new section 104A(4), as discussed in section 6.2.3 of this Memorandum.

This new provision supplements and works in conjunction with other heads of power that deal with access to “services” (which is defined to mean services provided by means of “network infrastructure facilities”, which has been amended to include SPS).

In practice it will be licensed retailers who access services provided by SPS, so as to sell the electricity produced by the SPS to the customer (or group of customers) that receive their electricity supply via SPS. Western Power will not be retailing electricity to end use customers.

Access to network services provided by SPS will differ in important ways from the other regular services provided by the covered network. Foremost, to provide the service, the NSP will in effect be undertaking a combination of generation and distribution activities. Amendments to the ENAC (or PNAC if applicable) will be developed to deal with this and other operational aspects of the services provided by SPS.

A retailer's access to services provided by SPS would form part of the arrangements that retailers establish with Western Power under the access arrangement for access to network services more generally. There will be no access to services provided by a single SPS in and of themselves. That is, it will not be possible to make an application for coverage under the ENAC of an SPS in and of itself.

Given the current settings for contestability in retail markets for electricity, it is Synergy (Electricity Generation and Retail Corporation) that will be the likely retailer. Government will consider whether the current arrangements for competition in retail markets for customers who consume more than 50 megawatt hours per annum should include customers who receive their supply of electricity via SPS.

Second, new section 105(1)(cb) will insert a power for the ENAC to manage Western Power's (and, if necessary, Horizon Power's) use of SPS and storage and their participation in these new energy markets, as discussed in section 3.2 of this Memorandum.

6.3 Other amendments to Part 8

Clause 13

6.3.1 Amendment to section 107 (Code is subsidiary legislation)

The language in section 107(6) of the Act is clarified by clause 13 of the Bill to better align the language with the actual disallowance process, by explicitly describing the consequences if the ENAC is partially disallowed by Parliament. This is simply a drafting adjustment. It does not change Parliament's power to wholly or partially disallow the ENAC or any amendment to it.

Clause 14 and 15

6.3.2 Amendments to sections 108 and 111 (Public comment on Code amendment)

Clauses 14 and 15 of the Bill make minor language changes to sections 108 and 111 of the Act to allow for electronic publications and submissions.

Clause 16

6.3.3 Amendments to section 115 (Prohibition on hindering access)

Clause 16 of the Bill makes minor consequential changes to section 115 of the Act to pick up new language, being the defined expression *covered network*, and the language simplification enabled by section 3 of the Act. They do not change its effect.

There is also a minor change to the definition of *associate*, to reflect changes in the Commonwealth *Corporations Act 2001*.

Clause 17

6.3.4 Amendments to section 116 (Limitations on proceedings)

Existing section 116 of the Act provides that certain matters arising under Part 8 can only be dealt with in ways set out in section 116(1).

Section 116(2) is a savings provision, making it clear that subsection (1) does not limit certain rights. Relevantly, subsection (2)(b) preserves a person's right to seek judicial review.

Previous section 116(2) listed certain decision makers whose decisions could be subject to judicial review. However, the policy intention, and probable legal effect, is that judicial review should be available for all Part 8 decisions, whether or not the decision maker was explicitly listed there.

In drafting the corresponding provision in Part 8A (new section 120T(2)(b)), the clause was simplified by not explicitly listing the decision makers whose decisions could be judicially reviewed.

Accordingly, clause 17 of the Bill amends section 116(2)(b) of the Act to bring it into line with new section 120T(2)(b), making it clear that judicial review is available for all decisions under Part 8 as well as Part 8A.

Clause 18

6.3.5 Deleting section 119 and 120

Clause 18 of the Bill deletes sections 119 and 120 of the Act, which were spent transitional provisions dating from the commencement of the Act in 2004.

7. New Part 8A – Pilbara networks (Clause 19)

Clause 19 of the Bill inserts new Part 8A into the Act to deal with light regulation and the Pilbara ISO for Pilbara networks. It has been created by adapting and merging provisions from the existing Part 8 (for access) and existing Part 9 (for systems operations) of the Act. New Part 8A empowers the making of subordinate instruments, including the PNAC, PNR and regulations.

Clause 19

7.1 Division 1 – Preliminary

Division 1 sets out the purpose and objective of Part 8A. Establishing a fit-for-purpose regulatory framework for Pilbara networks is intended to balance the need for facilitating open access, whilst minimising the regulatory burden and costs on market participants. This will enable a more secure and efficient electricity system that will contribute to the future economic development of the Pilbara.

For this reason, a specific Pilbara electricity objective is adopted, along with specific factors that decision makers must have regard to when making decisions in respect of covered Pilbara networks.

7.1.1 New section 119(1) – Purposes of Part 8A

New section 119(1) sets out the purposes of Part 8A.

It sets the scene that Part 8A relates to light regulation of covered Pilbara networks, whereas the equivalent provision in Part 8 relates to full regulation.

As network access regulation is about facilitating third party access and delivering better outcomes for electricity consumers, the purposes of Part 8A are also expressly stated by new section 119(1)(b) to include giving effect to the *Competition Principles Agreement*. This is identical to the equivalent provision for Part 8 of the Act, contained in section 102, save that in new Part 8A it relates to covered Pilbara networks only.

To address the reform objective of enabling a whole-of-system approach to the operation of the power system, outage and contingency management, procurement of essential system services and cost allocation, new section 119(1)(c) sets out a purpose for Part 8A related to operation, management, security and reliability of the interconnected Pilbara system and other Pilbara networks. This purpose relates to the role of the ISO and the implementation of the PNR.

7.1.2 New section 119(2) – The Pilbara electricity objective

New section 119(2) sets out the Pilbara electricity objective. The rationale for the proposed approach to this objective is discussed in section 2.3 of this Memorandum.

This objective reproduces, in the context of the Pilbara electricity networks, the NEO and the very similar NGO, which are uniform statements of policy intent used in both the gas and electricity sectors across Australia, including in Western Australia's gas pipeline access regime.[25]

7.1.3 Recognising the Pilbara context

As discussed in section 2.3 of this Memorandum, Pilbara electricity networks operate within a different context, when compared with most other Australian electricity networks. Accordingly, new section 119(3) permits the subordinate instruments to set out matters to which a decision maker must have regard to in determining whether the performance of a function meets the Pilbara electricity objective.

New section 119(4) contains a non-exhaustive list of "have regard to" factors that may be referenced in the subordinate instruments. The factors recognise the contribution of the Pilbara resources industry to the State's economy, the nature and scale of investment involved in that industry, and the importance to the industry of maintaining a secure and reliable electricity supply.

For example, a regulatory decision maker may find that the security and reliability of supply required by the resources industry might lead NSPs to invest in networks with higher rates of redundancy than might normally be considered efficient in other locations.

Whether this is the case, and what its implications might be for users seeking to access that network (i.e. the extent to which the additional investment should be reflected in the user's tariffs) are matters for the decision maker. New section 119(3) and (4) will not limit the factors a decision maker may take into account, and will not require any particular weighting to be given to the factors or require any particular preference to be given to one set of stakeholders over any other.

7.1.4 New section 120 – Terms used

New section 120 defines terms relevant to the access and system operations arrangements under new Part 8A.

- *interconnected Pilbara network* – Pilbara networks include both interconnected networks and non-interconnected (also known as islanded) networks. This is an important issue for the current reforms, because most of the Pilbara ISO's functions will focus only on interconnected networks (see section 2.6.2 of this Memorandum). At present, the three main interconnected networks are those owned and operated by Rio Tinto, Horizon Power and Alinta Energy, which together form the coastal system known as the NWIS. Other smaller, single-user networks are also interconnected to the NWIS, including those owned by BHP and FMG.

[25] *DBNGP Access Arrangement: 2016-2020 Access Arrangement Period Access Arrangement* Document, 30 June 2016 (Economic Regulation Authority).

- *interconnected Pilbara system* – this is the full electricity system built around an interconnected Pilbara network, including the networks themselves and also all generating works, loads and other facilities. The common name for this system at present is the NWIS.

- *Pilbara access agreement* – when an access seeker obtains access to a covered network, they enter into an access agreement[26] – usually called a network access contract or electricity transfer access contract (ETAC). Under the Act as amended by this Bill:

  – an access contract for a light regulated network under Part 8A and the PNAC will be a Pilbara access agreement as defined here; and

  – an access contract for a full regulated network under Part 8 and the ENAC will be an access agreement as defined in section 103 of the Act.

- *Pilbara electricity objective* – see discussion at section 7.1.2 of this Memorandum.

- *Pilbara ISO* – the independent system operator, the central administrative role for an interconnected network. Subject to finalising arrangements, the Government is considering appointing AEMO to this role.

- *Pilbara network service provider* – a person who owns, operates or controls a Pilbara network. It fulfils the same function in new Part 8A as the existing definition of "network service provider" fills in Part 8, but is expanded to cover persons who own or control a network, not merely those who operate it.

  - The existing Part 8 (section 103) defines "network service provider" as only the operator of the facilities.

  - Expanding the definition to match the NGL and NEL will enable the Pilbara light-handed access regime to deal flexibly with situations in which ownership, operatorship and control do not all vest in the same entity. The PNR will, for example, need to deal seamlessly with a non-hypothetical situation in which networks owned by more than one entity have been brought together for operational convenience, and are being operated as an integrated whole, with contractual and financial arrangements nonetheless preserving the underlying ownership structure.

- *Pilbara network user* – this expression captures any person who is provided with access to services (a broad concept)[27] by a Pilbara network service provider, except the Pilbara ISO.

  - Pilbara network users are the persons, such as electricity retailers and major consumers, who contract for their own power supply, who will benefit directly from access to covered Pilbara networks. This in turn will benefit those users' customers and employees.

[26] Access *agreement* is not to be confused with an access *arrangement* under Part 8, which is the ERA-approved instrument setting out terms and prices for access, and various other matters.

[27] *services* is defined in section 3 of the Act as (a) the transport of electricity, and other services, provided by means of network infrastructure facilities; and (b) services ancillary to those services.

- *Pilbara networks participant* – This broad expression is used as a drafting device in a few places within new Part 8A to describe the full class of persons who will or might need to be regulated, i.e. have rights or obligations imposed upon them by the PNAC (new section 120C(p) or the PNR (new section 120N(2)(d)). This list is comprehensive, but not all Pilbara networks participants will need to be regulated to the same extent. The subordinate instruments such as the PNAC and PNR are under development, so it is not yet possible to determine whether all categories of participant set out in this definition will need to be used in those instruments, either in the initial versions or as they are adapted over time to meet changing circumstances.

    - The breadth of this list, and the consequential potential breadth of the power to make the PNAC and PNR provisions which impact upon these persons, is tempered by several factors.

        1. The power to make subordinate instruments is constrained by the purpose and objects set out in the Act,[28] the Pilbara electricity objective in new section 119(2), and the "have regard to" factors under new sections 119(3) and (4).

        2. Both the PNAC and PNR will undergo extensive consultation during their initial development, and will have formal consultation arrangements in place for any changes to them once they have commenced.[29]

        3. The PNAC and any changes to it are a disallowable instrument, as are the regulations under which the PNR are made.[30]

    - The classes of person caught by this definition, and an indication of why they have been included as persons regarding whom subordinate instruments may need to make provision, are as follows:

        – (a) the Pilbara ISO, (b) a Pilbara network service provider, (k) a registered system participant under the PNR and (h) Pilbara networks users – being the central participants in these Pilbara reforms;

        – (c) to (g) – licensees under this Act holding generation, transmission, distribution, retail or integrated regional licences – these are all participants in the electricity industry, who will be, or might become, or will have several points of interaction with the central participants mentioned in the previous bullet point;

        – (i) and (j) – persons on whom functions are conferred under, or in respect of new Part 8A – clearly, the PNR and PNAC will need to regulate the performance of anyone given such a function; and

        – (l) – any other person (if such exist) upon whom obligations are imposed by the regulations which empower the making of the PNR.

[28] New section 119, Division 2 and Division 3 of Part 8A.

[29] New sections 120J and 120M(b).

[30] New section 120G. New section 120M(c) allows that the regulations may provide for the PNR and changes to the PNR to be tabled in Parliament.

7.2 Division 2 – The Pilbara Networks Access Code (PNAC)

7.2.1 Overview

Division 2 of new Part 8A deals with the establishment, amendment and replacement of the PNAC, and the matters to be provided for and regulated under it. It contains provisions dealing with the legislative status of the PNAC, and its relationship with existing agreements. The PNAC is the key instrument that will govern access to lightly regulated networks and will also contain the process for the form of regulation decision to be made by the Minister as to whether a covered Pilbara network is to be lightly regulated or fully regulated.

7.2.2 New section 120A: Minister to establish Pilbara Networks Access Code

New section 120A empowers the Minister to establish the PNAC to provide for light regulation of covered Pilbara networks, to govern access to those networks and to give effect to the Pilbara electricity objective.

It creates a direct link between the provisions that follow which empower and define the PNAC, and the high-level purposes and objective set out at the beginning of Part 8A, being both:

- the purposes in new sections 119(1)(a) and (b); and
- the Pilbara electricity objective in new section 119(2).

7.2.3 New section 120B: Pilbara Networks Access Code – covered Pilbara networks (establishing light regulation)

New sections 120B and 120C broadly mirror new sections 104A and 104B, discussed at sections 6.2.3 and 6.2.4 of this Memorandum. The first provision in each case deals with the provisions which set up regulation for the network, and the second deals with the content of, respectively, the ENAC and the PNAC.

A key aspect of the PNAC in this regard is that it will enable and guide the Minister's form of regulation decision, which will determine whether a covered Pilbara network is to be fully regulated under Part 8 and the ENAC, or light regulated under new Part 8A and the PNAC.

Accordingly, new section 120B contains a list of matters to be included in the PNAC dealing with how light regulation is to be applied and removed from a network, and the consequences.

- Paragraph (a) contains a one-off mechanism for the PNAC to prescribe networks which are to be light regulated from the PNAC's commencement. This is modelled on previous section 104(1)(a) in Part 8 of the Act (the repeal of which is discussed at section 6.2.2 of this Memorandum). The PNAC will only prescribe the Alinta DEWAP network to be light regulated from commencement. This network will join Horizon Power's network which was covered by Ministerial decision in 2018, as the only covered Pilbara networks at the commencement of these reforms. For all other Pilbara networks, the Ministerial coverage process under existing Part 8 of the Act will continue to apply unchanged.

- Paragraphs (b) and (c) empower the ENAC provisions which set out the process and machinery for the Minister's form of regulation decision to determine whether a covered Pilbara network is to be light or full regulated, including the matters the Minister is to consider and the criteria he or she is to apply.

- Paragraph (d) empowers a process for NSPs to be able to voluntarily opt-in to light regulation under the PNAC. It is proposed that opting-in can only be done in respect of Pilbara networks that are not already covered and are not subject to a coverage application. The effect of opting-in will be to protect the network from subsequent coverage applications, i.e. to protect it from full regulation under Part 8 of the Act.[31]

- Paragraph (e) empowers the PNAC to regulate how such an NSP might voluntarily opt back out of light regulation. Any prerequisites for opting-out should be kept to a minimum, lest they act as a deterrent to opting-in in the first place. It is presently proposed that the only prerequisite will be a minimum period after opting-in before an NSP can opt-out again, initially proposed to be 12 months.

- Paragraphs (f) to (h) empower machinery and transitional provisions to deal with networks changing from light to full regulated and vice versa, opting-in and out of light regulation, and generally managing how matters and things are to be handed over between Part 8 and new Part 8A. For example, a provision will be needed to deal with a situation in which a network opts-out of light regulation while an access application is being considered, or in the event that a covered NSP applies for light regulation, while a full regulation access arrangement approval is underway. Not all possible permutations are equally likely.

The Pilbara reforms are not changing the coverage process under Part 8 of the Act, except for minor consequential changes to integrate the existing coverage mechanism with the new form of regulation process to accommodate light regulation of Pilbara networks. The form of regulation decision only determines whether a Pilbara network, which is a covered network, is to remain as fully regulated under the ENAC (this is the default position) or is to be lightly regulated under the PNAC. Full regulation under the ENAC is not changed by these reforms.

[31] PNAC provisions made under section 120B(f)(iii), and consequential amendments to the ENAC made under section 120F(1), will provide this protection.

7.2.4 New section 120C: Pilbara Networks Access Code – light regulation

If a covered Pilbara network is light regulated, the PNAC will then govern access to that network. As discussed above (section 2.4.2 of this Memorandum), the regime which will be created in the PNAC is adapted from Part 23 of the NGR.

Light regulation removes some or all of the up-front approval process associated with full regulation. Arbitration plays a broader regulatory role (if required) in determining matters that would have been determined up-front in a full regulation regime. The main benefit of this model is the reduced up-front investment in time and resources compared with full regulation. The light regulation regime includes transparency measures to enable parties to better predict how an arbitrator is likely to decide should negotiations fail. The light regulation regime also provides guidance to the parties and, if necessary, the arbitrator on pricing. The dispute resolution regime is adapted from Part 23 of the NGR.

New section 120C provides the various heads of power for the light regulation regime in the PNAC. It is modelled on the existing heads of power in section 104 of the Act (now renumbered section 104B), adapted for the light regulation regime.

Paragraph (a) provides for access to light regulation networks in accordance with negotiated access agreements (access contracts, or ETACs) or arbitral determinations, reflecting the standard approach to access regulation used across Australia in both the full regulation and light regulation models.

Paragraph (b) ensures that access contracts do not displace the Pilbara ISO's powers.

Paragraphs (c) and (d) empower provisions to be made in the PNAC on pricing arrangements. The Government's current intention based on stakeholder consultation is for the PNAC to provide for the following pricing arrangements.

- Covered NSPs will use a set of pricing principles to develop a building block cost of service model to determine target revenue for their regulated network and a tariff-setting methodology to determine how this revenue will be recovered.

- Pricing will be guided by revenue and pricing principles modelled on those in the national gas and electricity legislation.

- In terms of setting the initial Regulatory Asset Base (RAB), a key component in price setting:

    - Horizon Power's initial RAB will be prescribed in the PNAC; and

    - for other covered networks, the NSP will determine the RAB in accordance with specific principles and parameters set out in the PNAC and designed to lead to an objectively reasonable value, and this RAB will be able to be challenged before an arbitrator in an access dispute.

- In terms of setting the rate of return, another key pricing input:
    - the ERA will determine the weighted average cost of capital for Horizon Power's network in the NWIS and the Alinta DEWAP network for the first pricing period – the PNAC will prescribe factors the ERA must consider, including relevant parts of the ERA's current rate of return guideline for gas pipelines; and
    - for all other networks, and for Alinta and Horizon Power networks after the first pricing period, the rate of return is to be determined by the NSP (considering the same factors as the ERA) and able to be reviewed by the arbitrator in a dispute.
- In terms of the tariff-setting methodology, the PNAC is intended to provide that:
    - an NSP must develop and publish a tariff setting methodology, which it must use to derive a price list. It is intended to require an NSP to review its tariff-setting methodology every five years or less; and
    - covered Pilbara networks will be required to set their standard prices on the assumptions that all users are paying the standard price.

Paragraph (e) empowers provisions to be made in the PNAC to set out the negotiation framework. The Government's current intention based on stakeholder consultation is for the PNAC to provide for provisions to be adapted from Part 23 of the NGR and provide for:

- access applications – how an access request is to be presented and when and how further information or investigations are to be conducted;
- access offers – matters such as details an access offer must contain, a prescribed period of time within which an offer must be made, and the circumstances when an NSP is, or is not, required to make an access offer; and
- negotiations – matters such as disclosure and use of confidential information, and a duty on both parties to negotiate in good faith.

Paragraph (f) empowers provisions to be made in the PNAC on the duties and requirements in relation to the provisions of access to services that are to be complied with by an NSP.

Transparency requirements are outlined in paragraph (g). The clause empowers provisions to be made in the PNAC requiring NSPs to develop and publish information. The Government's current intention based on stakeholder consultation is for the PNAC to provide for positions adapted from Part 23 of the NGR, including requirements for an NSP to prepare and publish the following information to facilitate timely and effective commercial negotiations:

- information about the network, including technical constraints and policies that may affect access or use of the network;
- standard terms and pricing, the pricing methodology and policies and information underpinning the prices;

- financial information about each of its light regulation networks for the financial year;

- a network development policy – an important instrument setting out such things as planning standards, the NSP's policies regarding capital and non-capital contributions, its extensions and expansions policy, and the rules for determining when new capital expenditure may be added to the RAB; and

- a user access guide outlining procedures for seeking access.

Paragraph (h) deals with the circumstances in which different users may pay different prices.

Paragraph (i) mirrors new section 105(1)(ca) (see section 6.2.5 of this Memorandum), and is inserted to ensure that there is no doubt that the PNAC may regulate access to SPS.

Paragraph (j) empowers provisions to be made in the PNAC to set out the dispute resolution framework. The Government's current intention, based on stakeholder consultation, is for the PNAC to provide for the following positions:

- the arbitrator will be selected from a pool by agreement between the parties, and failing agreement, will be appointed by the ERA;

- there will be scope for other parties to join an access dispute if their interests are directly affected, but in general, disputes will be restricted to two parties;

- the arbitrator must resolve the dispute with as little formality and technicality, and as much expedition, as the regulatory framework and the specific dispute permits;

- the arbitrator may refer the dispute to meditation;

- there is an expediated process for queuing disputes;

- past decisions will not be binding, but an arbitrator must have regard to relevant aspects of past decisions and make an explicit decision whether to follow or depart from it, having regard to the desirability of promoting predictability in the regulatory outcomes;

- arbitration will generally be in private, but the final determination will be made public, redacted to preserve the parties' confidential information;

- a final access determination is binding on the parties, although an applicant may elect not to enter into an access contract as specified by the final determination;

- costs of arbitration will be at the discretion of the arbitrator;

- the arbitrator may terminate a vexatious claim early, and without making a determination; and

- the regime will apply to access disputes, not contract disputes. Contract disputes will be dealt with by whatever means the contract prescribes.

Paragraph (k) confers functions on the ERA, including:

- subparagraph (i) – supervisory and other functions for the purposes of the PNAC, which is intended to be used to confer the function of administering the pool of arbitrators;

- subparagraph (ii) – the function of determining requirements (including prices and terms) in relation to access to services, which is intended to be used to confer the function of determining the initial weighted average cost of capital for the Alinta DEWAP and Horizon Power networks; and

- subparagraph (iii) – the issuing of guidelines, which is intended to be used to issue financial reporting guidelines.

Paragraph (l) provides for an obligation of Pilbara network participants to comply with guidelines issued by the ERA.

Paragraphs (m) to (o) empower provisions to be made in the PNAC to set out ringfencing arrangements and for the ERA to approve such arrangements. The PNAC will outline the ringfencing objectives, which have the purpose of preventing NSPs from acting in an anti-competitive manner.

The Government's current intention based on stakeholder consultation is for the PNAC to provide for the following positions:

- NSPs will propose ringfencing rules to the ERA which address the ringfencing objectives;

- the ERA will approve the NSP's ringfencing rules if they effectively address the ringfencing objective, or not approve the NSPs ringfencing rules if they do not effectively address the ringfencing objective. The ERA may suggest amendments to the ringfencing rules, having regard to the potential harm the ringfencing rules are intended to address and the costs likely to be incurred by the NSP imposing a ringfencing rule;

- an NSP must establish a compliance monitoring and reporting regime; and

- a suspected breach of the ringfencing rules is to be reported to the ERA, which may make a determination that the NSP review and submit revised ringfencing rules.

Paragraph (p) empowers the PNAC to confer rights and impose obligations on Pilbara network participants.

Paragraph (q) deals with confidential or commercially sensitive information, which is discussed separately (see section 2.9 of this Memorandum).

Finally, paragraphs (r) to (u) empower various machinery and administrative provisions. They are modelled closely on existing sections 104(2)(n) and 104(2)(d) (to be renumbered sections 104B(n) and 104B(b) respectively) and section 105(d) in Part 8. These relate to the following:

- paragraph (r) empowers the PNAC to confer functions relating to access on the Minister and the Pilbara ISO;

- paragraph (s) deals with the recovery of costs for functions conferred on the ERA or the Pilbara ISO by the PNAC;

- paragraph (t) allows the PNAC to provide for the relationship between the Minister, or another Minister, and a Pilbara network participant in respect to performance of functions conferred by the PNAC; and

- paragraph (u) empowers the PNAC to provide for the regulation of other matters, including matters which are savings, transitional or supplementary in nature.

7.2.5 New section 120D: Additional matters for Pilbara Networks Access Code and other instruments

New section 120D fulfils a similar function to section 105 in Part 8, by providing for various additional matters the regulations or the PNAC may address.

Subsection 120D(1) is intended to protect stakeholders by making sure that where the PNAC requires information to be given, compliance with this obligation will not expose the provider to any claim or liability. Almost all commercial contracts contain confidentiality regimes, and almost all of these include exemptions dealing with a situation where a person is required by law to disclose information. However, because there will already be existing contractual arrangements in place at the time the PNAC commences, it is possible that the information disclosure requirements of the PNAC would cause an issue for confidentiality regimes under those contracts.

It is also important that the new regime can work as designed without being hampered by legacy contractual provisions which may include confidentiality provisions that would be breached by the disclosing or use of information in accordance with the PNAC. For this reason, new subsection 120D(1) provides that regulations or the PNAC may provide that disclosure or use of confidential or commercially sensitive information regulated by the PNAC will not result in civil or criminal liability and will not result in any breach of duty, professional ethics or standards or unprofessional conduct.

The Government is, however, aware of the need to ensure that confidential and commercially sensitive information is handled carefully, and that competing interests are weighed before information is disclosed (see section 7.3.5 of this Memorandum).

The electricity industry operates under a large number of rules, codes and standards. New subsection 120D(2) provides the power for the regulations, the PNAC or any instrument made under them to adopt any document or writing in effect or existing when the regulations, the PNAC or any other instrument made under them comes into existence. This provision is modelled on section 48(4) of the Act, and would, for example, allow the PNAC to adopt instruments developed under the ENAC, NGL or the NEL.

New subsection 120D(3) empowers the regulations or the PNAC to provide for a cost recovery methodology for functions under the regulations or the PNAC. It is modelled on existing section 124(4).

New subsection 120D(4) prevents decisions made under the PNAC from being challenged or reviewed through the normal judicial process, requiring instead that decisions are challenged or reviewed through the specialist merits review regime in section 130 of the Act. This is modelled on the current section 104(3) of the Act (new section 104A(3)), and is designed to align the merits review regimes across existing Part 8 and new Part 8A.

New subsection 120D(5) provides for the Minister to determine by order published in the *Gazette* how things in progress before commencement of the PNAC are to be treated. This standard transitional mechanism is modelled on existing section 105(2) of the Act, and will, for example, enable Horizon Power's covered network to be transitioned from regulation under the ENAC (as now) to light regulation under the PNAC.

7.2.6 New section 120E: Additional matters for Pilbara Networks Access Code: more than one provider for network

During consultation, stakeholders requested that the Pilbara regime include language similar to that found in the NGL and NEL, which enables the regime to deal with situations where assets may be owned and operated by different members of a corporate group, or where assets under different ownership are operated in an integrated manner.

New section 120E recognises that there may be multiple NSPs and allows for an NSP to act on behalf of another NSP with consent, and for things done or omitted to be done by one NSP to be attributed to another NSP in relation to the relevant network. It is similar to section 10 of the NGL. The PNAC will provide the framework within which NSPs can publish this allocation of roles.

7.2.7 New section 120F: Consequential amendments to the Code (ENAC)

As the existing coverage process will remain unchanged but covered networks may, in the case of Pilbara networks, be governed by the PNAC following a form of regulation decision, it is necessary to make some consequential changes to the ENAC to recognise this. There is also the possibility that a covered Pilbara network will need to transition from full to light regulation, or vice versa, and some transitional provisions in the ENAC to recognise this will be needed. New section 120F allows these necessary consequential amendments to be made to the ENAC.

The new section excludes these consequential amendments from having to undergo the public comment process usually required for amendments to the ENAC in sections 108 and 109 of the Act. This is because the only amendments being made to the ENAC through this process are as a result of incorporating the creation of a light regulation regime. Stakeholders will be consulted throughout the development of the PNAC, including on these consequential changes.

7.2.8 New section 120G: Pilbara Networks Access Code is subsidiary legislation

The PNAC, like the ENAC, will be subsidiary legislation for the purposes of the *Interpretation Act 1984* (WA) and will be a disallowable instrument, meaning that Parliament may disallow the PNAC or an amendment, within a defined period after it is made. This new section is modelled on section 107 of the Act, which is the equivalent process for the ENAC.

7.2.9 New section 120H: Public comment on amendment or replacement of Pilbara Networks Access Code

New section 120H provides the process by which the Minister can exercise power to make amendments to, or repeal or replace the PNAC, and provides for a process of public consultation. This new section is modelled on existing section 108 of the Act and so follows the same process for amendment, repeal or replacement as the ENAC.

7.2.10 New section 120I: Exception to 120H

As with Part 8, an exception to the public consultation process in new section 120H is available if the proposed amendment is of a minor nature or required to be made urgently. However, if this expedited process is used, there must be an alternative consultation process as soon as practicable after the amendment comes into force. This new section is modelled on existing section 109 of the Act and follows the equivalent process for the ENAC.

7.2.11 New section 120J: Consultation with network service providers on amendment or replacement of Pilbara Networks Access Code

Under new section 120J, there is an additional requirement to consult with an NSP when that NSP will be affected by the proposed amendment or replacement of the PNAC. The NSP can make submissions. This new section is modelled on section 110 of the Act which is the equivalent process for the ENAC.

7.3 Division 3 – Pilbara networks rules

The PNR will apply to any interconnected Pilbara system and regulations may also prescribe that the PNR can apply to other covered Pilbara networks and uncovered Pilbara networks that are not part of an interconnected system.

The PNR will set up the ISO model and the ISO functions. The administrative ISO model adopted is intended to meet the core objectives of these reforms in a least cost and least intervention manner, whilst improving the transparency across the operation of the interconnected Pilbara system. The ISO's primary function is to maintain and improve system security.

The PNR will include technical rules which describe the technical performance requirements of the power system and the obligations of the NSP to provide transmission and distribution systems that will allow these requirements to be achieved.

If harmonisation between different sets of current technical rules is not possible, there will be a minimum standard or automatic standard mechanism as exists currently in the WEM Rules.

This division provides for the regulations to establish the PNR and for matters to be provided for and regulated under the PNR. It contains provisions dealing with the legislative status of the PNR, and amendments to and replacement of the PNR.

7.3.1 New section 120K: Regulations to provide for Pilbara networks rules

The regulations will provide for the establishment of the initial PNR, and the PNR will set out or deal with the matters prescribed by the regulations. This is the approach adopted in Part 9 for the WEM Rules.

New section 120K creates a layered approach to the implementation and application of the PNR.

- New section 120K(1) sets out the main focus of the PNR, namely the operation, management, security and reliability of the interconnected Pilbara system (i.e. the NWIS).

- New section 120K(2) provides for the PNR to extend to deal with these matters in respect of a Pilbara network which are covered but not interconnected. There are currently no networks in this category.

- Finally, for Pilbara networks that are neither interconnected nor covered, new section 120K(3) will provide that the PNR may provide for matters within the Pilbara ISO's limited functions in respect of such networks under new section 120W(4)(d), and for NSPs' obligations to provide information and otherwise assist in connection with those functions.

7.3.2 New section 120L: Pilbara networks rules not subsidiary legislation

The PNR will not be subsidiary legislation for the purposes of the *Interpretation Act 1984* (WA) and cannot be disallowed by Parliament under section 42 of that Act.

7.3.3 New section 120M: Establishment and amendment of Pilbara networks rules

New section 120M provides for regulations to deal with the establishment, amendment or repeal and replacement of the PNR, and is modelled on section 123(4) of the Act, which is the equivalent provision for the WEM Rules.

7.3.4 New section 120N: General matters to be dealt with in regulations

The purpose of the PNR is to assist in achieving the Pilbara electricity objective. New section 120N contains a non-exhaustive list of matters that may be included in the PNR which includes conferring authority of various decision makers.

As with the WEM Rules under existing Part 9 of the Act, this new section provides broad empowering provisions, but the detail of the ISO arrangements will be set out in the PNR, and on occasion in the regulations.

Categories that may be covered by the PNR include:

- operational matters, including metering equipment;
- disclosure of information; and
- cost recovery and allocation.

7.3.5 New section 120O: Additional matters to be dealt with in regulations or rules

This new section provides for additional matters for the regulations or the PNR.

New subsection 120O(1) provides for a registration regime for system participants. Unlike in the WEM Rules under existing Part 9, in which all generators and wholesale market customers must register, the Government's current intention is that registration be limited to just NSPs.

New subsection 120O(2) empowers the regulations or the PNR to provide that disclosure or use of confidential or commercially sensitive information regulated by the PNR will not result in civil or criminal liability and will not result in any breach of duty, professional ethics or standards or unprofessional conduct.

As with the equivalent provision in relation to the PNAC in new subsection 120D(1), this is necessary to enable the new regime to work, without being hampered by legacy contractual provisions restricting the flow of information. However, the detail of these provisions will be considered further by the Government in consultation with stakeholders, recognising the sensitivity of commercial confidential information (see further discussion in section 2.9 of this Memorandum).

It may be necessary for the PNR to adopt external rules, codes or standards, for example, developed under the NGL, NEL or the ENAC. New subsection 120O(3) empowers the PNR to adopt or incorporate other documents or writing in effect or existing when the regulations, the PNR or any other instrument made under them comes into operation.

New subsection 120O(4) empowers the regulations to provide for a cost recovery methodology as discussed in section 2.6.3 of this Memorandum.

New subsection 120O(5) provides for the Minister to determine by order published in the *Gazette* how things in progress before commencement of the PNR are to be treated. This standard transitional mechanism is modelled on section 105(2) in the Act.

7.3.6 New section 120P: Additional matters to be dealt with in rules: more than one provider

Similar to new section 120E, new section 120P deals with the situation where a network may have more than one owner or operator. Stakeholders requested that the Pilbara regime include language similar to that found in the NGL and NEL, which enables the regime to deal with situations where assets may be owned and operated by different members of a corporate group, or where assets under different ownership are operated in an integrated manner.

The new section allows for an NSP to do something on behalf of another NSP with consent and for acts or omissions by one NSP to be attributed to another NSP. The PNR will then provide the framework within which NSPs can publish this allocation of roles.

7.4 Division 4 – Pilbara networks technical rules

An important design element of the Pilbara reforms is to establish uniform, agreed rules to apply to both covered and uncovered networks to be implemented and managed by the ISO.

This division empowers regulations to provide for the making, formulation and approval of the technical rules.

7.4.1 New section 120Q: Technical rules

The harmonised technical rules are intended to apply across the interconnected Pilbara network. The rules will not apply to non-covered non-interconnected (islanded) networks. This new section contains a single head of power creating technical rules for both the PNAC and PNR, and differs from the approach in the SWIS where technical rules are dealt with solely as an ENAC matter under Part 8 (currently section 104(2)(l)), and then referenced by the WEM Rules as necessary.

The intention is that these harmonised technical rules will form part of the PNR, but they will also apply in relation to access (PNAC) matters where necessary.

7.5 Division 5 – Enforcement

Division 5 deals with matters relating to compliance and enforcement of the PNAC and the PNR. It is modelled on the equivalent provisions in Part 8 of the Act in relation to the ENAC.

Like any legislation creating a regulatory regime, an enforcement regime comprising civil penalties and other enforcement powers is necessary and desirable – a statutory regime without an enforcement mechanism is of little practical benefit.

However, as the Pilbara is currently operating on the basis of existing relationships between NSPs and some limited operational agreements, the Government is not intending to impose a heavy-handed compliance and enforcement regime. It is therefore proposed that the initial PNR will not contain a civil penalty enforcement regime, but this will be closely monitored and such a regime may be recommended in the future if it appears necessary and justified.

7.5.1 New section 120R: References to contravening the regulations, Pilbara Networks Access Code or Pilbara networks rules

This new section clarifies the circumstances in which a person will be deemed to have contravened the regulations, PNAC or PNR. It extends liability beyond actual contravention, to include attempting, aiding and/or inducing contravention. This new section is modelled on existing section 114 of the Act.

7.5.2 New section 120S: Prohibitions on hindering or preventing access

This new section provides for penalties where an NSP of a covered Pilbara network, or an associate of the NSP, engages in conduct for the purpose of hindering or preventing access by another person. The same penalty applies to a person who has access to services, or an associate of that person, who engages in conduct for the purpose of hindering or preventing access by another person to services. This new section is modelled on existing section 115 of the Act.

7.5.3 New section 120T: Proceedings

This new section provides that civil proceedings cannot be brought in respect of a matter arising under the PNAC except in accordance with the regulations, by arbitration under the PNAC, or in accordance with section 130. This new section is modelled on existing section 116 of the Act.

7.5.4 New section 120U: Criminal proceedings do not lie

This new section provides that criminal proceedings do not lie against a person by reason only that the person has contravened a provision of the PNAC. This new section is modelled on existing section 117 of the Act.

7.5.5 New section 120V: Regulations as to enforcement of Pilbara Networks Access Code and Pilbara networks rules

New section 120V empowers the regulations to prescribe all matters that are necessary or convenient for the enforcement of the PNAC and PNR. This new section merges existing section 118 in Part 8 of the Act, which deals with enforcement of the ENAC, and existing sections 124(2)(h)-(m) in Part 9 of the Act, which deals with enforcement of the WEM Rules.

7.6 Division 6 – Independent system operator

Division 6 deals with the establishment, appointment and functions of the ISO.

The Government's current intention is that the key aspects of the administrative ISO model will be as below:

- the primary function of the ISO is to maintain and improve system security;
- the ISO will be provided with statutory immunity, as is provided to AEMO under the Act as the system management participant for the SWIS;
- responsibility for system reliability will remain with the NSPs;
- there will be a transparent cost allocation methodology to allow costs associated with the ISO to be recovered from system participants;
- the ISO will not have real-time visibility of the power system, which precludes real-time intervention to manage contingency or emergency events. The ISO will not dispatch essential system services;
- there will be an operational framework and protocol for emergencies;
- the ISO will be able to delegate its functions and responsibilities to NSPs;
- the ISO will have a direct relationship with NSPs through a registration process, but will not have a direct relationship with generators or loads; and
- the ISO will conduct post-incident reviews to assist with continuous improvement with a view to maximising the effectiveness of power system operations.

7.6.1 New section 120W: Independent system operator

7.6.1.1 The ISO's functions

New section 120W establishes the role of the Pilbara ISO and prescribes the ISO's functions (section 120W(4)) as being:

- paragraph (a): to maintain and improve system security in any interconnected Pilbara system (currently, the NWIS);
- paragraph (b): to facilitate overall network co-ordination and planning for interconnected Pilbara systems;
- paragraph (c): any function it may be given under new Part 8A in relation to covered Pilbara networks (interconnected or not); and
- paragraph (d): certain limited functions in respect of non-covered and non-interconnected Pilbara networks, namely:
    - collecting and considering information relating to network operation, management security and reliability; and

- reporting or publishing that information.

This describes a three-tier model for the ISO's role. Its primary focus is on interconnected Pilbara networks; it has a secondary role in connection with covered networks; and it has an information-gathering and dissemination role in respect of non-covered and non-interconnected (i.e. islanded) networks.

The ISO's functions do not refer to power system reliability, which is to remain the responsibility of NSPs.

7.6.1.2 Possible interim ISO

New section 120W(3) permits Horizon Power to be given an interim role as Pilbara ISO. This power may be used if the long-term appointee to that role, currently intended to be the AEMO, is not yet ready to take up the role.

Section 120W(3) is necessary because Horizon Power, as a statutory corporation, can only do things for which it has been given a suitable statutory function.

The Government's present intention is that Horizon Power would only be named as the interim ISO:

- in the unlikely event that the AEMO chooses not to accept the role; or
- if more time is needed to establish the PNR and allow AEMO to become operational in the role.

However, with the current intention being for the PNR to commence on 1 July 2020, the Government does not anticipate that an interim ISO is likely to be needed.

If Horizon Power were to be appointed interim ISO, then:

- additional ringfencing measures would be needed to keep the ISO functions separate from the rest of Horizon Power's business;
- it would be given only the minimum necessary set of functions; and
- the duration of the appointment would be limited to the minimum reasonably necessary to secure a full-time, independent ISO.

7.6.2 New section 120X: Regulations relating to Pilbara ISO

This new section authorises the regulations, PNAC or PNR to permit the ISO to delegate the performance its functions, and to regulate that process.

Under the administrative ISO model, it is proposed that the ISO should delegate its system security function to NSPs or other entities in all normal and most emergency situations. The precise nature of this regime, and hence the delegations it will require, remains to be developed.

The ISO, but not a delegate, may permit one further level of sub-delegation. Thus, for example, the ISO could delegate to an NSP the performance of a function relating to system black start, and the NSP could sub-delegate the performance of that function to a power station operator.

New section 120X(e) permits the regulations to deal with the ISO's residual responsibilities in respect of a delegated function. Thus, they can define the extent to which the ISO remains responsible.

For example, under the administrative ISO model, it is proposed that the ISO will have no independent control desk, and no real-time visibility of system performance. Therefore, it will not be physically possible for the ISO to exercise moment-by-moment control over system security, as may be implied under its function to maintain and improve system security in new section 120W(4)(a), and regulations under section 120X(e) will be able to reflect this. But equally, it will not be appropriate for the ISO to simply delegate this function to NSPs and walk away.

Regulations under section 120X(e) will define the extent of the ISO's residual supervisory role, within the bounds of what can be achieved within a reasonable budget, and balancing the need to preserve system security against the objective of interfering as little as possible in the day-to-day operational freedom of NSPs.

7.7 Division 7 – Functions of the Authority

Division 7 deals with the ERA's functions and responsibilities.

The ERA has no general up-front approval role under new Part 8A of the Act, such as it does under the ENAC for the SWIS, in which it periodically approves Western Power's access arrangement. Instead, the ERA is proposed to have a limited consultation and approval role, such as:

- determining the cost of capital for the Alinta DEWAP and Horizon Power networks for the first pricing period under the PNAC;
- administering the pool of arbitrators and the arbitration regime under the PNAC; and
- approving ringfencing arrangements under the PNAC.

The ISO must also seek ERA approval for its proposed allowable revenue and forecast capital expenditure for each three-year review period, as discussed in section 2.6.3 of this Memorandum.

The ERA's costs of administering its functions under the PNR will also be recovered through system fees.

7.7.1 New section 120Y: Functions of the Authority

New section 120Y is a general section conferring functions on the ERA as provided for in new Part 8A, consistent with the description above.

The regulations may provide for obligations on the ERA to report to the Minister on specified matters and to prepare and publish information on specified matters.

7.8 Division 8 – Reviews of decisions

Section 130 of the Act allows a person adversely affected by a certain decision or direction to apply to the Electricity Review Board for review. Division 8 deals with the review by the Electricity Review Board of decisions made under the regulations and the PNR.

7.8.1 New section 120Z: Reviews of decisions

Application may be made to the Electricity Review Board to review decisions made by persons under the regulations or the PNR.

7.9 Division 9 – Immunity

As discussed in section 2.7, a necessary consequence of the administrative ISO model is a greater role and responsibility for other participants such as NSPs. This involves some direct responsibilities, but it also involves a substantial delegation of the ISO's functions, including its primary system security function. This has required a modification and extension of the normal statutory immunity afforded to system governance entities in the WEM and NEM.

7.9.1 New section 120ZA: Terms used

This new section creates the definitions used in Division 9.

The definition of *civil monetary penalty* is the same as in existing section 126.

The definitions of *officer* have been updated from section 126 merely to reflect changes in the Commonwealth Act, and the definition of *entity* is simply machinery, designed to ensure that all types of entities are caught.

The definition of *participant* is the same as market governance participant in section 126, except for the addition of paragraph (b) which extends this Part 8A expression to delegates.

The definition of *preparing entity* is used in section 120ZB(5), and means an entity which is preparing to become the Pilbara ISO.

7.9.2 New section 120ZB: Immunity of participants and their officers or employees

The new section sets out the main immunities.

Subsection (1) protects participants and their staff (officers and employees).

The protection extends not only to liability for acts or omissions of the protected entity, but also to any liability the protected entity may face as a result of the acts or omissions of its staff, delegates or their staff. When the Pilbara ISO is the protected person, this extends to acts or omissions by its delegates' delegates and their staff.

As with section 126 under Part 9 of the Act, the protection applies only in respect of acts or omissions done or made in good faith, in the performance or purported performance of a function under Part 8A.

Subsection (2) provides linkages to important limitations on this immunity, as discussed under new sections 120ZC and 120ZD below.

Subsections (3) and (4) extend a similar protection to the Pilbara ISO's contractors and their staff.

Subsection (5) extends a similar immunity to preparatory work by entities in anticipation of being appointed to the role, for example, the work currently being undertaken by the AEMO under an agreement with the Government in assisting in the development of the Pilbara ISO administrative model.

7.9.3 New section 120ZC: Regulations may limit or affect immunity

As discussed in section 2.7.2 of this Memorandum, because of the complexities of the Pilbara environment, in which the Pilbara ISO's functions will be delegated to NSPs who are also vertically-integrated retailers or self-suppliers, and in which a significant body of contracts already exists, each likely containing a negotiated risk allocation mechanism, it is not appropriate to simply impose a blanket immunity across all relationships. Similarly, the existing ability to impose or relax the immunity for negligence (only), and to sculpt the cap on liability is not sufficient to allow the level of adjustment which may be required to achieve the twin objectives of:

- ensuring adequate protection for participants where appropriate; while
- not inappropriately interfering with or disrupting negotiated commercial arrangements.

The regulation-making power in new section 120ZC is designed to allow the blanket immunity in section 120ZB to be trimmed back as necessary.

Examples of how this might be exercised are:

- to clarify when a vertically-integrated NSP is acting as an ISO delegate, and hence immune, and when it is merely acting as an NSP or a retailer, and hence is not protected by section 120ZB;
- to create a situation in which, rather than being entirely protected, a protected entity's exposure is more akin to what might be expected in a normal energy contract, e.g. by sculpting back the immunity so that the entity is exposed to some level of liability for direct damage; or

- to enable small claims to be brought for losses other than just negligence, e.g. a statutory claim for misleading and deceptive conduct, or a contractual claim, while still protecting the entity against large claims, by sculpting back the protection to allow certain small claims through.

Sculpting under section 120ZC is not available in respect of the Pilbara ISO itself, or its staff (see section 120ZB(2)(a)). Thus, the blanket immunity will apply, subject to any negligence claims permitted under section 120ZD.

7.9.4 New section 120ZD: Limitation on immunity after initial period

Section 120ZD mirrors existing sections 126(3), (4) and (5) of the Act. It provides that, after the first 12 months, the immunity does not apply in respect of negligent acts or omissions, although the regulations can impose a cap on this liability. The 12 months is intended to allow participants a grace period after the regime commences.

Regulations can reverse this position, i.e. reinstate the immunity for negligent acts or omissions.

Finally, the regulations permit the liability cap for negligence to be sculpted, so that different caps can apply in different circumstances etc.

7.9.5 New section 120ZE: Liability of an officer of an entity to that entity not affected

This mirrors existing section 126(6) of the Act, and provides that the immunity does not apply to block any claims by an entity against its own officers.

7.10 Division 10 – Competition authorisation

Division 10 deals with the relationship between the CCA, Competition Code, PNAC and PNR.

7.10.1 New section 120ZF: Competition authorisation by regulation

This new section is modelled on existing section 127 of the Act. It provides for the regulations to authorise or approve matters in connection with the PNAC and PNR under the CCA and Competition Code.

7.11 Division 11 – Review of system

Division 11 deals with the five-yearly review by the ERA of the Pilbara networks regime.

This is a necessary inclusion and mirrors the approach taken in the SWIS. It allows an assessment as to whether the objectives and purpose of the reforms are being achieved.

7.11.1 New section 120ZG: Review of regulation of Pilbara networks

This new section is modelled on existing section 128 of the Act. The ERA is to review the regulatory arrangements for Pilbara networks as soon as practicable after five years from the commencement of the empowering section of the Act, and then at intervals of not more than five years.

The purpose of the review is to assess the extent to which the Pilbara electricity objective has been or is being achieved.

7.11.2 New section 120ZH: Public consultation

This new section is modelled on existing section 129 of the Act. The new section provides the process by which the ERA is to conduct public consultation when conducting a review under new section120ZG.

7.12 Division 12 – Transitional provisions

Division 12 sets out a grandfathering regime in relation to existing arrangements in place at the time the PNAC and the PNR commence. This is necessary so as to minimise disruption to existing arrangements.

7.12.1 New section 120ZI: Pilbara Networks Access Code and Pilbara network rules do not affect existing agreements

This new section is modelled on existing section 106 in the Act. This new section provides that, in general, the making and operation of the PNAC and the PNR do not affect the terms and conditions, or the operation of, agreements in operation immediately before the commencement of the PNAC and the PNR.

As with section 106(2), new section 120ZI allows the regulations, PNR and PNAC to modify the blanket exemption. This can be necessary, where prior contractual arrangements did not anticipate the new regime and do not operate properly within it. The Government intends to consult with affected stakeholders as to whether any provisions such as this might be needed and, if so, what form they should take to preserve existing commercial arrangements as far as possible.

8. Amendments to Parts 9 and 9A of the Act (Clauses 20 to 25)

The amendments to Parts 9 and 9A of the Act are limited to consequential and minor drafting amendments.

Clause 20

8.1.1 Amendments to section 126

The changes in clause 20 are limited to recognising that the *Corporations Act 2001* has changed its definitions of “officer”.

Clause 21

8.1.2 Amendments to section 127

The changes in clause 21 are limited to changing the name of (what is now) the CCA.

Clauses 22 and 23

8.1.3 Amendments to sections 128 and 129

The changes in clause 22 and 23 are to modernise the provisions by allowing for electronic publishing and communication.

Clause 24

8.1.4 Amendment to section 129B

The definition of “Code” is no longer needed, because the main definition has been moved from Part 8 to section 3, with clause 24 making the change.

Clause 25

8.1.5 Amendment to section 129F

The cross references to what was section 104 have been changed, because the provisions have been renumbered but remain of the same effect, with clause 25 making the change.

9. New Part 9B – Temporary access contribution (Clause 26)

New Part 9B provides for the Temporary Access Contribution (TAC), discussed in section 2.5 of this Memorandum. The mechanism for the TAC is modelled closely on the existing Tariff Equalisation Contribution (TEC) mechanism in Part 9A. Many of the provisions are almost identical.

Clause 26

9.1.1 New section 129K: Purpose of this Part

New section 129K establishes that the purpose of Part 9B is to maintain the financial viability of Horizon Power by enabling recovery of historical generation costs. The purpose guides the remaining provisions of new Part 9B which set up the mechanism for the TAC.

This new section is modelled on existing section 129A of Part 9A.

9.1.2 New section 129L: Terms used

New section 129L establishes the relevant concepts for the TAC. Some are very similar to their Part 9A counterparts, being:

- *Temporary Access Contribution Account;*
- *temporary access contribution; and*
- *user*

Most of the remaining concepts are used to develop the basis on which the TAC will be determined.

The starting point is *generation costs*, which describes the costs Horizon Power incurs to acquire the electricity supplied to its customers.

This is then narrowed to *historical generation costs*, the central concept in new Part 9B. These are costs which Horizon Power has committed to, before the policy was adopted on 19 August 2019. However, there are some complexities in determining these costs. Past expenditure is relatively easy to identify. Horizon Power is also locked in to future expenditure under existing contracts, which it either cannot break, or which it would be imprudent or expensive to break.

The TAC should not incentivise or permit Horizon Power to incur costs under those contracts without regard to whether there may be more cost-effective ways to manage its supply portfolio. Thus, historical generation costs does include future generation costs incurred by Horizon Power under contracts to which it is already committed, but only to the extent that these costs do not exceed what a prudent supplier, seeking reasonably to minimise its costs, would reasonably incur.

Under section 129N(2), the Treasurer must determine the annual cost to Horizon Power of its historical generation costs. Under section 129N(3) the TAC payable by Horizon Power's network business unit (*NBU*) for a year is the contestable proportion of this annual amount. The following definitions set up how that proportion is to be calculated:

- first, Horizon Power's *total annual volume* is determined, being the total amount of electricity Horizon Power sells in a year;
- next, the amount of this volume which is open to competition (the *contestable annual volume*) is determined, by identifying how much of the total annual volume is supplied to *contestable customers* (i.e. is *contestable supply*);
- finally, the contestable annual volume is divided by the total annual volume to produce the *contestable proportion*.

Part 9B permits regulations to prescribe a *termination date*, on which the TAC scheme will come to an end.

This new section is modelled on section 129B of Part 9A.

9.1.3 New section 129M: Temporary Access Contribution Account

The mechanism for the recovery of the TAC is similar to the determination and recovery of the TEC under Part 9A of the Act. Like the TEC, an agency special purpose account is established, and mechanisms are created to determine how contributions are made to the account.

This new section is modelled on section 129C from Part 9A.

9.1.4 New section 129N: Determination of temporary access contributions

The Treasurer will determine the amount of the TAC payable each year (until a termination date set by regulation) which, as described above, must not exceed the contestable proportion of the annual cost to Horizon Power of its historical generation costs.

Horizon Power's NBU must pay this amount into the relevant Account.

This new section is modelled on section 129D from Part 9A.

9.1.5 New section 129O: Treasurer may seek advice from the Authority

The Treasurer can seek advice from the ERA in determining the amount of the TAC.

This new section is modelled on section 129E from Part 9A.

9.1.6 New section 129P: Payment and passing on of temporary access contribution

New section 129P provides that Horizon Power is to pay the TAC into the agency special purpose account. The TAC is payable by Horizon Power's NBU. The PNAC will contain provisions for recovery of the TAC amount from users of Horizon Power's covered Pilbara network, and how the TAC is to be factored into access disputes.

The machinery of new section 129P is modelled closely on existing section 129D from Part 9A.

9.1.7 New section 129Q: Payments from Temporary Access Contribution Account

New section 129Q provides that the TAC paid can be distributed to Horizon Power in order to meet the purpose of Part 9B – i.e. to maintain the financial viability of Horizon Power by enabling it to recover its historical generation costs.

This new section is modelled on section 129G from Part 9A.

9.1.8 New section 129R: Information

Horizon Power is to provide information to the Treasurer and the ERA to enable them to perform their functions under this Part.

This new section is modelled on section 129H from Part 9A.

9.1.9 New section 129S: Treasurer to recommend regulations

Regulations cannot be made under Part 9B unless the Treasurer recommends such regulations.

This new section is modelled on section 129I from Part 9A.

9.1.10 New section 129T: Delegation by Treasurer

The Treasurer and the Under Treasurer are able to delegate functions to an officer of the Treasury for the purposes of this Part.

This new section is modelled on section 129J from Part 9A.

10. Amendments to Part 10 of the Act (Clauses 27 to 29)

Clause 27

10.1.1 Section 130 amended: Review by the Board

Section 130 of the Act has been amended to ensure that certain new decisions by persons under Part 8A, the regulations, the PNR or another written law that are made under the regulations or the PNR, will be subject to review by the Western Australian Electricity Review Board. This includes a decision:

- by the Minister as to a covered Pilbara network's form of regulation (section 130(2)(ia));
- under the PNAC as to whether an NSP of a Pilbara network has satisfied the requirements to opt-in or opt-out of the network being subject to light regulation (section 130(2)(ib));
- by the ERA to add to the obligations of an NSP under the PNAC in respect of ringfencing obligations proposed by an NSP, or to waive any of those obligations (section 130(2)(j);
- by the ERA to approve or not to approve a thing for which the approval of the ERA is required under the PNAC (section 130(2)(ka)); and
- by the ERA to release confidential data given to the ERA for the performance of its functions under Part 8A (section 130(2)(l)).

Clause 28

10.1.2 New section 131B: Enforcement of the regulations

This new section allows the regulations to provide that a contravention of a regulation is an offence and to prescribe penalties for offences against the regulations. This provides flexibility for the regulations to develop offences and penalties where this is necessary.

Clause 29

10.1.3 Section 133 amended: An arbitrator

Section 133 has been amended to make regulations for an arbitrator under Part 8 and now also under Part 8A to recover fees and charges for their services.

11. Amendments to other Acts (Clauses 30 to 31)

Clause 30

11.1 Amendments to *Electricity Corporations Act 2005*

11.1.1 Giving Western Power a function in relation to stand-alone power systems

Existing section 41 of the *Electricity Corporations Act 2005* (Corporations Act) sets out Western Power's functions.

Clause 30(2) of the Bill inserts new section 41(ba) into the Corporations Act to confirm that Western Power does have a function in relation to the provision of SPS, but that the exercise of that function will be limited to whatever the ENAC or regulations prescribe (see section 3.2). This provision removes any doubt that may otherwise have arisen that Western Power's existing function under section 41(b), to do anything it is authorised or required to do under the ENAC, could not be used to extend Western Power's functions to the provision of SPS.

The word "provide" is used in new section 41(ba) to be consistent with the remainder of section 41. The language used in section 41(a) in relation to transmission and distribution systems ("manage, plan, develop, expand, enhance, improve and reinforce") was not considered to be fit for purpose in describing this new SPS function. The intent is that new section 41(ba), when read together with the function in section 41(i) and the general powers under section 59 of the Corporations Act, particularly the powers under section 59(1) to "acquire, hold, manage, improve, develop and dispose of any real or personal property" for the purpose of performing any function, will allow Western Power to effectively own and operate SPS in a like manner to its existing electricity networks.

No specific function has been included in relation to storage works because it is considered that their use is already within Western Power's existing functions, notably those in section 41(d) and 41(i) and the general powers under section 59.

11.1.2 Giving Horizon Power a function in relation to new Part 8A

Existing section 50 of the Corporations Act sets out Horizon Power's functions.

Clause 30(3) of the Bill inserts a new paragraph (ca) into section 50 of the Corporations Act, authorising Horizon Power to do anything authorised or required to be done under new Part 8A of the Act.

This mirrors section 41(b) of the Corporations Act which authorises Western Power to do anything authorised or required under Part 8 of the Act.

11.1.3 Consequential amendments

Clause 30(4) of the Bill amends section 54(1) of the Corporations Act, consequential upon this Bill's moving the definition of "services" from section 103 of the Act to section 3 of the Act.

Clause 30(5) of the Bill amends section 54(8) of the Corporations Act. That section provides that the contestability threshold implemented under sections 54(1) and (2) prevails over the access regimes set out in the Act. At present it refers to the full regulation regime in Part 8, but it now also needs to refer to the light regulation regime in new Part 8A of the Act. The effect of this amendment is to ensure that contestability can be phased-in in the Pilbara, as it has been in the SWIS.

Clause 31

11.2 Amendment of *Energy Operators (Powers) Act 1979*

Section 45(4) of the *Energy Operators (Powers) Act 1979* (Powers Act) imposes requirements relating to the acquisition of an interest in land by an energy operator in respect of, among other things, generating works and electricity transmission works operating at 200,000 volts or above.

Clause 31(2) of the Bill inserts new section 45(4A) into the Powers Act, to provide that SPS constructed, installed, operated or maintained under Part 8 of the Act are not classified as generating works for the purposes of section 45(4) of the Powers Act, with the consequence that the powers to access land under existing section 28(3)(c) of the Powers Act will apply in relation to SPS.

SPS are intended to be provided as an alternative to (replacement for) existing electricity networks in which access rights under the Powers Act already exist. Given this circumstance, it is considered appropriate for those powers to apply in relation to SPS provided as a replacement to, or as an adjunct to, Western Power's covered network. The expectation is that this power will be used sparingly.

The ENAC will be empowered to regulate the use of this power under new s105(1)(ca) of the Act, as explained in section 6.2.5. The Government intends to use the ENAC to place safeguards on how the power to access land under the Powers Act is exercised in relation to SPS. This is to ensure that, amongst other things, customers who receive their supply through SPS will not be unreasonably required to host SPS that are serving other nearby customers (e.g. arrays of solar panels) without recompense.