



Regulatory framework for the Pilbara electricity networks: Institutional arrangements

Consultation Paper

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Abbreviations

Term	Definition
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
BBCOS	Building Block Cost of Service
ENAC	<i>Electricity Networks Access Code 2004</i>
ERA	Economic Regulation Authority
FOR	Form of Regulation
ISO	The proposed NWIS independent system operator
PNAC	Pilbara networks access code (to be implemented under these reforms)
NEL	<i>National Electricity Law</i> , found in the Schedule to the <i>National Electricity (South Australia) Act 1996 (SA)</i>
NEM	National Electricity Market
NEO	The National Electricity Objective
NSP	Network Service Provider
NWIS	North West Interconnected System, the common name of the interconnected system of networks described in the current Bill as the “interconnected Pilbara system”
RAB	Regulated Asset Base
SWIN	South West Interconnected Network
SWIS	South West Interconnected System

Glossary

Term	Definition
<i>Access Consultation Paper</i>	A Public Utilities Office paper titled <i>Detailed Design Consultation Paper for the Pilbara Light Handed Access Regime</i> (to be published shortly)
Administrative ISO model	a model, described more fully in the <i>ISO Consultation Paper</i> in which the ISO's role is largely administrative and coordination, see sections 2.3.3 and 7.3 below
Bill	<i>Electricity Industry Amendment (Pilbara Networks) Bill 2019</i>
covered network	a network which is covered as a result of Ministerial decision, by prescription, or by opting-in to light regulation
EI Act	the <i>Electricity Industry Act 2004 (WA)</i> , proposed to be amended by the proposed Bill
full regulation	full up-front price regulation under the ENAC and Part 8 of the EI Act
interconnected Pilbara network	a Pilbara network that is interconnected with another Pilbara network
<i>ISO Consultation Paper</i>	A Public Utilities Office paper <i>Detailed Design Consultation Paper for the Pilbara for the System Operations Arrangements</i> (to be published shortly)
light regulation	the alternative path for access regulation for covered Pilbara networks, under the PNAC and Part 8A of the EI Act
Pilbara network	A network infrastructure facility that is located wholly or partly in the Pilbara region.
Rules	The Pilbara networks rules to be implemented under these reforms

Executive Summary

The need for a regulatory framework for electricity networks located in the Pilbara region of Western Australia has been long recognised, and many reviews have identified potential efficiency improvements for participants in the region.

In August 2017, the Minister for Energy (the Minister) announced¹ the Western Australian Government's intention to implement a light handed regulatory regime to facilitate fair and reasonable access by third parties to Pilbara networks. The objective of this reform initiative was to establish a fit-for-purpose regulatory framework that can deliver better outcomes for electricity consumers and assist in driving regional development in the Pilbara region.

The Public Utilities Office was requested to develop the design of a new regulatory framework and associated arrangements for an independent system operator for Government's consideration. Over the period November 2017 to March 2018, the Public Utilities Office has engaged with stakeholders to progress the requirements of the design, culminating in the publication of a Design Report for a new regulatory framework for Pilbara electricity networks.

In April 2018, the regulatory framework for Pilbara networks was presented to Government, and approval provided to commence the detailed design, comprising five Workstreams.

1. System operations arrangements design - Establishing the formalised system operations environment, including the functions to be performed by the Independent System Operator (ISO).
2. Access regime design - Designing the light handed access regime.
3. ISO establishment - Establishing the necessary capacities and systems within Australian Energy Market Operator (AEMO) to enable that organisation to become the ISO.
4. Institutional arrangements - Drafting the Electricity Industry Amendment Bill 2019, the Pilbara networks access code (PNAC) and the Pilbara Networks Rules (Rules); and associated parliamentary and executive processes.
5. Transition - Working with Pilbara participants to ensure a smooth transition to the new regulatory environment.

This consultation paper addresses the specific design for Workstream 4 – Designing the institutional arrangements, and where relevant, draws from the work completed in other workstreams.

This consultation paper will focus on the institutional arrangements that implement the new Pilbara networks regulatory framework, rather than describing the detailed design elements of the framework which have been fully described in the detailed design consultation papers for the other workstreams.

As a part of the detailed design phase, and in developing this consultation paper, the Public Utilities Office has undertaken an extensive stakeholder consultation process.

¹ <https://www.mediastatements.wa.gov.au/Pages/McGowan/2017/08/Regulatory-reform-to-the-Pilbara-electricity-system.aspx>

The proposed Electricity Industry Amendment (Pilbara Networks) Bill 2019

The proposed Pilbara electricity reforms will be implemented by way of a new *Electricity Industry Amendment (Pilbara Networks) Bill 2019* (Bill), which will make suitable amendments to the *Electricity Industry Act 2004* (EI Act). A Consultation Draft (Draft 5) of the Bill accompanies this exposure draft consultation paper.

The reforms comprise two streams:

- an access stream, implemented through the PNAC², see separate *Access Consultation Paper*,³
- a system operations stream including an ISO, implemented through the Pilbara networks rules (Rules) see separate *ISO Consultation Paper*.⁴

The Bill's main reform is to insert a new Part 8A into the EI Act, which has been created by adapting and merging provisions from existing Part 8 (for access) and Part 9 (for system operations).

Proposed new Part 8A will set high-level principles and empower the making of subordinate instruments, notably the PNAC for access and the Rules for the ISO functions.

The Bill makes consequential changes to Parts 1, 2, 8, 9 and 10 of the EI Act.⁵

Entities, roles and responsibilities

Section 2.3 of this consultation paper summarises the roles and responsibilities of the key entities in the Pilbara reform, being:

- the Minister – makes and amends the PNAC, makes the initial Rules, continues to make coverage and revocation decisions as now, and makes the new form of regulation decision for any covered Pilbara networks;
- the Rule Change Panel – administers the Rules after the Minister makes the first version;
- the ISO – under the Administrative ISO model, is responsible for system security but delegates primary responsibility for this to the interconnected Network Service Providers (NSPs), maintains an oversight and coordination role, and may have directive powers to preserve system security in rare, extreme circumstances;
- the Economic Regulation Authority (ERA) – has no general up-front access arrangement approval role as in full regulation, but does have other roles including determining the cost of capital for Alinta and Horizon Power networks, and administering the pool of arbitrators;
- the NSPs will:
 - continue to operate and maintain their networks as now;
 - be responsible for day-to-day maintenance of system security, as the ISO's delegates under the Administrative ISO model;

² The PNAC may be contained in a separate instrument, or it may appear as new chapters in the ENAC.

³ *Detailed Design Consultation Paper for the Pilbara Light Handed Access Regime* to be published shortly

⁴ *Detailed Design Consultation Paper for the System Operations Arrangements* to be published shortly

⁵ See section 10 of this paper.

- if they are part of the interconnected Pilbara system, fund the ISO.
- an arbitrator – which will be called on to determine access disputes if necessary.

The Pilbara context

Section 2.4 of this consultation paper discusses two aspects of the reforms which reflect the Pilbara's particular characteristics:

- the *Access Consultation Paper* outlines two possible refinements to the Pilbara electricity objective to ensure that regulatory outcomes are appropriate for the Pilbara;⁶ and
- the regime is intended to cause as little disruption as possible to existing contracts, approvals, licences and other authorisations, and stakeholder comment is sought on where derogations or exemptions may be needed.⁷

Key provisions of the Bill

The balance of this consultation paper outlines the key provisions of the Bill, as follows:

Preliminary Matters - Division 1 (Section 3)

Division 1 of proposed new Part 8A deals with preliminary matters and sets out the purposes and objectives of Part 8A, and creates some new definitions.

Pilbara networks access code – Division 2 (Section 4)

Division 2 of proposed 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.

Pilbara networks rules – Division 3 (Section 5)

Division 3 of proposed new Part 8A provides for the regulations to establish the Rules and for matters to be provided for and regulated under the Rules. It contains provisions dealing with the legislative status of the Rules, and amendments to and replacement of the Rules.

Enforcement – Division 4 (Section 6)

Division 4 of proposed new Part 8A deals with matters relating to compliance and enforcement of the PNAC and Rules.

Independent system operator – Division 5 (Section 7)

Division 5 of proposed new Part 8A deals with the establishment, appointment and functions of an ISO.

ERA functions and reviews – Divisions 6, 7 and 10 (Section 8)

Division 6 of proposed new Part 8A deals with the ERA's functions and responsibilities. Division 7 deals with the review by the Board of decisions made under the regulations and the Rules. Division 10 deals with the review by the ERA of the Pilbara regime.

⁶ The current form of the Pilbara electricity objective is set out in proposed new section 120A of the Bill, see section 3.2 below.

⁷ The granting or content of any individual exemption or derogation will be decided on the merits of each case. Most such arrangements will be implemented in the PNAC or Rules under existing proposed new transitional provisions, but the Public Utilities Office will if necessary consider amendments to the Bill to preserve its policy intentions in this regard.

Immunity and Trade practices authorisation – Divisions 8 and 9 (Section 9)

Division 8 of proposed new Part 8A deals with the immunity of participants, including the ISO. Division 9 provides for the regulations to authorise or approve matters in connection with the Rules under trade practices legislation and the Competition Code⁸.

Consequential changes (Section 10 below)

The Bill contains four groups of other changes, all of which are consequential following the insertion of new Part 8A.

- Various definitions are added to existing section 3, some new ones to accommodate the reforms, and some merely moved from Part 8 so that they can also apply in Part 8A.
- Existing section 11 is proposed to be modified to allow for the relationship between licence conditions and the new light regulations regime.
- A number of superficially quite substantial changes are proposed to the coverage and revocation provisions in Part 8, but in fact these are merely drafting changes as a result of the new terminology needed to implement Part 8A, and the need to integrate the existing coverage mechanisms with the new form of regulation process for covered Pilbara networks – see analysis in section 10.3 of this consultation paper.
- Existing section 130 is proposed to be modified to create a review mechanism for the relevant decisions under the new Pilbara regime.

Invitation for submissions

The Public Utilities Office invites written submissions on this consultation paper. Submissions are requested by 5:00pm (WST) on 16 April 2019.

Electronic submissions are preferred and should be emailed to PUOSubmissions@treasury.wa.gov.au.

⁸ The “Competition Code” is defined in Part XIA of the Competition and Consumer Act 2010 (Cth).

1. Introduction

1.1 Background to the Pilbara electricity reforms

For background to the Pilbara electricity reforms, please refer to the Design Report published on the Public Utilities Office website⁹.

1.2 Scope of this Consultation Paper

This consultation paper presents the detailed design for Workstream 4 – Institutional Arrangements design.

Alignment with the Design Elements

The Design Report established 35 design elements that provide for a fit-for-purpose light handed access regime and the establishment of an independent system operator to enhance network security, manage ancillary services and facilitate overall network coordination and planning in the region.

The Detailed Design Consultation Papers for the other workstreams describe each of the design elements and how they have been addressed in those papers. This consultation paper does not include a detailed discussion of the design elements but rather describes the institutional arrangements that implement the design principles as described in these papers.

Details of other workstreams within this initiative, including the Public Utilities Office's consultation papers and stakeholders' submissions are available on the Department of Treasury's website.¹⁰

1.3 Making a submission

The Public Utilities Office invites written submissions on this consultation paper. Submissions are requested by 5.00 pm (WST) on 16 April 2019.

Electronic submissions are preferred and should be emailed to PUOSubmissions@treasury.wa.gov.au.

Alternatively, submissions can be sent to:

Attn: Alyce Lines
Project Leader, Energy Networks Public Utilities Office
Department of Treasury
Locked Bag 11
Cloisters Square WA 6850

⁹ http://www.treasury.wa.gov.au/uploadedFiles/Site-content/Public_Utilities_Office/Industry_reform/Pilbara-Electricity-Reforms-Design-Report.pdf

¹⁰ www.treasury.wa.gov.au/Public-Utilities-Office/Open-consultations-reviews/NWIS-Regulatory-Reform/

2. Introduction to the amendment Bill

2.1 General approach

The proposed Pilbara electricity reforms will be implemented by way of a new *Electricity Industry Amendment (Pilbara Networks) Bill 2019* (Bill), which will make suitable amendments to the *Electricity Industry Act 2004* (EI Act). A Consultation Draft (Draft 5) of the Bill accompanies this consultation paper.

For consultation purposes, the proposed amendments are set out as a mark-up to the EI Act. In due course they will be converted to traditional amending legislation.

In broad terms, the proposed Pilbara reforms can be discussed in two streams:

- an access stream, for which the primary instrument will be the Pilbara networks access code (PNAC)¹¹, which is discussed more fully in the *Detailed Design Consultation Paper for the Pilbara Light Handed Access Regime* (Access Consultation Paper);
- a system operations stream including an independent system operator (ISO), for which the primary instrument will be the Pilbara networks rules (Rules), which are discussed more fully in the *Detailed Design Consultation Paper for the System Operations Arrangements* (ISO Consultation Paper).

Although both streams have been developed for the Pilbara context, they are broadly comparable to, respectively:

- the network access arrangements established under Part 8 of the EI Act; and
- the system management and operations components of the wholesale market regime established for the SWIS under Part 9 of the EI Act.¹²

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

As with other energy reforms in Western Australia, and consistent with the EI Act's current structure, proposed new Part 8A will set high-level principles and empower the making of subordinate instruments, notably the PNAC for access and the Rules for the ISO functions.

Part 8A also contains some additional provisions that are unique to the design of the Pilbara regime, including detailed transitional provisions and provisions relating to the establishment, role and functions of the ISO.

The Bill makes consequential changes to Parts 1, 8, 9, and 10 of the EI Act.¹³

¹¹ The PNAC may be contained in a separate instrument, or it may appear as new chapters in the ENAC.

¹² The SWIS regime includes a wholesale market, which is not proposed here.

¹³ See proposed amended sections 3, 11, 30, 103, 104, 105, 115, 127, 130, and 133, and see proposed new sections 104A and 104B.

2.2 Overview of proposed Part 8A

Proposed new Part 8A is made up of the following divisions:

Preliminary Matters - Division 1

Division 1 deals with preliminary matters and sets out the purposes and objectives of Part 8A, and creates some new definitions.

Pilbara networks access code – Division 2

Division 2 deals with the establishment, amendment and replacement of the PNAC, and the matters to be provided for and regulated under the PNAC. It contains provisions dealing with the legislative status of the PNAC, and its relationship with existing agreements.

Pilbara networks rules – Division 3

Division 3 provides for the regulations to establish the Rules and for matters to be provided for and regulated under the Rules. It contains provisions dealing with the legislative status of the Rules, and amendments to and replacement of the Rules.

Enforcement – Division 4

Division 4 deals with matters relating to compliance and enforcement of the PNAC and Rules.

Independent system operator – Division 5

Division 5 deals with the establishment, appointment and functions of an ISO.

ERA functions and reviews – Divisions 6, 7 and 10

Division 6 deals with the ERA's functions and responsibilities. Division 7 deals with the review by the Board of decisions made under the regulations and the Rules. Division 10 deals with the review by the ERA of the Pilbara regime.

Immunity and Trade practices authorisation – Divisions 8 and 9

Division 8 deals with the immunity of participants, including the ISO. Division 9 provides for the regulations to authorise or approve matters in connection with the Rules under trade practices legislation and the Competition Code¹⁴.

2.3 Entities, roles and responsibilities

The main entities involved in the Pilbara regime will be the Minister, the Rule Change Panel, the ISO, the ERA, the NSPs and an arbitrator. This section summarises their roles and responsibilities. More detail on each of these can be found in the following sections of this paper, or the *Access and ISO Consultation Papers*.

2.3.1 The Minister

The Minister will make and amend the PNAC.

The Minister will also make the initial version of the Rules, but thereafter the Rules will be administered by the same Rule Change Panel as currently administers the WEM Rules for the SWIS.

¹⁴ The "Competition Code" is defined in Part XIA of the Competition and Consumer Act 2010 (Cth).

The Minister will continue to administer the existing “coverage” process, which determines whether networks should be obliged to provide access, and the coverage “revocation” process.¹⁵

If a Pilbara network becomes covered, the Minister will now make a new “form of regulation decision” to determine whether the network should be subject to full regulation under the current ENAC, or light regulation under the proposed new PNAC.

2.3.2 The Rule Change Panel

The existing Rule Change Panel will administer the rule change process for the Rules.¹⁶

2.3.3 The ISO

An ISO will be appointed under Part 8A with the primary function of maintaining and improving system security in the interconnected Pilbara system.¹⁷ AEMO is proposed to be appointed as ISO.

The ISO’s functions, roles and responsibilities, including in relation to access negotiations, are discussed in the related *ISO Consultation Paper*.

Phase 1: Administrative ISO model

The ISO Consultation Paper discusses the Public Utilities Office’s proposal to implement an “Administrative ISO model” under which system security will be ensured through a three-fold approach, namely:

- as is the case now, NSPs will bear primary responsibility for system security within their own networks;
- the ISO will have a coordinating role, working with NSPs to develop pre-established contingency response plans and to manage system emergencies; and
- perhaps, in extraordinary circumstances, the ISO may issue directions to Pilbara networks participants, as a last resort to maintain system security.

The Administrative ISO model will be reflected in the detailed implementation of the roles, powers and responsibilities under the regulations, the PNAC and the Rules.

Possible later reforms

During the detailed design phase, stakeholders discussed other models for the ISO and its functions, in which the ISO has a more direct ‘hands-on’ involvement.

The Public Utilities Office has no present plans to move beyond the Administrative ISO model, and no such move may ever be required, but to allow flexibility should adjustments to the model be required in the future, and to maintain consistency with the Part 9 provisions from which the ISO provisions in Part 8A have been drawn, the empowering provisions set out in the Bill¹⁸ are sufficiently broad to support other ISO models.

¹⁵ See section 3.2 of the Access Consultation Paper.

¹⁶ See section 3.4.2 of the ISO Consultation Paper.

¹⁷ Proposed new section 120V(4)(a).

¹⁸ Especially proposed new section 120O.

Any future change away from the Administrative ISO model will be a matter for the government of the day, and can be expected to be accompanied by full stakeholder consultation.

2.3.4 The ERA

The ERA has no general up-front approval role in the proposed Pilbara regime, such as it does under the ENAC for the SWIS, in which it periodically approves Western Power's access arrangement.

Instead, the ERA will have a limited consultation and approval role, being to:

- determine the cost of capital for the Alinta and Horizon Power networks for the first pricing period;
- administer the pool of arbitrators and the arbitration regime;
- perhaps, undertake a broader consultation role if an issue is referred to it by the arbitrator;
- approve ring-fencing arrangements; and
- publish guidelines such as the financial reporting guideline.

2.3.5 Network Service Providers

The NSPs will:

- continue to operate and maintain their networks as now;
- be responsible for day-to-day maintenance of system security, as the ISO's delegates under the Administrative ISO model;
- if they are part of the interconnected Pilbara system, fund the ISO.

In addition, if an NSP is subject to light regulation it will:

- publish information about access, the network and prices;¹⁹
- determine prices and terms and conditions for access, including:²⁰
 - except in the case of Horizon Power, determining its own regulated asset base (RAB); and
 - except in the case of Horizon Power and Alinta for the first price period, determine its own rate of return;
- determine and publish its own pricing policies and methodologies, including:²¹
 - a building block cost of service approach to determine target revenue;
 - a tariff-setting methodology to allocate target revenue to individual tariffs;
 - a Network Development Policy which will include its own prudence test for expenditure;²²

¹⁹ See section 5 of the Access Consultation Paper.

²⁰ See section 4 of the Access Consultation Paper.

²¹ See section 4 of the Access Consultation Paper.

²² See especially section 4 of the Access Consultation Paper.

- a User Access Guide and a range of network and financial information;²³ and
- a Cost Allocation Method and possible Competition Protection Measures;²⁴ and
- consult periodically with the public regarding the above information.

2.3.6 An arbitrator

Except for a small number of matters for which the ERA will provide up-front approval, the main regulatory scrutiny for the NSPs' material above will come through an access seeker's ability to bring an access dispute, and to challenge not only the proposed terms, prices and requirements for access, but also the basis on which they have been determined (i.e. the above policies).²⁵

2.4 The Pilbara context

The present reforms are being implemented within the Pilbara's established commercial and operational environment. The Pilbara's infrastructure and economy are critical contributors to Western Australia's prosperity. Network use is focused on the high value resources sector and large end-users. This impacts the proposed reforms in two specific ways

2.4.1 Adjusting the Pilbara electricity objective

First, the Public Utilities Office considers that the particular history and circumstances of the Pilbara networks' development, and the nature of the NSPs and their major users, mean that the context for economic regulation is different from that which applies for most other utility regulation in Australia. As a result, the Public Utilities Office proposes in section 4.2 of the related *Access Consultation Paper* two options for adapting the National Electricity Objective (NEO) for use as the "Pilbara electricity objective" in the Pilbara context.

The first option is to emphasise that, when the objective refers to the "long term interests of consumers", it means consumers of all types and sizes, and also to provide that in considering their long-term interests, regard must be had to the purpose for which that class of consumers uses the electricity, and wider economic benefits that may flow from that use.

The second option is to include a separate provision requiring decision makers to have regard to the importance of the Pilbara mining industry to the Western Australian economy, the critical role that certain Pilbara networks play in that industry, and the risk to the very substantial investment which underpins that industry which could arise from any disruption to the operation and development of those networks.

Depending on stakeholder feedback, the Public Utilities Office may implement one or both of these options. If so, the Pilbara electricity objective presently set out in proposed new section 120A will likely be adjusted.

2.4.2 Existing arrangements

As noted, the present reforms are being implemented within an established commercial and operational environment. The NSPs have existing contracts with network users, who in turn have existing contracts with end users or other parties. Except with the smallest end-users, each such contract will represent a commercially-negotiated arrangement, including an

²³ See especially section 5 of the *Access Consultation Paper*.

²⁴ See especially section 7 of the *Access Consultation Paper*.

²⁵ The dispute resolution arrangements are described in section 6 of the *Access Consultation Paper*.

agreed allocation of responsibilities and risks which will be reflected in the contract's price or other consideration.

NSPs' and others' operations will also be governed by various approvals, licences and other authorisations.

The Public Utilities Office's intention is to cause as little disruption as possible to these existing arrangements. The adoption of the Administrative ISO model is one aspect of this policy, and the inclusion of proposed new section 120G²⁶ is another.

The *ISO Consultation Paper* asks stakeholders a specific question about how the statutory immunity being afforded to the ISO and its delegates under the Administrative ISO model might interact with existing contractual risk allocations.²⁷ More generally, because the Public Utilities Office does not know what is contained in most contracts and authorisations, it invites feedback from any affected stakeholder, who feels that its contractual or other arrangements might be adversely impacted by the proposed reforms, such that transitional, or even in some cases permanent, exemptions or other derogations may need to be considered.

The granting or content of any individual exemption or derogation will be decided on the merits of each case. Most such arrangements will be able to be implemented in the PNAC²⁸ or Rules²⁹, and so can be refined during the detailed development of those instruments, but the Public Utilities Office hopes to identify as many such issues as possible, so that it can consider whether the Bill needs to make further provision.

²⁶ See 4.5 below.

²⁷ See section 4.4.2 of the ISO Consultation paper.

²⁸ The PNAC's treatment of transitional matters will be authorised by proposed new sections 120C(g) and 120D(n).

²⁹ The Rules' treatment of transitional matters will be authorised by proposed new section 120O(2)(j).

3. Part 8A Division 1 – Preliminary matters

Proposed new Division 1 sets out the purposes and objectives of Part 8A, and definitions.

Please refer to the following quick reference guide to see the corresponding (or, sometimes, roughly comparable) existing provision, for each proposed new provision:

Proposed new section	See in Part 8	See in Part 9
119	102	122
120	103	121
120A	(—)	122

3.1 Purposes

The purposes of Part 8A are:³⁰

- to provide for light regulation of access to services;
- to provide for an ISO for the interconnected Pilbara system and any other Pilbara networks;
- to provide for the Rules; and
- to give effect to the relevant principles of the *Competition Principles Agreement*³¹ in respect of the provision of access to services.

3.2 The Pilbara electricity objective

Proposed new section 120A sets out the current proposed form of the Pilbara electricity objective as follows:

“[T]o promote efficient investment in, and efficient operation and use of, services 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 the interconnected Pilbara system.”

This proposed objective is copied verbatim from the National Electricity Objective,³² applied to the specific Pilbara context.

The *Access Consultation Paper*³³ discusses the possibility of enhancing this objective to reflect the fact that a large part of the market served by the Pilbara comprises the minerals extraction and processing sector and associated large end-users, which has materially different features

³⁰ Proposed new section 119.

³¹ This is the inter-governmental *Competition Principles Agreement* originally dated 11 April 1995 and most recently amended in 13 April 2007, available from this [link](#). This provision mirrors existing section 102(b) in Part 8. Clauses 6(4) and (5) of the agreement set out desirable characteristics for a State access regime to be considered “effective”.

³² NEL s 7.

³³ See section 4.2 of the paper.

and requirements to the markets served by most regulated utilities in Australia (i.e. utilities serving large population centres). Two options are proposed for the enhancement:

- the first option is to expand on the meaning of the word “consumers” in the Pilbara objective; and
- the second is to include a separate objective reflecting the importance of the resources sector to the State, and the importance of the Pilbara to that sector and its investment.

Objectives clauses are of course among the most closely studied provisions in any access regime. During the detailed implementation stage, the Public Utilities Office will continue to refine, and consult on, the language of any words it includes to supplement the Pilbara objective, but at this stage the *Access Consultation Paper* seeks stakeholder comment on the above two options.

3.3 New definitions

The Bill introduces several new expressions, some to reflect new concepts, and some giving new names to existing concepts, or formalising those concepts’ informal names.

An example of the latter is the proposed new defined term “covered network”, meaning a network that is obliged to provide access either under full regulation or light regulation.

New defined expressions include:

- “Pilbara network”, being a network located wholly or partly in the “Pilbara region”;³⁴
- “covered Pilbara network”, being a Pilbara network which is a covered network;³⁵
- “interconnected Pilbara network”, being a network which is interconnected with other Pilbara networks;³⁶
- “interconnected Pilbara system”, being the broader system comprising an interconnected Pilbara network plus its associated generation, loads and other facilities;³⁷
- “full regulation”, describing the existing regulatory regime set out in the ENAC under Part 8 of the EI Act;³⁸
- “light regulation” describing the new regulatory regime for Pilbara networks.³⁹

3.3.1 Definitional issue: Network ownership versus operation

It is common in access regulation for the “service provider” concept to be drawn relatively widely. For example:

- the NEL defines “network service provider” as someone who *owns, controls or operates* a network;⁴⁰ and

³⁴ Pilbara region is defined in proposed amended section 3 as the local districts of Ashburton, East Pilbara, Port Hedland and Roebourne. This matches the standard definition used in Western Australia.

³⁵ Proposed amended section 3.

³⁶ Proposed new section 120.

³⁷ Proposed new section 120.

³⁸ Proposed amended s 3.

³⁹ Proposed amended s 3.

⁴⁰ NEL s 2

- the NGL likewise defines “service provider” as (among other things) someone who *owns, controls or operates* a pipeline.⁴¹

This can sometimes result in more than one entity being caught as a “service provider” for an asset, so these regimes then provide provisions to manage that outcome. For example, the NGL allows multiple service providers to delegate compliance responsibility to a single person.⁴²

The EI Act is presently less sophisticated. The definition of “network service provider” in existing section 103⁴³ refers only to the *operator* of the facilities.

This may be acceptable in the SWIS, where the only network presently being regulated is owned, operated and controlled by a single entity, Western Power, but the Public Utilities Office considers that the Pilbara light handed access regime needs to be flexible enough to deal with situations in which ownership, operatorship and control do not all vest in the same entity. This will ensure that the rules can, for example, deal seamlessly with a 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.

Accordingly, the Public Utilities Office proposes to amend the Bill to include:

- a definition of “network service provider” which catches all entities who own, control or operate a network; and
- provisions which allow efficient delegation and coordination of compliance obligations, to minimise, and preferably eliminate, any additional compliance burden arising from this change.

Stakeholders’ views are invited on this proposal. It has not yet been reflected in the draft Bill, but the NGL provisions cited above will likely be used as a template.

⁴¹ NGL s 8

⁴² NGL s 10

⁴³ This definition is presently embedded within the definition of “network infrastructure facilities”.

4. Part 8A Division 2 – Pilbara networks access code

Proposed new Division 2 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.

Please refer to the following quick reference guide to see the corresponding (or, sometimes, roughly comparable) existing provision, for each proposed new provision:

Proposed new section	See in Part 8	See in Part 9
120B	104	(—)
120C	104A	(—)
120D	104B	(—)
120E	(—)	(—)
120F	(—)	(—)
120G	106	(—)
120H	107	(—)
120I	108	(—)
120J	109	(—)
120K	110	(—)

4.1 General concepts

4.1.1 Existing Part 8 coverage regime unchanged

The existing Part 8 of the EI Act contains a mechanism which can require the operators of certain Western Australian electricity networks to provide network services to third party access seekers, that is, to allow third parties to transport⁴⁴ electricity through their networks.

Networks which are subject to this obligation are said to be “covered networks”, and it is proposed that this become a formal definition in an amended section 3 of the *Electricity Networks Access Code 2004* (ENAC).

At present, there are two ways a network can become “covered”:

- by prescription in the ENAC – Western Power’s South West Interconnected Network (SWIN) is covered in this way;⁴⁵ or
- by a Ministerial “coverage decision” – Horizon Power’s Pilbara network is covered in this way.⁴⁶

⁴⁴ Although it is usual to speak of a network service provider “transporting” or “conveying” electricity for a network user, which implies a point-to-point service, in fact most contracts for network services involve primarily point-specific services, i.e. to connect at a point(s), and to inject electricity into, or withdraw electricity from, the network at that point(s). In practice very little turns on this distinction, and this paper will disregard this distinction, and use the expressions interchangeably.

⁴⁵ ENAC section 3.1

⁴⁶ Hon. Ben Wyatt MLA, Minister for Energy, *Coverage of the Horizon Power electricity network in the North West Interconnected System – Final Coverage Decision*, 2 February 2018 (available [here](#)) (**Horizon Coverage Decision**).

The ENAC sets out the process and criteria for the Ministerial coverage decision.⁴⁷ Any person can apply to have a network covered.⁴⁸ Once covered, the NSP can apply to have coverage revoked.

None of the above mechanisms will change. However, because a new light regulation option is to be introduced, various linguistic changes to Part 8 are required. These are outlined in section 4.1.3 below.

During the implementation phase, the ENAC will be amended to implement the new language, but its coverage and revocation processes and decision criteria will otherwise remain unchanged.

4.1.2 Pilbara covered networks

The PNAC creates a “light regulation” option for “covered Pilbara networks”. A “covered Pilbara network” is a “covered network” located wholly or partly in the “Pilbara region”.⁴⁹

As now, Part 8 and the ENAC will deal with coverage for all Western Australian networks including Pilbara networks. Once covered, provisions created under proposed Part 8A will deal with the question of “form of regulation” decision, which determines whether the network is to be light regulated under Part 8A and the PNAC, or full regulated under Part 8 and the ENAC.

4.1.3 Covered networks

The proposed amended section 3 now describes four ways in which a network infrastructure facility can become a “covered network”, namely:

- being prescribed under proposed new s 104A(1)(a);⁵⁰
- the Minister deciding under the ENAC;
- being prescribed under proposed new s 120C(a); or
- the NSP opting under the PNAC to be subject to light regulation.

4.2 Establishment, amendment and status of the PNAC

The PNAC will be implemented and amended as follows:

- the Minister will make the PNAC;⁵¹
- the Minister will make any amendments to the PNAC, after public consultation (except in the case of minor or urgent amendments, in which case there will be retrospective consultation);⁵²

⁴⁷ ENAC Chapter 3

⁴⁸ ENAC section 3.2.

⁴⁹ Pilbara region is defined in proposed amended s 3 as the local districts of Ashburton, East Pilbara, Port Hedland and Roebourne.

⁵⁰ This is simply a rewording of existing section 104(2)(a), see discussion in section 10.3 below.

⁵¹ The code may be contained in a separate instrument, or it may appear as new chapters in the ENAC, see proposed new section 120B(2).

⁵² Proposed new sections 120I to 120K.

- the PNAC 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 code or an amendment, within a defined period after it is made;⁵³ and
- the Minister may amend the ENAC to give effect to or to make any consequential amendments relating to a provision under the PNAC.⁵⁴

4.3 Contents of the Pilbara networks access code

4.3.1 Prescribed facilities

As noted above, the PNAC will prescribe network infrastructure facilities that are to be light regulated.⁵⁵

4.3.2 Decisions

Provisions made under Part 8A will provide for processes and criteria relating to:

- a Minister’s decision whether a covered Pilbara network is to be subject to light regulation;
- a Minister’s decision whether a covered Pilbara network that is subject to light regulation is to cease to be subject to light regulation;
- a NSP of a non-covered Pilbara network ‘opting-in’ to light regulation;
- a NSP of an ‘opted-in’ Pilbara network to ‘opt out’ again.

The PNAC will also provide for the effect on any process, requirement or access agreement under the ENAC or the PNAC, of these decisions or changes, and any transitional matters.

4.3.3 Division 2 matters

The PNAC will provide for a range of matters necessary for the purposes of Division 2. Most notably, this includes:

- the relationship between the ENAC and the PNAC;
- network service providers’ duties and requirements in relation to the provision of access to services;
- access agreements or arbitration determinations to regulate access to services;
- the rights, powers and duties that are to apply in relation to access requests and offers and the negotiation, making, and implementation of access agreements;
- provision for access agreements and contracts to be subject to the ISO’s determinations or requirements;
- provision for network access pricing principles and the associated procedures, requirements, methodologies, guidelines, parameters, values and processes to be applied by NSPs as to prices, tariffs, revenue and costs;

⁵³ Proposed new section 120H.

⁵⁴ Proposed new section 120F.

⁵⁵ Proposed new section 120C(a).

- provision for the rights, powers, and duties for the negotiation, making and implementation of access agreements and the relevant NSP's duties and requirements in its subsequent provision of access to services;
- provision for network service providers to develop and publish standing prices (including reasonable details of the methodologies and assumptions used in determining the standing prices), standing terms, and information to assist persons seeking connection and access;
- set out the circumstances in which a NSP may or may not offer or agree different prices and terms for different network users;
- provision for the resolution of disputes in relation to access to services, including arbitration by a person or body that is determined or appointed in accordance with the PNAC;
- provision for the ERA to have supervisory and other functions for the purposes of dispute resolution, including functions relating to determining requirements in relation to access that are to be complied with;
- setting out the obligations of a network service provider for the segregation of its various functions and businesses;
- provisions as to services between related bodies corporates;
- rights and obligations of network users;
- the disclosure and use of confidential or commercially sensitive information;
- conferring functions on the Minister or ISO; and
- provision for the regulation of savings, transitional or supplementary matters or matters otherwise necessary or convenient for the purposes of Division 2.

The regulations, the PNAC or an instrument made under the PNAC may apply, adopt or incorporate any provision of a rule, code or standard that is contained in another document, and may do so with or without modification or, as the provision is in force, at the time when the regulations, the PNAC or the instrument are made, or from time to time.⁵⁶

4.4 Review of form of regulation decision

A decision under the PNAC as to whether a covered Pilbara network is to become subject to full or light regulation or is to cease to be subject to full or light regulation is not liable to be challenged in, or reviewed or called in question by, a court or tribunal otherwise than under existing section 130 as amended.⁵⁷

4.5 Existing agreements

The making of the PNAC will not affect the terms and conditions or operation of existing agreements for access to services which are in operation immediately before the commencement of the PNAC, unless the PNAC itself, those agreements or an enactment provide otherwise.⁵⁸

⁵⁶ Proposed new section 120E(1).

⁵⁷ Proposed new section 120E(2). See section 10.4 of this paper.

⁵⁸ Proposed new section 120G.

This is discussed in more detail at section 2.4.2 above.

4.6 Amendment or replacement of the code

Where the PNAC is established by a separate instrument, there will be a public consultation process before the Minister can amend or repeal and replace it.⁵⁹ An exception to the public consultation process is available if the proposed amendment is of a minor nature or required to be made urgently.⁶⁰ However, if this expedited process is used, there must be an alternative consultation process as soon as practicable after the amendment comes into force.

There is an additional consultation requirement to consult with a NSP when that provider will be affected by the proposed amendment or replacement of the code. The NSP can make submissions.⁶¹

These provisions are consistent with the process for amendments or replacements of the ENAC.⁶²

⁵⁹ Proposed new section 120I. A final decision has yet to be made regarding how many instruments will be used to house the PNAC, the ISO rules and the technical rules. At present the Public Utilities Office's thinking is that (i) the PNAC will either be housed in one instrument, or in new chapters in the ENAC; and (ii) the ISO rules and technical rules will both be housed in a second instrument, the "Rules".

⁶⁰ Proposed new section 120J.

⁶¹ Proposed new section 120K.

⁶² Existing sections 108 -110 of Part 8.

5. Part 8A Division 3 – Pilbara Networks Rules

Proposed new Division 3 provides for the regulations to establish the Rules and for matters to be provided for and regulated under the Rules. It contains provisions dealing with the legislative status of the Rules, and amendments to and replacement of the Rules.

Please refer to the following quick reference guide to see the corresponding (or, sometimes, roughly comparable) existing provision, for each proposed new provision:

Proposed new section	See in Part 8	See in Part 9
120L	(—)	123
120M	(—)	123(2)
120N	(—)	123(4)
120O	(—)	124

5.1 Establishment and amendment of the Rules

The Rules will be implemented and amended as follows:

- the regulations will provide for the establishment of the initial Rules, and the Rules will set out or deal with the matters prescribed by the regulations;⁶³
- the Rules will not be “subsidiary legislation” for the purposes of the *Interpretation Act 1984* (WA) and cannot be disallowed by Parliament under s 42 of the *Interpretation Act*,⁶⁴
- the regulations may provide for the amendment, or repeal and replacement, of the Rules by rules made in accordance with the regulations and the Rules,⁶⁵ and
- the regulations may provide for the publication, commencement, and laying before each House of Parliament, of the initial Rules, and rules amending, repealing and replacing, the Rules.

The ISO consultation paper contains a detailed discussion of the rule change process that is proposed to apply to the Rules (refer s 3.3.3 of that paper).

5.2 Application of the Rules

The Rules will provide for the operation, management, security and reliability of interconnected Pilbara networks.

The regulations will extend a limited number of the Rules more broadly, to apply them to Pilbara covered networks and potentially to all Pilbara networks.⁶⁶

The precise suite of provisions which might get extended beyond the interconnected Pilbara system will be determined during the detailed implementation of the Rules, but the Public Utilities Office’s present thinking is that it might include:

⁶³ Proposed new section 120L.

⁶⁴ Proposed new section 120M.

⁶⁵ Proposed new section 120N.

⁶⁶ Proposed new section 120L.

- system planning and reserve capacity assessments, because it may be more efficient for an islanded network to interconnect, than to install new network infrastructure or generation (noting that the ISO may have a role in helping the NSP to consider these options); and
- for covered networks, the ISO may still provide “network services” to facilitate access applications, such as modelling, data gathering and determinations under the technical rules.

5.3 Content of the Rules

As with the existing ENAC and WEM Rules in the SWIS, the PNAC and Rules will be implemented in structurally different ways. The PNAC, like the ENAC, will be made by the Minister directly under the EI Act. The Rules, like the WEM Rules, will largely be made under *regulations*, which in turn will be made under the EI Act.

Proposed new section 120O empowers the regulations to prescribe all matters that are necessary for the Rules and to meet the purposes and objectives of Part 8A. Most notably, this includes the following:

- to regulate the conduct of persons and impose obligations on them;
- to confer powers and functions, or authorise the rules to confer powers and functions on the Minister, the ERA, the ISO, a person holding office under a written law; a body established under a written law, or any other person;
- to authorise the rules to confer rights and impose obligations and responsibilities on “Pilbara networks participants” which is defined broadly in proposed new section 120 as the ISO, a network service provider, a licensee, a network user, a person on whom functions are conferred, a person who is registered under the rules, or a person whose conduct is regulated or on whom obligations are imposed by the regulations made under proposed new section 120O(2)(a);
- to provide, or authorise the rules to provide for the resolution of disputes between Pilbara networks participants;
- to authorise the rules to set out, or require the ISO or a network service provider to publish, technical codes regarding network system operations, power system stability and system security for Pilbara networks;
- to provide, or authorise the rules to provide for metering of the supply of electricity in Pilbara networks;
- to provide, or authorise the rules to provide as to the disclosure and use of confidential or commercially sensitive information; and
- to provide, in respect of costs incurred in the performance of functions conferred on a person or body, for the implementation of accounting arrangements to enable those costs to be identified, the allocation of those costs between Pilbara networks participants, and the recovery of those costs;
- to provide or authorise the rules to provide for matters of a saving or transitional nature.

The regulations may prohibit persons from engaging in an activity specified in the regulations unless they are registered in accordance with the Rules.⁶⁷

The regulations, the Rules or any instrument made under the Rules may apply, adopt or incorporate any provision of a rule, code or standard that is contained in another document, and may do so with or without modification or, as the provision is in force, at the time when the regulations, the Rules or the instrument are made, or from time to time.⁶⁸

⁶⁷ Proposed new section 120O(3).

⁶⁸ Proposed new section 120O(4)

6. Part 8A Division 4 – Enforcement

Proposed new Division 4 deals with matters relating to compliance and enforcement of the PNAC and Rules.

Please refer to the following quick reference guide to see the corresponding (or, sometimes, roughly comparable) existing provision, for each proposed new provision:

Proposed new section	See in Part 8	See in Part 9
120P	114	124(5)
120Q	115	(—)
120R	116	(—)
120S	117	(—)
120T	(—)	(—)
120U	118	(—)

6.1 Hindering or preventing access

Proposed new section 120Q provides for penalties where a 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.⁶⁹

6.2 Restrictions on bringing court proceedings

6.2.1 Civil proceedings

Civil proceedings cannot be brought in respect of a matter arising under the PNAC except in accordance with the regulations, by arbitration under the code, or in accordance with section 130 as proposed to be amended.⁷⁰

Existing 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. That is, proposed amended section 130 establishes an avenue of review.

The Bill will amend section 130 to ensure that certain new decisions under this regime will be subject to review by the Board. These decisions are:

- a decision by the Minister as to a covered Pilbara network’s form of regulation;
- a decision under the PNAC as to whether a NSP of a Pilbara network has satisfied the requirements to opt in or opt out of the network being subject to light regulation;

⁶⁹ The penalty is \$100,000 plus a \$20,000 daily penalty.

⁷⁰ Proposed new section 120R.

- a decision by the ERA to add to the obligations of a NSP under the PNAC in respect of the segregation of the functions and business of providing services from the NSP's other functions and business, or to waive any of those obligations;
- a decision by the ERA to approve or not to approve a thing for which the approval of the ERA is required under the PNAC; and
- a decision by the ERA to release confidential data given to the ERA for the performance of its functions under Part 8A.

Civil proceedings, and relief or remedy, can still be brought in respect of any matter or thing if the cause of action, or relief or remedy, arises on grounds that do not rely on the PNAC.⁷¹

Proceedings can also be brought for judicial review of a decision of the Minister, the ERA, the Board, the ISO or a person or body carrying out an arbitration under the Act or the PNAC.⁷²

6.2.2 Criminal proceedings

Criminal proceedings do not lie against a person by reason only that the person has contravened a provision of the PNAC.⁷³

6.3 Regulations can provide for other compliance and enforcement matters

Proposed new section 120T allows the regulations to provide that a contravention of a regulation is an offence and to prescribe penalties for offences against the regulations.

Proposed new section 120U allows the regulations to provide for a number of additional matters in respect of penalties and contraventions, and the taking of actions in respect of contraventions such as demands for payments, proceedings, injunctions, declarations, recovery of amounts of loss or damage and warrants. More generally, the regulations may prescribe all matters necessary or convenient to be prescribed for the enforcement of the PNAC and the Rules.

⁷¹ Proposed new section 120R(2)(a).

⁷² Proposed new section 120R(2)(b).

⁷³ Proposed new section 120S.

7. Part 8A Division 5 - Independent system operator

Proposed new Division 5 creates the role of ISO, gives the ISO its functions, and provides for its rights and obligations.

Please refer to the following quick reference guide to see the corresponding (or, sometimes, roughly comparable) existing provision, for each proposed new provision:

Proposed new section	See in Part 8	See in Part 9
120V	(—)	(—)
120W	(—)	(—)

Most of the detail associated with this Division of proposed new Part 8A is to be found in the *ISO Consultation Paper*.

7.1 AEMO will be the ISO

Proposed new section 120V(1) requires the interconnected Pilbara system to have an ISO.

Regulations made under proposed new section 120V(2) are proposed to appoint AEMO to fill this role.

7.2 Horizon Power will be the transitional ISO

It is expected that Horizon Power will fill the role of ISO for a transitional period commencing towards the end of calendar 2019.⁷⁴

Horizon Power may be given a subset of the ISO's full functions, during this transitional period.⁷⁵

7.3 ISO's core functions

The ISO's core functions will be:

- to maintain and improve system security in the interconnected Pilbara system; and
- to facilitate overall network co-ordination and planning for the interconnected Pilbara system.

Under the Administrative ISO model, the ISO will delegate its system security function to NSPs in all normal and most emergency situations, see section 7.4 below.

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

The Bill also allows the ISO to be given other functions by the regulations, PNAC or Rules. These functions can apply to any Pilbara networks, i.e. are capable of extending more broadly

⁷⁴ Proposed new s120V(3)

⁷⁵ The precise legislative mechanism for this is still being decided, but it is likely that it will be done through a staged implementation of the ISO's statutory functions under Part 8A. Some or all of the provisions which impose the ISO's key functions will not be commenced, until AEMO is ready to step into the role. In the meantime, regulations or the Rules will create interim functions for Horizon Power, which will fall away when AEMO commences and the main statutory and Rules functions commence.

than to just the interconnected Pilbara system. The *ISO Consultation Paper* expands upon the intended ISO functions.

7.4 Delegation, contracting and immunity

It is normal for a statutory appointee to be given the power to delegate or contract the performance of its functions.

The ISO is proposed to be no different, see proposed new section 120W.

In the proposed Administrative ISO model, this power to delegate takes on a particular focus because the ISO is expected to almost wholly delegate its system security function to the NSPs. This raises some governance and practical issues, which are discussed more fully in the *ISO Consultation Paper*.⁷⁶ In short:

- the ISO will be operating almost exclusively in a coordinating and administrative capacity, and will have no real time visibility of the system;
- as now, NSPs will bear primary responsibility for system security within their own networks; and
- the ISO will have a coordinating role, working with NSPs to develop pre-established contingency response plans and to manage system emergencies brought on by unforeseen contingencies, usually through NSPs acting as the ISO's delegate.

In short, the ISO's system security function will be largely delegated to the NSPs. As a result, it is proposed to extend the ISO's normal statutory immunity to its delegates, including NSPs when they act as its delegates. The *ISO Consultation Paper* seeks stakeholder feedback on the possible implications of this arrangement for existing and new contractual arrangements.

⁷⁶ See section 4.4.2 of that paper.

8. Part 8A Divisions 6, 7 and 10 – Functions of the ERA and reviews

Proposed new Division 6 deals with the ERA’s functions and responsibilities. Division 7 deals with the review by the Board of decisions made under the regulations and the Rules. Division 10 deals with the review by the ERA of the Pilbara regime.

Please refer to the following quick reference guide to see the corresponding (or, sometimes, roughly comparable) existing provision, for each proposed new provision:

Proposed new section	See in Part 8	See in Part 9
120X	112	(—)
120Y	(—)	125
120ZB	111	128

8.1 Functions of the ERA

The ERA is responsible for approving the ISO’s budget, has the investigation and enforcement powers conferred on it by the regulations for the purposes of Part 8A and has any other functions and powers conferred under Part 8A.⁷⁷

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.⁷⁸

8.2 Review of decisions

Application may be made to the Board to review decisions made by persons on whom functions are conferred under Part 8A, the regulations, the Rules or another written law that are made under the regulations or the Rules and are of a class to be specified in the regulations.⁷⁹

The regulations can also provide for the powers of the Board and other provisions relating to those reviews.⁸⁰

Review by a court or tribunal is still available according to law.⁸¹

8.3 Review of regime

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 Bill, and then as soon as practicable after the expiration of five years from a report being laid before each House of Parliament under proposed new section 120ZB(5)(a).⁸²

The purpose of the review is to assess the extent to which the Pilbara electricity objective has been or is being achieved.⁸³

⁷⁷ See proposed new section 120X.

⁷⁸ Proposed new section 120X(2).

⁷⁹ Proposed new section 120Y(1).

⁸⁰ Proposed new section 120Y(2).

⁸¹ Proposed new section 120Y(3).

⁸² Proposed new section 120ZB.

⁸³ Proposed new section 120ZB(2).

9. Part 8A Division 8 and 9 - Immunity and Trade practices authorisation

Proposed new Division 8 deals with the immunity of participants, including the ISO. Division 9 provides for the regulations to authorise or approve matters in connection with the Rules under trade practices legislation and the Competition Code.

Please refer to the following quick reference guide to see the corresponding (or, sometimes, roughly comparable) existing provision, for each proposed new provision:

Proposed new section	See in Part 8	See in Part 9
120Z	(—)	126
120ZA	(—)	127

9.1 Immunity

Proposed new section 120Z grants immunity from civil monetary liability for acts or omissions done or made in good faith in the performance, or purported performance, of a function under the Act, regulations, the PNAC or the Rules. This immunity extends to:

- the ISO, including an officer, employee, or delegate of the ISO;
- a “participant” or an officer or employee of a participant; and
- a person or body with which the ISO enters into a contract.

However, proposed new subsection 120Z(5) provides that if an act or omission is done or made after 12 months from the establishment of the code or rules, whichever is relevant, and that act or omission is negligent, the immunity does not apply. If this is the case but the act or omission was nevertheless in good faith, the civil monetary penalty will be capped under a prescribed maximum amount. The regulations may exempt a specified participant from the operation of section 120Z(5).

9.2 Trade practices authorisation

Proposed new section 120ZA empowers the regulations to authorise or approve any arrangement, act, matter or thing in relation to the Rules for the purposes of the *Competition and Consumer Act 2010* (Cth) and the Competition Code⁸⁴. It mirrors existing section 127 in Part 9.

⁸⁴ The “Competition Code” is defined in Part XIA of the Competition and Consumer Act 2010 (Cth).

10. Consequential changes

The table below (under 10.3) sets out the consequential changes made to other parts of the Act, outside of Part 8A.

10.1 Amended section 3 – New and relocated definitions

The Bill will amend existing section 3 to:

- insert several new definitions, discussed at section 3.3 above; and
- relocate definitions from Part 8, when the relevant expression is used in Part 8A as well, sometimes with consequential adjustments.

10.2 Amendment to section 11

A consequential change will be made to the existing provisions in section 11, which prescribe how licence conditions are to interact with the access regime, to allow for the fact that there are now two different access regimes – light and full regulation.

10.3 Amendments to Part 8

The proposed amendments to Part 8 are all consequential upon the Part 8A reforms.

However, some restructuring of provisions has been required as a result of:

- the use of new defined terms; and
- the need to integrate the existing coverage and revocation regime, and full regulation regime, with the new light regulation option for Pilbara networks.

The main changes are as follows:

Proposed new or amended section	Description	Comment
103	sets out definitions used only in Part 8	many definitions moved to amended section 3 because they are now used in Part 8A as well
104A(1)(b)	permits the ENAC to set out the Ministerial coverage process and criteria	replicates old section 104(2)(b)
104A(1)(c)	permits the ENAC to set out the Ministerial coverage revocation process and criteria	replicates old section 104(2)(b)
104A(1)(d)	machinery for paras (b) and (c)	replicates old section 104(2)(b)
104A(2)	Provides that full regulation under the ENAC is the default position for a covered network. I.e unless they have been made subject to light regulation.	This is a new provision, to allow for the fact that some networks will no longer be subject to the existing ENAC and Part 8

104A(3)	Provides that coverage decisions are reviewable under existing s 130	replicates old section 104(3)
104B	Creates a new heading and lead-in words for the existing shopping list of matters that the ENAC may deal with	ss 104B(a) to (l) are unchanged from old ss 104(2)(c) to (o), save for the use of the new defined term “covered network”
115	unchanged, save for the use of the new defined terms “covered network” and “full regulation”	it is mirrored for light regulated networks by proposed new section 120Q

10.4 Amendments to Part 10

Part 10 is amended to reflect the move of a definition to amended section 3, and also to add new reviewable decisions into section 130.