

Legislative Council—No 69

As received from the House of Assembly and read a first time, 22 September 2020

South Australia

**Statutes Amendment (National Energy Laws)
(Penalties and Enforcement) Bill 2020**

A BILL FOR

An Act to amend the *National Electricity (South Australia) Act 1996*, the *National Energy Retail Law (South Australia) Act 2011* and the *National Gas (South Australia) Act 2008*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *National Electricity Law*

- 4 Amendment of section 2—Definitions
- 5 Amendment of section 2AA—Meaning of civil penalty provision and conduct provision
- 6 Insertion of section 2AB
 - 2AB Civil penalty amounts for breaches of civil penalty provisions
- 7 Insertion of section 2G
 - 2G Related bodies corporate
- 8 Amendment of section 20B—Return of identity cards
- 9 Amendment of section 27—Obstruction of person authorised to enter
- 10 Amendment of section 28—Power to obtain information and documents in relation to performance and exercise of functions and powers
- 11 Amendment of section 28R—Providing to AER false and misleading information
- 12 Amendment of section 28ZF—AER enforcement guidelines
- 13 Amendment of section 53E—Providing false or misleading information
- 14 Amendment of section 61—Proceedings for breaches of a provision of this Law, the Regulations or the Rules that are not offences
- 15 Amendment of section 61A—Proceedings for declaration that a person is in breach of a conduct provision
- 16 Amendment of section 62—Additional Court orders
- 17 Amendment of section 64—Matters for which there must be regard in determining amount of civil penalty
- 18 Amendment of section 73—Definition
- 19 Amendment of section 74—Power to serve a notice
- 20 Amendment of section 75—Form of notice
- 21 Substitution of section 76
 - 76 Infringement penalties
- 22 Amendment of section 81—Payment exiates breach of civil penalty provision
- 23 Amendment of section 82—Payment not to have certain consequences
- 24 Amendment of section 83—Conduct in breach of more than one civil penalty provision
- 25 Amendment of section 85—Offences and breaches by corporations
- 26 Amendment of section 86—Corporations also in breach if officers and employees are in breach
- 27 Amendment of section 118—Obstruction and non-compliance
- 28 Amendment of section 141—Disclosure of information
- 29 Amendment of section 143—Failing to attend as a witness
- 30 Amendment of section 144—Failing to answer questions etc
- 31 Amendment of section 145—Intimidation etc
- 32 Insertion of sections 159 and 160
 - 159 Penalty privilege
 - 160 Court may grant relief from liability
- 33 Amendment of Schedule 2—Miscellaneous provisions relating to interpretation

Part 3—Amendment of *National Energy Retail Law*

- 34 Amendment of section 2—Interpretation
- 35 Insertion of section 4A

	4A	Civil penalty amounts for breaches of civil penalty provisions
36		Insertion of section 7A
	7A	Related bodies corporate
37		Amendment of section 107—Power to revoke retailer authorisation
38		Amendment of section 158—Providing false or misleading information
39		Amendment of section 206—Power to obtain information and documents
40		Amendment of section 218—AER enforcement guidelines
41		Amendment of section 291—AER proceedings for breaches of this Law, the National Regulations or the Rules that are not offences
42		Amendment of section 292—Proceedings for declaration that a person is in breach of a conduct provision
43		Amendment of section 294—Matters for which there must be regard in determining amount of civil penalty
44		Insertion of sections 300A and 300B
	300A	Indexation of civil penalty amounts
	300B	Indexation of criminal penalties
45		Amendment of section 305—Corporations also in breach if officers and employees are in breach
46		Insertion of sections 321 and 322
	321	Penalty privilege
	322	Court may grant relief from liability

Part 4—Amendment of *National Gas Law*

47		Amendment of section 2—Definitions
48		Insertion of section 3A
	3A	Civil penalty amounts for breaches of civil penalty provisions
49		Insertion of section 19A
	19A	Related bodies corporate
50		Amendment of section 34—Return of identity cards
51		Amendment of section 41—Obstruction of persons authorised to enter
52		Amendment of section 42—Power to obtain information and documents in relation to performance and exercise of functions and powers
53		Amendment of section 60—Providing to AER false and misleading information
54		Amendment of section 68—AER enforcement guidelines
55		Amendment of section 83D—False or misleading statements
56		Amendment of section 91BC—AEMO's power of direction
57		Amendment of section 91FE—Providing false or misleading information
58		Amendment of section 91FEC—Giving to AEMO false and misleading information
59		Amendment of section 91FEG—Giving to AEMO false and misleading information
60		Amendment of section 91FEI—Giving false and misleading information used for capacity auctions
61		Amendment of section 200—Disclosure of information
62		Amendment of section 202—Failing to attend as a witness
63		Amendment of section 203—Failing to answer questions etc
64		Amendment of section 204—Intimidation etc
65		Amendment of section 231—AER proceedings for breaches of this Law, Regulations or the Rules that are not offences
66		Amendment of section 232—Proceedings for declaration that a person is in breach of a conduct provision
67		Amendment of section 234—Matters for which there must be regard in determining amount of civil penalty
68		Amendment of section 277—Power to serve notice
69		Substitution of section 279
	279	Infringement penalties

70	Amendment of section 289—Corporations also in breach if officers and employees are in breach
71	Insertion of sections 335A and 335B 335A Penalty privilege 335B Court may grant relief from liability
72	Amendment of Schedule 2—Miscellaneous provisions relating to interpretation

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

5 This Act may be cited as the *Statutes Amendment (National Energy Laws) (Penalties and Enforcement) Act 2020*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act—

- 10 (a) a provision in Part 2 amends the *National Electricity Law* set out in the Schedule to the *National Electricity (South Australia) Act 1996*; and
- (b) a provision in Part 3 amends the *National Energy Retail Law* set out in the Schedule to the *National Energy Retail Law (South Australia) Act 2011*; and
- 15 (c) a provision in Part 4 amends the *National Gas Law* set out in the Schedule to the *National Gas (South Australia) Act 2008*.

Part 2—Amendment of *National Electricity Law*

4—Amendment of section 2—Definitions

- (1) Section 2(1)—after the definition of *AER wholesale market reporting functions* insert:

20 *annual turnover* has the same meaning as in section 2(1) of Schedule 2 to the *Competition and Consumer Act 2010* of the Commonwealth;

- (2) Section 2(1), definition of *civil penalty*—delete the definition and substitute:

civil penalty—see section 2AB;

- (3) Section 2(1)—after the definition of *liable entity* insert:

25 *listed corporation* has the meaning given by section 9 of the *Corporations Act 2001* of the Commonwealth;

- (4) Section 2(1), definition of *rebidding civil penalty provision*—delete the definition

5—Amendment of section 2AA—Meaning of civil penalty provision and conduct provision

Section 2AA(1)(b)—delete paragraph (b)

6—Insertion of section 2AB

After section 2AA insert:

2AB—Civil penalty amounts for breaches of civil penalty provisions

(1) Subject to this section, the civil penalty for a breach of a civil penalty provision is—

(a) in the case of a breach of a civil penalty provision, other than a provision prescribed under paragraph (b), (c) or (d)—

(i) if the breach is by a natural person—

(A) an amount not exceeding \$33 900; plus

(B) an amount not exceeding \$3 390 for every day during which the breach continues;

(ii) if the breach is by a body corporate—

(A) an amount not exceeding \$170 000; plus

(B) an amount not exceeding \$17 000 for every day during which the breach continues; or

(b) in the case of a breach of a civil penalty provision prescribed by the Regulations for the purposes of this paragraph—

(i) if the breach is by a natural person—

(A) an amount not exceeding \$287 000; plus

(B) an amount not exceeding \$14 400 for every day during which the breach continues;

(ii) if the breach is by a body corporate—

(A) an amount not exceeding \$1 435 000; plus

(B) an amount not exceeding \$71 800 for every day during which the breach continues; or

(c) in the case of a breach of a civil penalty provision prescribed by the Regulations for the purposes of this paragraph—

(i) if the breach is by a natural person—an amount not exceeding \$500 000;

(ii) if the breach is by a body corporate—an amount not exceeding the greater of the following:

(A) \$10 000 000;

5

(B) if the Court can determine the value of any benefit reasonably attributable to the breach of the civil penalty provision that the body corporate, and any body corporate related to the body corporate, has obtained, directly or indirectly—3 times the value of that benefit;

10

(C) if the Court cannot determine the value of the benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the body corporate breached, or began breaching, the civil penalty provision; or

15

(d) in the case of a breach of a reliability obligation civil penalty provision—

(i) if the breach is by a natural person—an amount not exceeding \$1 435 000;

(ii) if the breach is by a body corporate—

20

(A) an amount not exceeding \$1 435 000 for a breach that relates to a reliability gap period; or

25

(B) an amount that applies under paragraph (c)(ii), as if the reliability obligation civil penalty provision were prescribed by the Regulations for the purposes of paragraph (c), for a breach that relates to a second or subsequent reliability gap period.

30

Note—

See section 67A, which deals with conduct that constitutes a breach of a reliability obligation civil penalty provision on 2 or more occasions in relation to the same reliability gap period.

35

Note—

See Schedule 2 clause 37A, which provides for the amounts specified in this subsection to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

40

(2) Subsection (1)(c)(ii)(B) or (C) will only apply in a particular case (including by operation of subsection (1)(d)(ii)(B)) if the AER, in applying for an order under section 61(2)(a), requests that those provisions be applied in that particular case.

7—Insertion of section 2G

After section 2F insert:

2G—Related bodies corporate

5 For the purposes of this Law, 2 or more bodies corporate are related to each other if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.

8—Amendment of section 20B—Return of identity cards

Section 20B, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$620.

Note—

10 See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

9—Amendment of section 27—Obstruction of person authorised to enter

15 Section 27, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$3 400;
- (b) in the case of a body corporate—\$17 000.

Note—

20 See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

10—Amendment of section 28—Power to obtain information and documents in relation to performance and exercise of functions and powers

- 25 (1) Section 28(1)—delete "or producing a document" and substitute:

, producing a document or giving evidence

- (2) Section 28(2)—delete "may require the person to—" and substitute:

may require the person to do 1 or more of the following:

- (3) Section 28(2)(b)—delete "subsection (1)." and substitute:

30 subsection (1); or

- (4) Section 28(2)—after paragraph (b) insert:

- (c) appear before the AER, or before a member of the staff assisting the AER who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice, to provide any information or to give any evidence of the kind referred to in subsection (1), either orally or in writing, and to produce any documents of the kind referred to in subsection (1).
- 35

- (5) Section 28(3), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

5

Note—

See Schedule 2 clause 37B, which provides for criminal penalty amounts specified to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

- (6) Section 28—after subsection (3) insert:

10

- (3a) A person must not, when appearing under subsection (2)(c), refuse or fail to answer a question that the person is required to answer for the purpose of providing information or giving evidence unless the person has a reasonable excuse.

Maximum penalty: \$6 300.

15

Note—

See Schedule 2 clause 37B, which provides for criminal penalty amounts specified to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

20

- (7) Section 28(4)—after "provide information" insert:

or give evidence

- (8) Section 28(4), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

25

Note—

See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

30

- (9) Section 28—after subsection (5) insert:

- (5a) It is a reasonable excuse for the purposes of subsection (3a) if the person is not capable of providing the information or giving the evidence (as the case may be) to which the question relates.

- (10) Section 28(6)(a)—delete paragraph (a) and substitute:

35

- (a) fail to provide information or to give evidence of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice;

- (11) Section 28(7)(a)—after "to the AER" insert:

, or to a person specified in a relevant notice

(12) Section 28(9)(a)—after "provide information" insert:

or give evidence

(13) Section 28(9)(c)—delete ", or produce a document," and substitute:

, give evidence or produce a document

5 (14) Section 28—after subsection (9) insert:

(9a) The AER, or a person specified in a relevant notice under this section, may require evidence given under subsection (2)(c) to be given on oath or affirmation and for that purpose the AER or specified person (as the case may be) may administer the oath or affirmation.

10

(9b) A person must not, without reasonable excuse, refuse or fail to be sworn or to make an affirmation under subsection (9a).

Maximum penalty: \$6 300.

Note—

15

See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(15) Section 28—after subsection (10) insert:

20

(11) Subject to the preceding subsections, the Court may, on application by the AER on behalf of the Commonwealth, if satisfied that a person has breached subsection (3) or (3a), make an order that the person take such action as the Court requires for remedying the breach.

25

(12) To avoid doubt, the Court may act under subsection (11) if satisfied on the balance of probabilities that a person is in breach of subsection (3) or (3a) (as the case may be).

(13) The AER must not exercise, or continue to exercise, a power under subsection (1) in relation to a matter (and any notice under that subsection will cease to have effect)—

30

(a) after the AER has commenced proceedings in relation to the matter, other than proceedings for an injunction (whether interim or final); or

35

(b) if proceedings for a final injunction have been commenced by the AER—after the close of pleadings in those proceedings.

(14) Subsection (13) does not prevent the AER from—

40

(a) using any information, evidence or document acquired under this section in any proceedings if the information, evidence or document has been obtained before the commencement of those proceedings; or

(b) exercising a power under this section for a purpose other than for the purposes of proceedings referred to in that subsection.

5 (15) Any information, evidence or document obtained under subsection (14)(b) may be used in any proceedings if it is found to be relevant to those proceedings.

(16) The Regulations may make any other provision in relation to the form, content or service of a notice under this section.

10 (17) An annual report for the AER must include the following information relating to the relevant reporting period for that report:

(a) the number of notices (if any) given under subsection (2)(c) during the reporting period to appear to provide information or to give evidence orally;

15 (b) in relation to a notice under paragraph (a)—a general description of the nature of the matter or matters in respect of which the notice was given;

(c) the number of proceedings (if any) commenced during the reporting period to challenge a notice given under subsection (2)(c) to appear to provide information or to give evidence orally.

(18) A person must not—

(a) threaten, intimidate or coerce another person; or

(b) cause or procure damage, loss or disadvantage to another person,

25 because that other person—

(c) proposes to provide information, give evidence or produce a document in response to a notice under this section; or

(d) proposes to appear, or has appeared, in response to a notice under this section.

30 Maximum penalty: \$6 300.

Note—

35 See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(19) In this section—

acting SES employee has the same meaning as in the *Public Service Act 1999* of the Commonwealth;

40 ***SES employee*** has the same meaning as in the *Public Service Act 1999* of the Commonwealth.

11—Amendment of section 28R—Providing to AER false and misleading information

Section 28R, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

Note—

See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

12—Amendment of section 28ZF—AER enforcement guidelines

(1) Section 28ZF—before subsection (1) insert:

- (a1) The AER must prepare guidelines about the exercise of its powers under section 28, including about—
 - (a) the rights and obligations of persons who are served with a relevant notice under that section; and
 - (b) the penalties applying under that section for non-compliance with a notice; and
 - (c) the purposes for which information obtained under that section may be used.

(2) Section 28ZF(2)—after "subsection" insert:

(a1) or

Note—

The heading to section 28ZF will be amended to "AER Guidelines" when this section comes into operation.

13—Amendment of section 53E—Providing false or misleading information

Section 53E, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

Note—

See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

14—Amendment of section 61—Proceedings for breaches of a provision of this Law, the Regulations or the Rules that are not offences

(1) Section 61(1)—delete "is in breach of" and substitute:

has breached

(2) Section 61(2)—delete "to be in breach of" and substitute:

has breached

(3) Section 61(2)—after paragraph (d) insert:

(da) an order that the person perform a specified service that relates to the breach and that is for the benefit of the community or a section of the community;

(db) an order that the person, at the person's expense, engage—

(i) another person specified in the order; or

(ii) another person in a class of persons specified in the order,

to perform a service that is specified in the order and that relates to the breach and that is for the benefit of the community or a section of the community;

(dc) an order to ensure that the person does not engage in further conduct of the same nature, or similar or related conduct, during the period of the order (which cannot exceed 3 years), including—

(i) an order that the person establish a compliance program or an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the conduct constituting the breach, or similar or related conduct; or

(ii) an order that the person revise the internal operations of the person's business that led to the person committing the breach;

(dd) an order that the person—

(i) disclose, in the way and to the persons specified in the order, specified information, being information that the person has possession of or access to; and

(ii) publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order;

(4) Section 61—after subsection (2) insert:

(2a) An order under subsection (2) paragraph (db) is not enforceable against a person mentioned in paragraph (db)(i) or (ii).

15—Amendment of section 61A—Proceedings for declaration that a person is in breach of a conduct provision

(1) Section 61A(1)—delete "is in breach of" and substitute:

has breached

(2) Section 61A(2)—delete "to be in breach of" and substitute:

has breached

- (3) Section 61A(2)(a) to (c)—delete "in breach" wherever occurring

Note—

The heading to section 61A will be amended to "Proceedings for declaration that a person has breached a conduct provision" when this section comes into operation.

5 **16—Amendment of section 62—Additional Court orders**

Section 62—delete "to be in breach of" and substitute:
to have breached

17—Amendment of section 64—Matters for which there must be regard in determining amount of civil penalty

- 10 (1) Section 64—delete "to be in breach of" wherever occurring and substitute in each case:

to have breached

- (2) Section 64—after paragraph (b) insert:

- 15 (ba) without limiting the operation of section 2AB(1)(c)(ii)(B) or (C) or (d)(ii)(B)—the value of any benefit reasonably attributable to the breach that the person or, in the case of a body corporate, any related body corporate, has obtained, directly or indirectly; and

18—Amendment of section 73—Definition

20 Section 73, definition of *relevant civil penalty provision*—delete the definition and substitute:

tier 1 civil penalty provision means a civil penalty provision with a civil penalty determined under section 2AB(1)(c) or (d)(ii)(B);

tier 2 civil penalty provision means a civil penalty provision with a civil penalty determined under section 2AB(1)(b) or (d)(i) or (ii)(A);

25 *tier 3 civil penalty provision* means a civil penalty provision with a civil penalty determined under section 2AB(1)(a).

Note—

The heading to section 73 will be amended to "Definitions" when this section comes into operation.

19—Amendment of section 74—Power to serve a notice

30 Section 74(1)—delete "that it has reason to believe has breached a relevant" and substitute:

if the AER believes on reasonable grounds that the person has breached a

20—Amendment of section 75—Form of notice

35 Delete "relevant civil penalty provision" wherever occurring and substitute in each case:

civil penalty provision

21—Substitution of section 76

Section 76—delete the section and substitute:

76—Infringement penalties

(1) The infringement penalty for a breach of a civil penalty provision is—

(a) in the case of a tier 3 civil penalty provision—

(i) if the breach is alleged to have been committed by a natural person—\$6 790 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;

(ii) if the breach is alleged to have been committed by a body corporate—

(A) if the AER makes a determination under subsection (2)—\$6 790 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision; or

(B) in any other case—\$33 900 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;

(b) in the case of a tier 1 or tier 2 civil penalty provision—

(i) if the breach is alleged to have been committed by a natural person—\$13 600 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;

(ii) if the breach is alleged to have been committed by a body corporate—\$67 800 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision.

(2) In the case of a body corporate that is not a listed corporation or a body corporate that is subject to the infringement penalty by virtue only of being a related body corporate, the AER may, in a particular case, determine that the infringement penalty to be included in an infringement notice to be issued to the body corporate in relation to an alleged breach of a tier 3 civil penalty provision will be the amount applying under subsection (1)(a)(ii)(A) if the AER considers this to be an appropriate course of action after taking into account—

(a) the nature of the alleged breach; and

(b) the degree of financial impact on the body corporate if the higher infringement penalty under subsection (1)(a)(ii)(B) were to be imposed; and

- (c) the extent to which the imposition of the higher infringement penalty would appear to be excessive in the circumstances; and
- (d) any other matter considered relevant by the AER.

5 **Note—**

See Schedule 2 clause 37A, which provides for the amounts specified in this section to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

10 **22—Amendment of section 81—Payment expiates breach of civil penalty provision**

Section 81—delete "relevant civil penalty provision" and substitute:
civil penalty provision

23—Amendment of section 82—Payment not to have certain consequences

15 Section 82—delete "relevant civil penalty provision" and substitute:
civil penalty provision

24—Amendment of section 83—Conduct in breach of more than one civil penalty provision

Section 83—delete "relevant civil penalty provisions" and substitute:
civil penalty provisions

20 **25—Amendment of section 85—Offences and breaches by corporations**

- (1) Section 85(1)—delete "is in breach of" and substitute:
breaches
- (2) Section 85(1)—delete "to have been in breach of" and substitute:
to have breached

25 **26—Amendment of section 86—Corporations also in breach if officers and employees are in breach**

Section 86—delete "in their capacity as officer or employee of the corporation" and substitute:

30 , which is within the scope of the actual or apparent authority of the officer or employee,

27—Amendment of section 118—Obstruction and non-compliance

- (1) Section 118(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$34 000;
- (b) in the case of a body corporate—\$170 000.

Note—

See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

5 (2) Section 118(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$34 000;
- (b) in the case of a body corporate—\$170 000.

Note—

10 See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

28—Amendment of section 141—Disclosure of information

Section 141, penalty provision—delete the penalty provision and substitute:

15 Maximum penalty:

- (a) in the case of a natural person—\$3 400;
- (b) in the case of a body corporate—\$17 000.

Note—

20 See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

29—Amendment of section 143—Failing to attend as a witness

Section 143, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$6 300.

25 **Note—**

See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

30—Amendment of section 144—Failing to answer questions etc

30 Section 144(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$6 300.

Note—

35 See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

31—Amendment of section 145—Intimidation etc

Section 145, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$6 300.

Note—

See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

5 **32—Insertion of sections 159 and 160**

After section 158 insert:

159—Penalty privilege

10 If an individual has a privilege against self-exposure to a penalty, other than for a criminal offence, the individual is not excused from doing any of the following on that ground:

- 15 (a) providing information under this Law, the Regulations or the Rules;
- (b) producing a document under this Law, the Regulations or the Rules;
- (c) providing evidence under this Law, the Regulations or the Rules;
- (d) answering a question under this Law, the Regulations or the Rules.

160—Court may grant relief from liability

20 If in any proceedings under this Law in which a person, other than a body corporate, may be liable for an offence or a civil penalty it appears to the Court that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or
25 partly from liability on such terms as the Court thinks fit.

33—Amendment of Schedule 2—Miscellaneous provisions relating to interpretation

(1) Schedule 2—after clause 37 insert:

37A—Indexation of civil penalty amounts

- 30 (1) Each civil penalty amount is to be adjusted in accordance with the method prescribed by the Regulations for the purposes of this clause.
- (2) The first adjustment is to occur on 1 July 2023.
- (3) The next adjustment is to occur on 1 July 2026 and an adjustment is to occur on 1 July every 3 years after that.
- 35 (4) The AER must, on or as soon as practicable after the date of the first adjustment and before each subsequent adjustment, publish on its website the civil penalty amounts that apply on and from the date of the adjustment. However, a failure by the AER to do so does not invalidate an adjustment.

(5) A civil penalty amount that is adjusted under this clause applies to a breach of a civil penalty provision that occurs or is alleged to occur on or after the date of the adjustment.

(6) In this clause—

civil penalty amount means—

- (a) each amount specified in section 2AB(1)(a), (b), (c)(i) or (ii)(A) or (d)(i) or (ii)(A); and
- (b) each amount specified as an infringement penalty in section 76.

37B—Indexation of criminal penalties

(1) Each criminal penalty amount is to be adjusted in accordance with the method prescribed by the Regulations for the purposes of this clause.

(2) The first adjustment is to occur on 1 July 2023.

(3) The next adjustment is to occur on 1 July 2026 and an adjustment is to occur on 1 July every 3 years after that.

(4) The AER must, on or as soon as practicable after the date of the first adjustment and before each subsequent adjustment, publish on its website the criminal penalty amounts that apply on and from the date of the adjustment. However, a failure by the AER to do so does not invalidate an adjustment.

(5) A criminal penalty amount that is adjusted under this clause applies to a breach of a provision that occurs or is alleged to occur on or after the date of the adjustment.

(6) In this clause—

criminal penalty amount means any amount, specified in this Law, which is the maximum monetary penalty that may be imposed on conviction for the commission of an offence against this Law.

(2) Schedule 2, clause 39(3)—delete "is in breach of" and substitute:

has breached

Part 3—Amendment of *National Energy Retail Law*

34—Amendment of section 2—Interpretation

(1) Section 2(1)—after the definition of *AER Retailer Authorisation Guidelines* insert:

annual turnover has the same meaning as in section 2(1) of Schedule 2 to the *Competition and Consumer Act 2010* of the Commonwealth;

(2) Section 2(1), definition of *civil penalty*—delete the definition and substitute:

civil penalty—see section 4A;

35—Insertion of section 4A

After section 4 insert:

4A—Civil penalty amounts for breaches of civil penalty provisions

- 5 (1) Subject to this section, the civil penalty for a breach of a civil penalty provision is—
- (a) in the case of a breach of a civil penalty provision, other than a provision prescribed under paragraph (b) or (c)—
- (i) if the breach is by a natural person—
- 10 (A) an amount not exceeding \$33 900; plus
- (B) an amount not exceeding \$3 390 for every day during which the breach continues;
- (ii) if the breach is by a body corporate—
- (A) an amount not exceeding \$170 000; plus
- 15 (B) an amount not exceeding \$17 000 for every day during which the breach continues; or
- (b) in the case of a breach of a civil penalty provision prescribed by the National Regulations for the purposes of this paragraph—
- 20 (i) if the breach is by a natural person—
- (A) an amount not exceeding \$287 000; plus
- (B) an amount not exceeding \$14 400 for every day during which the breach continues;
- (ii) if the breach is by a body corporate—
- 25 (A) an amount not exceeding \$1 435 000; plus
- (B) an amount not exceeding \$71 800 for every day during which the breach continues; or
- (c) in the case of a breach of a civil penalty provision prescribed by the National Regulations for the purposes of this paragraph—
- 30 (i) if the breach is by a natural person—an amount not exceeding \$500 000;
- (ii) if the breach is by a body corporate—an amount not exceeding the greater of the following—
- 35 (A) \$10 000 000;

(B) if the Court can determine the value of any benefit reasonably attributable to the breach of the civil penalty provision that the body corporate, and any body corporate related to the body corporate, has obtained, directly or indirectly—3 times the value of that benefit;

(C) if the Court cannot determine the value of the benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the body corporate breached, or began breaching, the civil penalty provision.

Note—

See section 300A, which provides for the amounts specified in this subsection to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(2) Subsection (1)(c)(ii)(B) or (C) will only apply in a particular case if the AER, in applying for an order under section 291(2)(a), requests that those provisions be applied in that particular case.

36—Insertion of section 7A

After section 7 insert:

7A—Related bodies corporate

For the purposes of this Law, 2 or more bodies corporate are related to each other if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.

37—Amendment of section 107—Power to revoke retailer authorisation

Section 107(2)(a)—delete "is in breach of" wherever occurring and substitute in each case:

has breached

38—Amendment of section 158—Providing false or misleading information

Section 158, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

Note—

See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

39—Amendment of section 206—Power to obtain information and documents

(1) Section 206(1)—delete "or producing a document" and substitute:

, producing a document or giving evidence

(2) Section 206(2)—delete "may require the person to—" and substitute:

may require the person to do 1 or more of the following:

(3) Section 206(2)(b)—delete "subsection (1)." and substitute:

subsection (1); or

(4) Section 206(2)—after paragraph (b) insert:

(c) appear before the AER, or before a member of the staff assisting the AER who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice, to provide any information or to give any evidence of the kind referred to in subsection (1), either orally or in writing, and to produce any documents of the kind referred to in subsection (1).

(5) Section 206(3), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

Note—

See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(6) Section 206—after subsection (3) insert:

(3a) A person must not, when appearing under subsection (2)(c), refuse or fail to answer a question that the person is required to answer for the purpose of providing information or giving evidence unless the person has a reasonable excuse.

Maximum penalty: \$6 300.

Note—

See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(7) Section 206(4)—after "provide information" insert:

or give evidence

(8) Section 206(4), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

Note—

See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

5 (9) Section 206—after subsection (5) insert:

(5a) It is a reasonable excuse for the purposes of subsection (3a) if the person is not capable of providing the information or giving the evidence (as the case may be) to which the question relates.

(10) Section 206(6)(a)—delete paragraph (a) and substitute:

10 (a) fail to provide information or to give evidence of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice;

(11) Section 206(7)(a)—after "to the AER" insert:

, or to a person specified in a relevant notice

15 (12) Section 206(9)(a)—after "provide information" insert:

or give evidence

(13) Section 206(9)(c)—delete ", or produce a document," and substitute:

, give evidence or produce a document

(14) Section 206—after subsection (9) insert:

20 (9a) The AER, or a person specified in a relevant notice under this section, may require evidence given under subsection (2)(c) to be given on oath or affirmation and for that purpose the AER or specified person (as the case may be) may administer the oath or affirmation.

25 (9b) A person must not, without reasonable excuse, refuse or fail to be sworn or to make an affirmation under subsection (9a).

Maximum penalty: \$6 300.

Note—

30 See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(15) Section 206—after subsection (10) insert:

35 (11) Subject to the preceding subsections, the Court may, on application by the AER on behalf of the Commonwealth, if satisfied that a person has breached subsection (3) or (3a), make an order that the person take such action as the Court requires for remedying the breach.

40 (12) To avoid doubt, the Court may act under subsection (11) if satisfied on the balance of probabilities that a person is in breach of subsection (3) or (3a) (as the case may be).

- 5 (13) The AER must not exercise, or continue to exercise, a power under subsection (1) in relation to a matter (and any notice under that subsection will cease to have effect)—
- (a) after the AER has commenced proceedings in relation to the matter, other than proceedings for an injunction (whether interim or final); or
 - (b) if proceedings for a final injunction have been commenced by the AER—after the close of pleadings in those proceedings.
- 10 (14) Subsection (13) does not prevent the AER from—
- (a) using any information, evidence or document acquired under this section in any proceedings if the information, evidence or document has been obtained before the commencement of those proceedings; or
 - (b) exercising a power under this section for a purpose other than for the purposes of proceedings referred to in that subsection.
- 15 (15) Any information, evidence or document obtained under subsection (14)(b) may be used in any proceedings if it is found to be relevant to those proceedings.
- 20 (16) The National Regulations may make any other provision in relation to the form, content or service of a notice under this section.
- 25 (17) An annual report for the AER must include the following information relating to the relevant reporting period for that report:
- (a) the number of notices (if any) given under subsection (2)(c) during the reporting period to appear to provide information or to give evidence orally;
 - (b) in relation to a notice under paragraph (a)—a general description of the nature of the matter or matters in respect of which the notice was given;
 - (c) the number of any proceedings (if any) commenced during the reporting period to challenge a notice given under subsection (2)(c) to appear to provide information or to give evidence orally.
- 30 (18) A person must not—
- (a) threaten, intimidate or coerce another person; or
 - (b) cause or procure damage, loss or disadvantage to another person,
- 35 because that other person—
- (c) proposes to provide information, give evidence or produce a document in response to a notice under this section; or
- 40

- (d) proposes to appear, or has appeared, in response to a notice under this section.

Maximum penalty: \$6 300.

Note—

See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

- (19) In this section—

acting SES employee has the same meaning as in the *Public Service Act 1999* of the Commonwealth;

SES employee has the same meaning as in the *Public Service Act 1999* of the Commonwealth.

40—Amendment of section 218—AER enforcement guidelines

- (1) Section 218—before subsection (1) insert:

- (a1) The AER must prepare guidelines about the exercise of its powers under section 206, including about—

- (a) the rights and obligations of persons who are served with a relevant notice under that section; and
(b) the penalties applying under that section for non-compliance with a notice; and
(c) the purposes for which information obtained under that section may be used.

- (2) Section 218(2)—after "subsection" insert:

- (a1) or

Note—

The heading to section 218 will be amended to "AER Guidelines" when this section comes into operation.

41—Amendment of section 291—AER proceedings for breaches of this Law, the National Regulations or the Rules that are not offences

- (1) Section 291(1)—delete "is in breach of" and substitute:

has breached

- (2) Section 291(2)—delete "to be in breach of" and substitute:

has breached

- (3) Section 291(2)—after paragraph (d) insert:

- (da) an order that the person perform a specified service that relates to the breach and that is for the benefit of the community or a section of the community;
(db) an order that the person, at the person's expense, engage—
(i) another person specified in the order; or

(ii) another person in a class of persons specified in the order, to perform a service that is specified in the order and that relates to the breach and that is for the benefit of the community or a section of the community;

5 (dc) an order to ensure that the person does not engage in further conduct of the same nature, or similar or related conduct, during the period of the order (which cannot exceed 3 years), including—

10 (i) an order that the person establish a compliance program or an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the conduct constituting the breach, or similar or related conduct; or

15 (ii) an order that the person revise the internal operations of the person's business that led to the person committing the breach;

(dd) an order that the person—

20 (i) disclose, in the way and to the persons specified in the order, specified information, being information that the person has possession of or access to; and

(ii) publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order;

(4) Section 291—after subsection (2) insert:

25 (2a) An order under subsection (2) paragraph (db) is not enforceable against a person mentioned in paragraph (db)(i) or (ii).

42—Amendment of section 292—Proceedings for declaration that a person is in breach of a conduct provision

(1) Section 292(1)—delete "is in breach of" and substitute:

30 has breached

(2) Section 292(2)—delete "to be in breach of" and substitute:

has breached

(3) Section 292(2)(a) to (c)—delete "in breach" wherever occurring

Note—

35 The heading to section 292 will be amended to "Proceedings for declaration that a person has breached a conduct provision" when this section comes into operation.

43—Amendment of section 294—Matters for which there must be regard in determining amount of civil penalty

40 (1) Section 294—delete "to be in breach of" wherever occurring and substitute in each case:

to have breached

(2) Section 294—after paragraph (b) insert:

- (ba) without limiting the operation of section 4A(1)(c)(ii)(B) or (C)—the value of any benefit reasonably attributable to the breach that the person or, in the case of a body corporate, any related body corporate, has obtained, directly or indirectly; and

44—Insertion of sections 300A and 300B

After section 300 insert:

300A—Indexation of civil penalty amounts

- (1) Each civil penalty amount is to be adjusted in accordance with the method prescribed by the National Regulations for the purposes of this section.
- (2) The first adjustment is to occur on 1 July 2023.
- (3) The next adjustment is to occur on 1 July 2026 and an adjustment is to occur on 1 July every 3 years after that.
- (4) The AER must, on or as soon as practicable after the date of the first adjustment and before each subsequent adjustment, publish on its website the civil penalty amounts that apply on and from the date of the adjustment. However, a failure by the AER to do so does not invalidate an adjustment.
- (5) A civil penalty amount that is adjusted under this section applies to a breach of a civil penalty provision that occurs or is alleged to occur on or after the date of the adjustment.
- (6) In this section—
civil penalty amount means each amount specified in section 4A(1)(a), (b) or (c)(i) or (ii)(A).

300B—Indexation of criminal penalties

- (1) Each criminal penalty amount is to be adjusted in accordance with the method prescribed by the National Regulations for the purposes of this section.
- (2) The first adjustment is to occur on 1 July 2023.
- (3) The next adjustment is to occur on 1 July 2026 and an adjustment is to occur on 1 July every 3 years after that.
- (4) The AER must, on or as soon as practicable after the date of the first adjustment and before each subsequent adjustment, publish on its website the criminal penalty amounts that apply on and from the date of the adjustment. However, a failure by the AER to do so does not invalidate an adjustment.
- (5) A criminal penalty amount that is adjusted under this section applies to a breach of a provision that occurs or is alleged to occur on or after the date of the adjustment.
- (6) In this section—

criminal penalty amount means any amount, specified in this Law, which is the maximum monetary penalty that may be imposed on conviction for the commission of an offence against this Law.

5 **45—Amendment of section 305—Corporations also in breach if officers and employees are in breach**

Section 305—delete "in their capacity as officer or employee of the corporation" and substitute:

, which is within the scope of the actual or apparent authority of the officer or employee,

10 **46—Insertion of sections 321 and 322**

After section 320 insert:

321—Penalty privilege

15 If an individual has a privilege against self-exposure to a penalty, other than for a criminal offence, the individual is not excused from doing any of the following on that ground:

- 20
- (a) providing information under this Law, the National Regulations or the Rules;
 - (b) producing a document under this Law, the National Regulations or the Rules;
 - (c) providing evidence under this Law, the National Regulations or the Rules;
 - (d) answering a question under this Law, the National Regulations or the Rules.

322—Court may grant relief from liability

25 If in any proceedings under this Law in which a person, other than a body corporate, may be liable for an offence or a civil penalty it appears to the Court that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or
30 partly from liability on such terms as the Court thinks fit.

Part 4—Amendment of *National Gas Law*

47—Amendment of section 2—Definitions

- (1) Section 2(1)—after the definition of *AER ring fencing determination* insert:

35 *annual turnover* has the same meaning as in section 2(1) of Schedule 2 to the *Competition and Consumer Act 2010* of the Commonwealth;

- (2) Section 2(1), definition of *civil penalty*—delete the definition and substitute:

civil penalty—see section 3A;

(3) Section 2(1)—after the definition of *limited access arrangement decision* insert:

listed corporation has the meaning given by section 9 of the *Corporations Act 2001* of the Commonwealth;

48—Insertion of section 3A

5 After section 3 insert:

3A—Civil penalty amounts for breaches of civil penalty provisions

(1) Subject to this section, the civil penalty for a breach of a civil penalty provision is—

- 10 (a) in the case of a breach of a civil penalty provision, other than a provision prescribed under paragraph (b) or (c)—
- (i) if the breach is by a natural person—
 - (A) an amount not exceeding \$33 900; plus
 - (B) an amount not exceeding \$3 390 for every day during which the breach continues;
 - (ii) if the breach is by a body corporate—
 - (A) an amount not exceeding \$170 000; plus
 - (B) an amount not exceeding \$17 000 for every day during which the breach continues; or
- 15
- 20 (b) in the case of a breach of a civil penalty provision prescribed by the Regulations for the purposes of this paragraph—
- (i) if the breach is by a natural person—
 - (A) an amount not exceeding \$287 000; plus
 - (B) an amount not exceeding \$14 400 for every day during which the breach continues;
 - (ii) if the breach is by a body corporate—
 - (A) an amount not exceeding \$1 435 000; plus
 - (B) an amount not exceeding \$71 800 for every day during which the breach continues; or
- 25
- 30 (c) in the case a breach of a civil penalty provision prescribed by the Regulations for the purposes of this paragraph—
- (i) if the breach is by a natural person—an amount not exceeding \$500 000;
 - (ii) if the breach is by a body corporate—an amount not exceeding the greater of the following:
 - (A) \$10 000 000;
- 35

(B) if the Court can determine the value of any benefit reasonably attributable to the breach of the civil penalty provision that the body corporate, and any body corporate related to the body corporate, has obtained, directly or indirectly—3 times the value of that benefit;

(C) if the Court cannot determine the value of the benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the body corporate breached, or began breaching, the civil penalty provision.

Note—

See Schedule 2 clause 47A, which provides for the amounts specified in this subsection to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(2) Subsection (1)(c)(ii)(B) or (C) will only apply in a particular case if the AER, in applying for an order under section 231(2)(a), requests that those provisions be applied in that particular case.

49—Insertion of section 19A

After section 19 insert:

19A—Related bodies corporate

For the purposes of this Law, 2 or more bodies corporate are related to each other if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.

50—Amendment of section 34—Return of identity cards

Section 34, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$620.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

51—Amendment of section 41—Obstruction of persons authorised to enter

Section 41, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$3 400;
- (b) in the case of a body corporate—\$17 000.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

5 **52—Amendment of section 42—Power to obtain information and documents in relation to performance and exercise of functions and powers**

(1) Section 42(1)—delete "or producing a document" and substitute:

, producing a document or giving evidence

(2) Section 42(2)—delete "may require the person to—" and substitute:

10 may require the person to do 1 or more of the following:

(3) Section 42(2)(b)—delete "subsection (1)." and substitute:

subsection (1); or

(4) Section 42(2)—after paragraph (b) insert:

15 (c) appear before the AER, or before a member of the staff assisting the AER who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice, to provide any information or to give any evidence of the kind referred to in subsection (1), either orally or in writing, and to produce any documents of the kind referred to in subsection (1).

20 (5) Section 42(3), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

Note—

25 See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(6) Section 42—after subsection (3) insert:

30 (3a) A person must not, when appearing under subsection (2)(c), refuse or fail to answer a question that the person is required to answer for the purpose of providing information or giving evidence unless the person has a reasonable excuse.

Maximum penalty: \$6 300.

Note—

35 See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(7) Section 42(4)—after "provide information" insert:

40 or give evidence

(8) Section 42(4), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

5

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(9) Section 42—after subsection (5) insert:

10

- (5a) It is a reasonable excuse for the purposes of subsection (3a) if the person is not capable of providing the information or giving the evidence (as the case may be) to which the question relates.

(10) Section 42(6)(a)—delete paragraph (a) and substitute:

15

- (a) fail to provide information or to give evidence of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice;

(11) Section 42(7)(a)—after "to the AER" insert:

, or to a person specified in a relevant notice

(12) Section 42(9)(a)—after "provide information" insert:

20

or give evidence

(13) Section 42(9)(c)—delete ", or produce a document," and substitute:

, give evidence or produce a document

(14) Section 42—after subsection (9) insert:

25

- (9a) The AER, or a person specified in a relevant notice under this section, may require evidence given under subsection (2)(c) to be given on oath or affirmation and for that purpose the AER or specified person (as the case may be) may administer the oath or affirmation.

30

- (9b) A person must not, without reasonable excuse, refuse or fail to be sworn or to make an affirmation under subsection (9a).

Maximum penalty: \$6 300.

Note—

35

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(15) Section 42—after subsection (10) insert:

5 (11) Subject to the preceding subsections, the Court may, on application by the AER on behalf of the Commonwealth, if satisfied that a person has breached subsection (3) or (3a), make an order that the person take such action as the Court requires for remedying the breach.

(12) To avoid doubt, the Court may act under subsection (11) if satisfied on the balance of probabilities that a person is in breach of subsection (3) or (3a) (as the case may be).

10 (13) The AER must not exercise, or continue to exercise, a power under subsection (1) in relation to a matter (and any notice under that subsection will cease to have effect)—

15 (a) after the AER has commenced proceedings in relation to the matter, other than proceedings for an injunction (whether interim or final); or

(b) if proceedings for a final injunction have been commenced by the AER—after the close of pleadings in those proceedings.

(14) Subsection (13) does not prevent the AER from—

20 (a) using any information, evidence or document acquired under this section in any proceedings if the information, evidence or document has been obtained before the commencement of those proceedings; or

25 (b) exercising a power under this section for a purpose other than for the purposes of proceedings referred to in that subsection.

(15) Any information, evidence or document obtained under subsection (14)(b) may be used in any proceedings if it is found to be relevant to those proceedings.

30 (16) The Regulations may make any other provision in relation to the form, content or service of a notice under this section.

(17) An annual report for the AER must include the following information relating to the relevant reporting period for that report:

35 (a) the number of notices (if any) given under subsection (2)(c) during the reporting period to appear to provide information or to give evidence orally;

(b) in relation to a notice under paragraph (a)—a general description of the nature of the matter or matters in respect of which the notice was given;

40 (c) the number of proceedings (if any) commenced during the reporting period to challenge a notice given under subsection (2)(c) to appear to provide information or to give evidence orally.

(18) A person must not—

- (a) threaten, intimidate or coerce another person; or
- (b) cause or procure damage, loss or disadvantage to another person,

5 because that other person—

- (c) proposes to provide information, give evidence or produce a document in response to a notice under this section; or
- (d) proposes to appear, or has appeared, in response to a notice under this section.

10 Maximum penalty: \$6 300.

Note—

15 See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(19) In this section—

acting SES employee has the same meaning as in the *Public Service Act 1999* of the Commonwealth;

20 *SES employee* has the same meaning as in the *Public Service Act 1999* of the Commonwealth.

53—Amendment of section 60—Providing to AER false and misleading information

Section 60, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- 25 (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

Note—

30 See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

54—Amendment of section 68—AER enforcement guidelines

(1) Section 68—before subsection (1) insert:

(a1) The AER must prepare guidelines about the exercise of its powers under section 42, including about—

- 35 (a) the rights and obligations of persons who are served with a relevant notice under that section; and
- (b) the penalties applying under that section for non-compliance with a notice; and
- 40 (c) the purposes for which information obtained under that section may be used.

(2) Section 68(2)—after "subsection" insert:

(a1) or

Note—

The heading to section 68 will be amended to "AER Guidelines" when this section comes into operation.

55—Amendment of section 83D—False or misleading statements

Section 83D, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$3 400;
- (b) in the case of a body corporate—\$17 000.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

56—Amendment of section 91BC—AEMO's power of direction

(1) Section 91BC(5), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$34 000;
- (b) in the case of a body corporate—\$170 000.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(2) Section 91BC(6)—delete "\$10 000" and substitute:

\$17 000

Note—

The following Note will be inserted at the foot of section 91BC(6):

"Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website."

57—Amendment of section 91FE—Providing false or misleading information

Section 91FE, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$6 300;
- (b) in the case of a body corporate—\$31 500.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

5 **58—Amendment of section 91FEC—Giving to AEMO false and misleading information**

Section 91FEC, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- 10 (a) in the case of a natural person—\$6 300;
(b) in the case of a body corporate—\$31 500.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

15 **59—Amendment of section 91FEG—Giving to AEMO false and misleading information**

Section 91FEG, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- 20 (a) in the case of a natural person—\$6 300;
(b) in the case of a body corporate—\$31 500.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

25 **60—Amendment of section 91FEI—Giving false and misleading information used for capacity auctions**

Section 91FEI, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- 30 (a) in the case of a natural person—\$3 400;
(b) in the case of a body corporate—\$17 000.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

35 **61—Amendment of section 200—Disclosure of information**

Section 200(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a natural person—\$3 400;
(b) in the case of a body corporate—\$17 000.

Note—

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

5 **62—Amendment of section 202—Failing to attend as a witness**

Section 202, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$6 300.

Note—

10 See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

63—Amendment of section 203—Failing to answer questions etc

Section 203(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$6 300.

15 **Note—**

See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

64—Amendment of section 204—Intimidation etc

20 Section 204, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$6 300.

Note—

25 See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

65—Amendment of section 231—AER proceedings for breaches of this Law, Regulations or the Rules that are not offences

(1) Section 231(1)—delete "is in breach of" and substitute:

has breached

30 (2) Section 231(2)—delete "to be in breach of" and substitute:

has breached

(3) Section 231(2)—after paragraph (d) insert:

(da) an order that the person perform a specified service that relates to the breach and that is for the benefit of the community or a section of the community;

35 (db) an order that the person, at the person's expense, engage—

(i) another person specified in the order; or

(ii) another person in a class of persons specified in the order,

to perform a service that is specified in the order and that relates to the breach and that is for the benefit of the community or a section of the community;

5 (dc) an order to ensure that the person does not engage in further conduct of the same nature, or similar or related conduct, during the period of the order (which cannot exceed 3 years), including—

10 (i) an order that the person establish a compliance program or an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the conduct constituting the breach, or similar or related conduct; or

15 (ii) an order that the person revise the internal operations of the person's business that led to the person committing the breach;

(dd) an order that the person—

(i) disclose, in the way and to the persons specified in the order, specified information, being information that the person has possession of or access to; and

20 (ii) publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order;

(4) Section 231—after subsection (2) insert:

25 (2a) An order under paragraph (db) of subsection (2) is not enforceable against a person mentioned in paragraph (db)(i) or (ii).

66—Amendment of section 232—Proceedings for declaration that a person is in breach of a conduct provision

(1) Section 232(1)—delete "is in breach of" and substitute:

has breached

30 (2) Section 232(2)—delete "to be in breach of" and substitute:

has breached

(3) Section 232(2)(a) to (c)—delete "in breach" wherever occurring

Note—

35 The heading to section 232 will be amended to "Proceedings for declaration that a person has breached a conduct provision" when this section comes into operation.

67—Amendment of section 234—Matters for which there must be regard in determining amount of civil penalty

(1) Section 234—delete "to be in breach of" wherever occurring and substitute in each case:

40 to have breached

(2) Section 234—after paragraph (b) insert:

- (ba) without limiting the operation of section 3A(1)(c)(ii)(B) or (C)—the value of any benefit reasonably attributable to the breach that the person or, in the case of a body corporate, any related body corporate, has obtained, directly or indirectly; and

68—Amendment of section 277—Power to serve notice

Section 277(1)—delete "that the AER has reason to believe has breached" and substitute:

if the AER believes on reasonable grounds that the person has breached

69—Substitution of section 279

Section 279—delete the section and substitute:

279—Infringement penalties

(1) In this section—

tier 1 civil penalty provision means a provision with a civil penalty determined under section 3A(1)(c);

tier 2 civil penalty provision means a provision with a civil penalty determined under section 3A(1)(b);

tier 3 civil penalty provision means a provision with a civil penalty determined under section 3A(1)(a).

(2) The infringement penalty for a breach of a civil penalty provision is—

(a) in the case of a tier 3 civil penalty provision—

(i) if the breach is alleged to have been committed by a natural person—\$6 790 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;

(ii) if the breach is alleged to have been committed by a body corporate—

(A) if the AER makes a determination under subsection (3)—\$6 790 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision; or

(B) in any other case—\$33 900 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;

(b) in the case of a tier 2 or tier 1 civil penalty provision—

(i) if the breach is alleged to have been committed by a natural person—\$13 600 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;

(ii) if the breach is alleged to have been committed by a body corporate—\$67 800 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision.

(3) In the case of a body corporate that is not a listed corporation or a body corporate that is subject to the infringement penalty by virtue only of being a related body corporate, the AER may, in a particular case, determine that the infringement penalty to be included in an infringement notice to be issued to the body corporate in relation to an alleged breach of a tier 3 civil penalty provision will be the amount applying under subsection (2)(a)(ii)(A) if the AER considers this to be an appropriate course of action after taking into account—

(a) the nature of the alleged breach; and

(b) the degree of financial impact on the body corporate if the higher infringement penalty under subsection (2)(a)(ii)(B) were to be imposed; and

(c) the extent to which the imposition of the higher infringement penalty would appear to be excessive in the circumstances; and

(d) any other matter considered relevant by the AER.

Note—

See Schedule 2 clause 47A, which provides for the amounts specified in this section to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

70—Amendment of section 289—Corporations also in breach if officers and employees are in breach

Section 289—delete "in their capacity as officer or employee of the corporation" and substitute:

, which is within the scope of the actual or apparent authority of the officer or employee,

71—Insertion of sections 335A and 335B

After section 335 insert:

335A—Penalty privilege

If an individual has a privilege against self-exposure to a penalty, other than for a criminal offence, the individual is not excused from doing any of the following on that ground:

(a) providing information under this Law, the Regulations or the Rules;

- (b) producing a document under this Law, the Regulations or the Rules;
- (c) providing evidence under this Law, the Regulations or the Rules;
- (d) answering a question under this Law, the Regulations or the Rules.

335B—Court may grant relief from liability

If in any proceedings under this Law in which a person, other than a body corporate, may be liable for an offence or a civil penalty it appears to the Court that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability on such terms as the Court thinks fit.

72—Amendment of Schedule 2—Miscellaneous provisions relating to interpretation

- (1) Schedule 2—after clause 47 insert:

47A—Indexation of civil penalty amounts

- (1) Each civil penalty amount is to be adjusted in accordance with the method prescribed by the Regulations for the purposes of this clause.
- (2) The first adjustment is to occur on 1 July 2023.
- (3) The next adjustment is to occur on 1 July 2026 and an adjustment is to occur on 1 July every 3 years after that.
- (4) The AER must, on or as soon as practicable after the date of the first adjustment and before each subsequent adjustment, publish on its website the civil penalty amounts that apply on and from the date of the adjustment. However, a failure by the AER to do so does not invalidate an adjustment.
- (5) A civil penalty amount that is adjusted under this clause applies to a breach of a civil penalty provision that occurs or is alleged to occur on or after the date of the adjustment.
- (6) In this clause—

civil penalty amount means—

- (a) each amount specified in section 3A(1)(a), (b) or (c)(i) or (ii)(A); and
- (b) each amount specified as an infringement penalty in section 279.

47B—Indexation of criminal penalties

- (1) Each criminal penalty amount is to be adjusted in accordance with the method prescribed by the Regulations for the purposes of this clause.

- 5
- (2) The first adjustment is to occur on 1 July 2023.
- (3) The next adjustment is to occur on 1 July 2026 and an adjustment is to occur on 1 July every 3 years after that.
- (4) The AER must, on or as soon as practicable after the date of the first adjustment and before each subsequent adjustment, publish on its website the criminal penalty amounts that apply on and from the date of the adjustment. However, a failure by the AER to do so does not invalidate an adjustment.
- 10
- (5) A criminal penalty amount that is adjusted under this clause applies to a breach of a provision that occurs or is alleged to occur on or after the date of the adjustment.
- (6) In this clause—
- 15
- criminal penalty amount*** means any amount, specified in this Law, which is the maximum monetary penalty that may be imposed on conviction for the commission of an offence against this Law.

- (2) Schedule 2, clause 49(3)—delete "is in breach of" and substitute:
has breached