

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 150

Issued by authority of the Assistant Treasurer

Competition and Consumer Act 2010

Competition and Consumer Amendment Regulation 2012 (No. 2)

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

The *National Energy Retail Law (South Australia) Act 2011* of South Australia, includes as its schedule the National Energy Retail Law. The National Energy Retail Law, the Rules and Regulations made under it and consequential amendments to the existing National Electricity Law (set out in the schedule to the *National Electricity (South Australia) Act 1996* of South Australia) and the National Gas Law (set out in the schedule to the *National Gas (South Australia) Act 2008* of South Australia), are collectively known as the National Energy Customer Framework (the Customer Framework). The Customer Framework will be applied in all jurisdictions which are part of the National Electricity Market, namely South Australia, Victoria, New South Wales, the Australian Capital Territory, Tasmania, Queensland, as well as the Commonwealth, by application Acts. This Commonwealth-state-territory cooperative legislative regime is part of the Council of Australian Governments' energy reform program, under which non-economic distribution and retail regulation of gas and electricity will come under national governing institutions and regulatory arrangements. The expected commencement date for the Customer Framework is 1 July 2012.

The relevant regulator for the Customer Framework is the Australian Energy Regulator, a Commonwealth body established under Part IIIAA of the Act. Part IIIAA of the Act also provides for the Australian Energy Regulator's functions and powers. The Australian Energy Regulator's functions include any functions conferred under a law of the Commonwealth or prescribed by regulations made under the Act (see section 44AH), as well as functions conferred pursuant to a relevant 'State/Territory energy law' subject to satisfaction of the requirements of section 44AI of the Act.

What constitutes a 'State/Territory energy law' is defined in section 4(1) of the Act, but includes, amongst other things, provisions of a law of a state or territory that relate to energy and are prescribed by regulations for the purposes of paragraph (c)(ii) of that definition.

Part IIIAA of the Act also provides for certain other matters concerning the Australian Energy Regulator's administration including, relevantly, its obligations with respect to confidentiality.

Under section 44AAG of the Act, the Australian Energy Regulator may make an application to the Federal Court for certain orders, including for breach of a 'State/Territory energy law'.

The *Competition and Consumer Amendment Regulation 2012 (No. 2)* (the Regulation) provides for the necessary amendment of the *Competition and Consumer Regulations 2010* (the primary Regulations) for the following purposes:

- facilitate the Australian Energy Regulator disclosing information under the Act to Ministers of participating jurisdictions responsible for the administration of the National Energy Retail Law, including information provided to the Australian Energy Regulator in confidence and any information obtained by compulsion in the exercise of the Australian Energy Regulator's powers (confidential information);
- update certain references in the primary Regulations to relevant bodies undertaking energy industry ombudsman functions to whom the Australian Energy Regulator may disclose confidential information under the Act;
- extend the Federal Court's jurisdiction under section 44AAG of the Act to proceedings brought by the Australian Energy Regulator for breach of certain provisions of state or territory application Acts for the National Energy Retail Law for which the Australian Energy Regulator has enforcement responsibility. This is achieved by prescribing those provisions for the purposes of the definition of 'State/Territory energy law';
- clarify that the specified provisions of jurisdictional application Acts may confer functions, powers and duties on the Australian Energy Regulator, subject to satisfaction of the requirements of section 44AI; and
- clarify that, as a matter of Commonwealth law (for the purposes of federal jurisdiction), the Australian Energy Regulator has the functions of:
 - making an application to the Federal Court under section 44AAG of the Act and conducting proceedings in relation to such an application; and
 - instituting and conducting any appeal from a decision of the Federal Court under section 44AAG to the Full Court of the Federal Court or the High Court.

Details of the Regulation are set out at Attachment A.

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

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

The Statement of Compatibility with Human Rights is set out at Attachment B.

The amendments in this Regulation will form part of the Australian energy market legislative arrangements which support the three national energy cooperative legislative regimes; the National Energy Retail Law, the National Electricity Law and the National Gas Law. Consequently, the Regulation has been consulted on and approved by the Energy Ministers of the Standing Council on Energy and Resources, sitting as the Ministerial Council on Energy, in accordance with the requirements of the Australian Energy Market Agreement. The Australian Energy Regulator and all Commonwealth, state and territory government departments responsible for energy policy have also been consulted.

The Regulation will commence on 1 July 2012, except for the clauses set out in Schedule 2 concerning Victoria, which will commence on the commencement of section 4 of the *National Energy Retail Law (Victoria) Act 2012* of Victoria.

Details of the *Competition and Consumer Amendment Regulation 2012 (No. 2)*

Section 1 – Name of Regulation

This clause provides that the title of the Regulation is the *Competition and Consumer Amendment Regulation 2012 (No. 2)*.

Section 2 – Commencement

Schedule 2, which concerns Victoria, commences on the commencement of section 4 of the *National Energy Retail Law (Victoria) Act 2012 (Vic)*; the remainder of the Regulation commences on 1 July 2012.

Section 3 – Amendment of *Competition and Consumer Regulations 2010*

This clause provides that the *Competition and Consumer Regulations 2010* are amended as set out in Schedules 1 and 2.

Schedule 1 – Amendments commencing on 1 July 2012

Item [1] – Regulation 7

This item amends existing regulation 7 to make it clear that, for paragraph 44AAF(3)(e) of the Act, the persons and bodies set out in the table are prescribed persons and bodies. It also includes revised numbering for the clause as subregulation (1). These amendments are consequential to the amendments made to regulation 7 under items [2], [5] and [6] of Schedule 1.

Item [2] – Regulation 7, table, column 2, heading

This item substitutes the heading to column 2 of the table in existing regulation 7 so that it reads 'Prescribed person or body'. This amendment is consequential to the amendments made to regulation 7 under item [5] of Schedule 1.

Item [3] – Regulation 7, table, item 4.2

This item makes a minor amendment to item 4.2 of the table set out in existing regulation 7 to identify the Energy and Water Ombudsman, established by section 10 of the *Energy and Water Ombudsman Act 2006* of Queensland, as the relevant body undertaking energy industry ombudsman functions in Queensland to which the Australian Energy Regulator may disclose information under section 44AAF of the Act.

Item [4] – Regulation 7, table, item 8.2

This item makes a minor amendment to item 8.2 of the table set out in existing

regulation 7 to identify the ACT Civil and Administrative Tribunal, established by section 88 of the *ACT Civil and Administrative Tribunal Act 2008* of the Australian Capital Territory, as the relevant body undertaking energy industry ombudsman functions in the Australian Capital Territory to which the Australian Energy Regulator may disclose information under section 44AAF of the Act.

Item [5] – Regulation 7, table, after item 8.2

This item inserts a new heading and new item 9.1 into the table in existing regulation 7, which prescribes persons and bodies for the purposes of section 44AAF(3)(e) of the Act. The effect of these amendments to the table in regulation 7 is that the Australian Energy Regulator may disclose information under section 44AAF of the Act, in each jurisdiction that has applied the National Energy Retail Law as a law of the jurisdiction, to the Minister responsible for administration of the national energy retail legislation as it applies in the jurisdiction.

Item [6] – Regulation 7

This item inserts new subregulation (2) into existing regulation 7, which includes definitions relevant to the amendments to the table in subregulation (1) made by item [5] of Schedule 1.

Items [7]-[10] – Various amendments to Regulation 7A, table

Items [7]-[10] make amendments to the table in existing regulation 7A to prescribe specified state and territory provisions relating to energy for the purposes of paragraph (c)(ii) of the definition of 'State/Territory energy law'.

The provisions that are prescribed are key provisions of state or territory application Acts for the National Energy Retail Law which operate to:

- modify the National Energy Retail Law as it applies in that jurisdiction; or
- provide additional local matters for which the Australian Energy Regulator has enforcement responsibility.

The effect of prescribing the relevant state or territory application Act provisions is to:

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

Item [11] – After regulation 7A – Insertion of new regulation 7AA (Australian Energy Regulator functions)

This item inserts new regulation 7AA into the primary Regulations to clarify, for paragraph 44AH(b) of the Act, that the Australian Energy Regulator has the functions of:

- a) making an application for an order under section 44AAG of the Act and conducting proceedings relating to the application; and
- b) instituting and conducting appeals relating to an application mentioned in (a).

This will make it clear, as a matter of Commonwealth law (for the purposes of federal jurisdiction), that the Australian Energy Regulator may bring an application for an order under section 44AAG and conduct proceedings in relation to such an application. It will also clarify that the Australian Energy Regulator may also initiate and conduct proceedings on appeal to the Full Court of the Federal Court and to the High Court in relation to the initial application under section 44AAG.

Schedule 2 – Amendments commencing on commencement of section 4 of National Energy Retail Law (Victoria) Act 2012 of Victoria

Item [1] – Regulation 7A, table, item 3.1

Existing item 3.1 in the table in regulation 7A refers to 'Parts 3 and 4 of the *Gas Industry Act 2001* of Victoria'. Item [1] of schedule 2 substitutes item 3.1 with revised drafting so that it refers only to Part 3 of the *Gas Industry Act 2001* of Victoria. The effect of this amendment is to remove the reference in the table to Part 4 of the *Gas Industry Act 2001*. This amendment will commence on the date that section 4 of the *National Energy Retail Law (Victoria) Act 2012* of Victoria commences, which will also be the date that Part 4 of the *Gas Industry Act 2001* is repealed under Victorian law.

Item [2] – Regulation 7A, table, after item 3.3

This item inserts item 3.4 into the table in existing regulation 7A to prescribe certain provisions of the *National Energy Retail Law (Victoria) Act 2012* of Victoria and regulations made under that Act for the purposes of paragraph (c)(ii) of the definition of 'State/Territory energy law'. The provisions that are prescribed operate to:

- modify the National Energy Retail Law as it applies in that jurisdiction; or
- provide additional local matters for which the Australian Energy Regulator has enforcement responsibility.

The effect of prescribing the relevant Victorian provisions is to:

- extend the Federal Court's jurisdiction under section 44AAG of the Act to proceedings for breach of those provisions; and

- clarify that those provisions may operate to confer functions, powers and duties on the Australian Energy Regulator, subject to satisfaction of the requirements of section 44AI of the Act.

Schedule 2, which concerns Victoria, commences on the commencement of section 4 of the *National Energy Retail Law (Victoria) Act 2012* (Vic); the remainder of the Regulation commences on 1 July 2012.

Statement of Compatibility with Human Rights

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

COMPETITION AND CONSUMER AMENDMENT REGULATION 2012 (No. 2)

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

Overview of Legislative Instrument

The *National Energy Retail Law (South Australia) Act 2011* of South Australia, includes as its schedule the National Energy Retail Law. The National Energy Retail Law, the Rules and Regulations made under it and consequential amendments to the existing National Electricity Law (set out in the schedule to the *National Electricity (South Australia) Act 1996* of South Australia) and the National Gas Law (set out in the schedule to the *National Gas (South Australia) Act 2008* of South Australia), are collectively known as the National Energy Customer Framework (the Customer Framework). The Customer Framework will be applied in all jurisdictions which are part of the National Electricity Market, namely South Australia, Victoria, New South Wales, the Australian Capital Territory, Tasmania, Queensland, as well as the Commonwealth, by application Acts. This Commonwealth-state-territory cooperative legislative regime is part of the Council of Australian Governments' energy reform program, under which non-economic distribution and retail regulation of gas and electricity will come under national governing institutions and regulatory arrangements. The expected commencement date for the Customer Framework is 1 July 2012.

The amendments to the *Competition and Consumer Regulations 2010* (the primary Regulations) in the *Competition and Consumer Amendment Regulation 2012 (No. 2)* are consequential to the application of the National Energy Retail Law in relevant states and territories and for the following purposes:

- facilitate the Australian Energy Regulator disclosing information under the Act to Ministers of participating jurisdictions responsible for the administration of the National Energy Retail Law, including information provided to the Australian Energy Regulator in confidence and any information obtained by compulsion in the exercise of the Australian Energy Regulator's powers (confidential information);
- update certain references in the primary Regulations to relevant bodies undertaking energy industry ombudsman functions to whom the Australian Energy Regulator may disclose confidential information under the Act;

- extend the Federal Court's jurisdiction under section 44AAG of the Act to proceedings brought by the Australian Energy Regulator for breach of certain provisions of state or territory application Acts for the National Energy Retail Law for which the Australian Energy Regulator has enforcement responsibility. This is achieved by prescribing those provisions for the purposes of the definition of 'State/Territory energy law';
- clarify that the specified provisions of jurisdictional application Acts may confer functions, powers and duties on the Australian Energy Regulator, subject to satisfaction of the requirements of section 44AI; and
- clarify that, as a matter of Commonwealth law (for the purposes of federal jurisdiction), the Australian Energy Regulator has the functions of:
 - a. making an application to the Federal Court under section 44AAG of the Act (Federal Court may make certain orders) and conducting proceedings in relation to such an application.
 - b. instituting and conducting appeals to the Full Court of the Federal Court and to the High Court relating to an application mentioned in (a).

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

The disclosure of information by the Australian Energy Regulator pursuant to section 44AAF of the Act is highly unlikely to involve the disclosure of personal information. The information disclosed will concern retailer and distribution businesses regulated under the National Energy Retail Law, which will be incorporated entities.

The prescription of certain provisions of state or territory application Acts for the purposes of the definition of 'State/Territory energy law' will ensure the Australian Energy Regulator may bring an application to the Federal Court under section 44AAG of the Act for orders in respect of a breach of those provisions. This will involve proceedings against regulated businesses relating to such breaches and will not give rise to proceedings against individuals where personal rights and freedoms may be at issue.

For the same reasons, appeals relating to an application made under section 44AAG will not involve proceedings against individuals where personal rights and freedoms may be at issue.

In the context of section 44AI of the Act, the prescription of the relevant state and territory provisions for the purposes of the definition of 'State/Territory energy law' will clarify that those provisions may confer functions, powers and duties on the Australian Energy Regulator, subject to satisfaction of the requirements of that section. This does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon David Bradbury MP
Assistant Treasurer, Minister Assisting for Deregulation