

2017

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

UTILITIES (TECHNICAL REGULATION) AMENDMENT BILL 2017

EXPLANATORY STATEMENT

**Presented by
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EXPLANATORY STATEMENT

This explanatory statement relates to the *Utilities (Technical Regulation) Amendment Bill 2017* as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on the Bill. It does not form part of the bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

The *Utilities (Technical Regulation) Act 2014* provides a technical and industry regulatory framework for electricity, gas, water and sewerage utility services. The Act establishes a legal framework that prescribes safety and reliability standards for utilities' network infrastructure while providing suitably flexible discretion for the utility to ensure its infrastructure's efficient performance and maintenance. The Act balances these standards and powers against other legislative obligations that apply to utilities as licensees or regulated services.

The bill introduces amendments to the Act to deliver key actions under the Strategic Bushfire Management Plan 2014-2019 (SBMP), which seek to mitigate the risk of overhead electricity infrastructure causing fires. For this purpose, the Bill assigns responsibility to the electricity distribution utility (the responsible utility) for vegetation management near power poles and related infrastructure in urban and non-urban areas.

Overview of the Bill

The bill gives effect to the Powerline Fire Safety Policy (PFSP), which provides guidance about managing the risk of bushfires caused by vegetation in the vicinity of overhead power infrastructure or power poles and powerlines that have been erected on privately-leased land in the rural areas.

One of the PFSP's key objectives is to share responsibility for risk-management of privately-owned electrical infrastructure with responsible utilities. Shared responsibility is warranted due to the significant risk of inadequately maintained private electrical infrastructure causing bushfires. To give effect to this objective, this bill contemplates measures that may authorise interferences with an individual's right to privacy and home under section 12 of the *Human Rights Act 2004* (HRA). To the extent that the provisions of this bill engage and limit such rights, the limitations are proportionate and necessary for managing the risk of electrical infrastructure causing bushfires. In this manner, the bill seeks to preserve and protect public safety.

The bill also makes provision to protect trees from undue damage by limiting the utility to existing minimum clearance distances prescribed in the *Utility Networks (Public Safety) Regulation 2001*. To compel utilities to observe these minimum distances, the bill introduces a strict liability offence for non-compliance with a Technical Code. A technical code will be made and approved by the Minister, which will establish enforceable standards for how trees should be pruned.

As this code relates to protection the environment, a new provision is inserted by the bill to require consultation on the draft code with the Conservator of Flora and Fauna. The offence provision will support the development of an infringement notice scheme to support efforts to enforce compliance with the Code.

Urban area

The Act will be amended to make the utility responsible for vegetation management on unleased Territory Land in the urban area. As the landholder, Transport Canberra and City Services (TCCS) is currently obliged to ensure that they are not interfering with a regulated utility network by allowing the trees to grow within the minimum prescribed clearances under the Utility Networks (Public Safety) Regulation.

Due to outstanding vegetation clearance work, a significant number of trees are too close to powerlines in much of the urban area, leading to an increased risk of ignition, shock and outages. Recent severe weather events have demonstrated the benefits to the ACT in terms of cost and safety when vegetation clearances are appropriately maintained, such as a January 2017 storm in which High Voltage powerlines cleared by ActewAGL Distribution did not experience any interruptions to supply; whereas in areas with outstanding vegetation clearance work 23,000 customers experienced interruptions. ActewAGL Distribution has the capacity to undertake this work, and a technical code developed under the Act will establish quality standards and reporting processes.

Non-urban area

The management of fire risk from vegetation encroachments in the non-urban area of the ACT is also critically important. ActewAGL Distribution undertakes this work on unleased non-urban land under past agreement with the Commonwealth and ACT Government.

The non-urban area is outside the built-up area of the ACT and includes nature reserves, national parks and rural leased properties. The Bushfire Abatement Zone (BAZ) is located within the non-urban area. ActewAGL Distribution intends to continue carrying out vegetation clearance work in this area, and the Act will be amended to provide the legislative responsibility for them to do so.

Non-urban area - private poles

Compared to other jurisdictions, the ACT has a small number of privately owned power poles (approximately 230) located on fewer than 200 rural leased properties. These installations pose a significant bushfire risk. Recent events such as the 2009 Victorian Bushfires demonstrate the risks associated with this 'private' infrastructure. The 2009 Victorian Bushfires Royal Commission identified two of the worst fires in Victoria on 'Black Saturday', at Kinglake and Murrindindi, as having been started by powerlines accounting for 159 of the 173 deaths that day. In the wake of the bushfires, the Victorian Government established a \$200 million Powerline Replacement Fund to see powerlines in the highest risk bushfire areas replaced with insulated overhead, underground cables or new conductor technologies.

In 2013 a poorly maintained tree falling onto a powerlines is understood to have caused the 2013 Blue Mountains bushfire disaster in which 196 homes were destroyed, resulting in a class action against the power company responsible for the network. During hot dry weather conditions in 1979 a fire ignited from powerlines near Hall and burnt into NSW.

One of the actions under the SBMP is to clarify arrangements regarding the provision of information and advice in relation to private power infrastructure on rural leased land. ActewAGL Distribution are aware of the risks associated with these poles and currently inspect and replace most private power poles at their own cost to mitigate the risk of these installations causing a fire.

The small number of private poles makes many of the policy responses employed in other jurisdictions uneconomical in the ACT. The Act will be amended to formalise the existing operational position where safety inspections and vegetation clearance works are undertaken by ActewAGL Distribution as the responsible utility, allowing the recovery of costs from the community as part of their bushfire mitigation activity.

Implications on rights under the *Human Rights Act 2004*

Right to Privacy and Home

Section 28(2)(a) – Nature of the right affected

Section 12 of the *Human Rights Act 2004* (HRA) states that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily and not to have his or her reputation unlawfully attacked.

The right to privacy and reputation is ‘one of the broadest and most flexible of human rights’^[1] and protects a wide range of personal interests that include personal identity family life, the home and home environment.^[2] The right to privacy is not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society.^[3]

This right requires that a Government does not arbitrarily or capriciously invade a person's privacy in a manner not based on demonstrable evidence, and that it adopt legislative and other measures to protect people from others arbitrarily interfering with their privacy. Despite this, an interference provided for in law may still be arbitrary if it is unreasonable or unjustified in particular circumstances.

As established in case law, ‘arbitrary’ may denote a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim.^[4] Interference can only be on the basis of law that is precise and circumscribed, and does not give too much discretion to authorities.

^[1] Gans et al, *Criminal Process and Human Rights*, 2011, The Federation Press, Sydney, para 8.1, p 301.

^[2] Lester QC., Pannick QC (General editors), 2005, *Human Rights Law and Practice*, Second edition, LexisNexis UK, p 261.

^[3] UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)*, UN Doc CCPR General Comment 16 (1988), para 7.

^[4] *WBM v Chief Commissioner of Police* [2010] VSC 219 (28 May 2010), para 51.

Section 28 (2)(b) – Importance of the limitation

The amendments in Clause 7 authorise utility providers responsible for electrical distribution infrastructure to enter and occupy private land to clear vegetation and maintain or assess the condition of that infrastructure. These access rights apply in varying degrees in both urban and non-urban areas.

Early and consistent attention to fire hazards is in the interests of owners and occupiers whose properties contain electrical infrastructure, especially those in rural areas. It is also in the interests of owners of surrounding rural properties and residents of the urban area in the ACT to prevent the ignition and spread of bushfires. Trees and vegetation growing too close to powerlines and other utility infrastructure can cause blackouts, create safety hazards such as grass fires and bushfires, and increase the risk of electrocution. Trees, vegetation and other obstructions may also restrict access to utility infrastructure, preventing essential maintenance from being carried out and threatening the integrity of the broader electricity network.

Section 28(2)(c) – The nature and extent of the limitation

Clause 7 of the Bill inserts new Sections 41D, 41H and 41I.

Section 41D authorises a responsible utility to enter and occupy land and undertake any activity or work on the land that is reasonably necessary for the clearance of vegetation near an aerial line (i.e. felling, lopping, trimming, clearing of trees/roots/vegetation).

Section 41H grants a responsible utility authority to do anything reasonably necessary at any time to maintain electrical infrastructure within the network boundary. This includes entering and occupying land, and undertaking any work on the land for maintaining electrical infrastructure.

While these rights of access are phrased in broad terms (e.g. “undertake any activity or work on the land” and “reasonably necessary”), they may only be employed for specifically defined purposes, like felling trees, clearing vegetation and maintaining electrical infrastructure, within the confines of the ‘network boundary.’ They are limited by the threshold of reasonableness, which requires the work to be sufficiently related to, and necessary for, achieving the purposes of vegetation clearance.

The bill also makes the ability to undertake activities and work for vegetation clearances and maintenance of electrical infrastructure subject to a technical code that may apply to that work. This ensures that the legislative authorisation to undertake activities is not unfettered and will be subject to reasonable limitations as to how the work should be undertaken and who can undertake it. This is another measure to ensure that work undertaken to maintain vegetation clearances, for example, is appropriately limited to that purpose and will minimise further impacts on landholders and the environment.

A technical code made under Part 3 of the Act is approved by the Minister. In approving a technical code, the Minister is bound to consider human rights issues as a public authority under section 40B HRA. This means that, in approving a draft technical code, the Minister is obliged to consider and act consistently with an individual's human rights (including the right to privacy).

The network boundary refers to the boundary between the utility's electrical network and the owner's electrical network. At a defined point of connection, the responsibility for the electrical infrastructure switches from the utility to the owner. The utility is responsible for all electrical infrastructure that distributes electricity up to the point of attachment (e.g. all of the poles and wires running to an individual's home). As such, the rights of access in sections 41D and 41H are restricted to the narrow area of an individual's property where the utility's network infrastructure is located and those places necessary for the utility staff to access it. These access rights do not normally extend, for example, to the interior of an individual's home.

Only for rural leased land (defined in section 234 of the *Planning and Development Act 2007*), section 41I grants a responsible utility a right of access to inspect electrical infrastructure that is outside the network boundary (i.e. on the owner's side of the network boundary). This right of inspection is necessary to ensure that the electrical infrastructure that is the owner's responsibility is not in an unsafe state and posing an unacceptable safety risk. If the utility is not reasonably satisfied that the private electrical infrastructure is safe and adequately maintained, it may direct the owner to repair it within a reasonable period (of not less than 14 days). If the owner does not, the utility may access and occupy the property to do whatever is necessary to restore the infrastructure to a safe state. As discussed above, these rights of access are only expected to apply to approximately 230 privately-owned power poles and related infrastructure.

Section 28(2)(d) – Proportionality

The access rights in the bill are necessary and proportionate for mitigating the risk of bushfires, which presents a significant risk to public health and safety – either directly or through its potential to compromise the electricity network. Presently, access to rural properties is arranged through informal agreement with landholders. Delays in access caused by disagreement with landholders may exacerbate such risks.

These authorisations share responsibility for bushfire prevention and management. Section 41I, in particular, is necessary where there is ambiguity or dispute about ownership of electrical infrastructure on rural land and outside the network boundary. To prevent grassfires as a result of short circuits, this provision permits the utility to at least inspect the infrastructure and conduct maintenance where the purported owner fails to do so.

The access rights granted by the bill are subject to additional safeguards, including specific notice requirements, a right of dispute in non-emergency situations and a statutory duty of the utility to take reasonable steps to cause as little inconvenience, damage or detriment as possible. This protection seeks to limit the ongoing impact of access on a person's right to privacy and home.

New section 41L requires a utility to give an affected owner or occupier at least 7 days' notice that it will access their property (whether to clear vegetation, or inspect or maintain electrical infrastructure within or outside the network boundary). This notice requirement will apply in all circumstances except where it is urgent and necessary to protect public health or safety, private or public property, the environment or the integrity of a network facility or the network itself. This reflects comparable authorisations under the Utilities Act 2000 for emergency access to private properties without consent, which is justified by the overriding public interest in addressing risks to public safety and the environment.

For all other non-emergency access, notices under section 41L must state why the utility requires access to the individual's property, what it intends to do, when and for how long (section 41L(3)(b)). New section 41M also supports the right to fair trial under section 21, HRA by giving the owner a right to make a submission to the utility and negotiate about the type of repairs required and the period in which they must be completed. This advance notification and flexibility to agree on times allows the occupier or owner to take steps that reduce the impact of the utility's access on their personal privacy. Where agreement cannot be reached and the utility has determined the work that is necessary and set a time and date, the occupier may apply to ACAT for a determination of the repairs that are required or the period in which they must be completed.

Finally, a utility accessing private property under these provisions will be performing a function of a public nature and so is bound, as a public authority under section 40B HRA. This means that, in performing these functions, the utility will be obliged to consider and act consistently with an individual's human rights (including the right to privacy).

Section 28(2)(e) – Reasonable alternatives

There are no less restrictive measures reasonably available to achieve the provisions' collective purpose, which is to strengthen public safety by authorising utilities to identify and mitigate bushfire risks arising from improperly maintained electrical infrastructure and surrounding vegetation.

The Bill makes the electrical distribution utility, which may be a private company, responsible for inspection and maintenance. Although individuals may more readily accept access to their properties (and related impacts on their privacy) by government inspectors performing these functions, this is not a viable alternative.

Despite this, electrical distribution utilities in the Territory are more suitably-placed to perform vegetation clearance and maintenance due to their existing experience, resources and bushfire readiness programs.

These advantages enable them to take an efficient and proactive response to bushfire risk mitigation relative to Government, which justifies allocating responsibility of this function (and related entry powers) to them.

Cultural rights of Aboriginal and Torres Strait Islander peoples

Section 28(2)(a) – Nature of the right affected

Section 27 of the HRA states that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right to maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

The authorisations for responsible utilities to access unleased territory land to undertake any activity or work for clearance of vegetation or to do anything necessary or desirable to maintain electrical infrastructure has the potential to affect objects or places that have cultural significance to Aboriginal or Torres Strait Islander peoples (i.e. Aboriginal scarred trees).

This bill does not exclude existing protections applying to Aboriginal and Torres Strait Islander places and objects within the meaning of the *Heritage Act 2004*. Where a utility proposes any changes that could adversely impact cultural heritage, existing safeguards under the Heritage Act (and if appropriate the *Tree Protection Act 2005*) will apply. This includes appropriate consultation requirements. Given these safeguards, and the public interest in maintaining electrical infrastructure and its surrounding environment to mitigate bushfire risks, any impacts on the cultural rights of Aboriginal and Torres Strait Islanders are appropriately circumscribed and demonstrably justified.

Scrutiny of Bills Committee Principles

(a) unduly trespass on personal rights and liberties

The bill is designed to resolve any ambiguity about the legislative responsibility for maintaining utility infrastructure and associated vegetation clearances between regulated utilities and land holders. The bill places legislative responsibility for ongoing maintenance and assessment of bushfire risks created by this infrastructure on the regulated utility and not on individuals. The responsibility for maintaining vegetation clearances on leased land in the urban area is unchanged and remains with the lessee.

In relation to private rural leases, the utility currently maintains the majority of private power poles in the same manner as they maintain their own assets and the bill will not constitute a significant change in processes. Rather, it formalises current practice. As with utility infrastructure in the urban area, the utility will attain a right of entry to rural properties for the purposes of activities that are reasonably necessary for vegetation management and maintaining the electrical infrastructure network.

This is a necessary limitation on personal rights to private property to ensure continuity of electricity supply and the integrity of the electrical infrastructure network, thereby reducing the risk of bushfires.

The bill inserts a right of entry onto private premises to assess the condition of private infrastructure, such as poles and wires, in order to determine whether this poses an unsuitable bushfire risk. The right of entry is not considered to unduly trespass on personal property rights and the right to privacy as it is reasonable, proportionate and justified in order to achieve the overarching public safety goals of preventing this high risk infrastructure igniting a bushfire. The right of entry is appropriately limited to the purpose of assessing the bushfire risk posed by the infrastructure.

The bill also inserts a new power for the utility to issue a notice requiring rectification works for private infrastructure that is determined by the utility to pose an unacceptable bushfire risk. In this circumstance the utility is given the power to issue a notice to the landholder that the private infrastructure outside of the infrastructure network boundary must be rectified to a safe standard. This is similar to an existing power in section 32 of the Utilities (Technical Regulation) Act where the responsible utility can issue a network protection notice.

This limitation on personal rights, and placing an obligation on a land holder to rectify unsafe infrastructure is aimed at the goal of positively supporting public safety outcomes. The intrusion on personal rights is proportionate and justified as it is in the pursuit of protecting public safety from the real threat of bushfires ignited by unsafe electrical infrastructure on rural properties. The intrusion is appropriately limited to rectifying unsafe infrastructure to a safe standard.

No other aspects of the bill are considered to unduly trespass on personal rights and liberties. The transfer of responsibility for vegetation management on unleased land in the urban area will not affect the manner in which the clearance work is undertaken, only the responsibility transfer from government to the utility.

(b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers

The bill does not make any rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. The bill is designed to resolve any ambiguity around legislative responsibility for maintaining utility infrastructure and managing vegetation, and places legislative responsibility for this on the regulated utility and not on individuals. Regulated utilities have defined responsibilities under the Utilities (Technical Regulation) Act.

The intended outcome of the bill is that there is increased clarity around legislative responsibility for maintaining electrical network infrastructure. The right of entry and defect notice powers discussed above are clearly defined in the legislation, including the limitations on the power to achieve public safety outcomes.

(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions

The bill inserts a decision-making power for the responsible utility to give written notice requiring the owner of private electrical infrastructure on a rural lease to repair unsafe infrastructure that poses a significant risk to public safety, property or the environment. In these circumstances, the responsibility for maintaining this infrastructure lies with the rural lessee as the infrastructure is not within the boundary of the utility network.

The utility is best placed to assess the condition of the electrical infrastructure and to determine the risks posed in normal circumstances, a 14 day period will apply to allow the rural lessee time to discuss rectification options with the utility and government regulators. In urgent circumstances, the risk posed by the unsafe infrastructure will be considered so great that it must be dealt with immediately to prevent the significant risk of loss of life or property or damage to the environment.

This approach is consistent with the power to issue network protection notices under section 32 of the Utilities (Technical Regulation) Act and similar provisions in the Utilities Act.

For electrical infrastructure outside the network boundary on private property, the new provisions also contain a dispute mechanism for owners to make a submission to the utility to negotiate on the type of works required, or the timing of those works. Ultimately, the owner can apply to the ACAT for a determination as to the required repairs or the period in which they must be undertaken. Therefore, the decisions of the utility in relation to infrastructure beyond the network boundary are subject to appropriate rights of dispute for the owner. In the first instance, this right of dispute is to the utility, to try and negotiate a mutually agreeable outcome. Where that cannot be reached, there is an ability to apply to ACAT for a determination.

(d) inappropriately delegate legislative powers

The amendments in the bill do not inappropriately delegate legislative powers. The amendments give the utility the power to issue notices in instances where the responsible utility, in carrying out their required bushfire mitigation activities, assesses a private power pole on rural leased land to pose a bushfire ignition risk due to its condition.

The utility is best placed to carry out this function given the similarity of the private infrastructure to that within their network, and their role in mitigating bushfire risk related to electricity infrastructure across most of the ACT. This is also consistent with the approach for leased land in the urban area where it is the lessee or tenant's responsibility to maintain trees near powerlines to prescribed clearances or face a fine from the utility, or the utility arranging for the work to be undertaken and then charging the lessee or tenant.

This is also consistent with the existing power in section 32 of the Utilities (Technical Regulation) Act where the utility can issue a network protection notice to require a land holder to undertake an activity to stop or prevent interference to the network.

Given the high and very real risk of bushfire ignition posed by unsafe private electrical infrastructure, it is appropriate to have a process under the Act that allows for swift remediation of the unsafe infrastructure. This will allow for the risks to be mitigated quickly, with remediation or rectification works completed to the appropriate safe standard.

(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny

The amendments do not insufficiently subject the exercise of legislative power to parliamentary scrutiny. The utility will be exercising legislative power to maintain their utility networks to safe standards. This power is extended to allow the utility to issue notices over private infrastructure that poses an unacceptable bushfire risk.

This power is given to the utility through the amendments in the bill and is considered necessary for the utility to exercise, as the utility has the expertise and resources to perform these functions. The bill does not establish new powers to create subordinate legislation or other legislative instruments.

Costs and benefits

The cost of implementing the amendments will be placed on the responsible utility, and it is likely that this will be passed through to customers. This is considered necessary and appropriate to reduce the bushfire risk to the Territory and a reasonable cost for achieving this benefit. Having a legislative basis for tree cutting responsibilities across non-urban, rural and urban sectors will afford the utility economies of scale and reduced costs of operation.

Implementing the legislative amendments constitutes the regulatory change event required for the utility to be able to apply to the Australian Energy Regulator for a positive cost pass through. The cost of undertaking additional responsibilities must also meet a materiality threshold specified in the positive change event exceeding 1% of the utility's annual revenue. When all issues relating to vegetation management and private power poles are considered together in the interests of bushfire safety, the cost exceeds the materiality threshold.

Provisions in detail

Clause 1 Name of Act

This clause sets out the name of the Act as the *Utilities (Technical Regulation) Amendment Act 2017*.

Clause 2 Commencement

This clause sets out that the Act commences on a day fixed by the Minister by written notice.

Commencement by written notice is appropriate in these circumstances as the Powerlines Fire Safety Policy also envisions the development of a technical code for regulated utilities that guides how vegetation management works must be completed. To allow time for the preparation of the technical code, consultation with relevant parties, including the regulated utility, and for financial planning to implement the changes, a delayed commencement of the bill is considered necessary.

The delayed commencement will also allow time for the responsible utility to plan for and implement their new responsibilities, specifically in relation to urban area unleased land and to develop an efficient cost recovery model.

Clause 3 Legislation amended

This clause specifies that the Act amends the *Utilities (Technical Regulation) Act 2014*. The Act also makes consequential amendments to the *Tree Protection Act 2005*.

Clause 4 Draft technical codes – consultation New section 13(2)(aa)

This clause inserts a new section 13(2)(aa) into the Act. This new provision requires consultation with the Conservator of flora and fauna on a draft technical code that is made for the purpose of protecting the environment. This mandatory consultation requirement is inserted to ensure that the views of the conservator are considered in the preparation of draft technical codes that relate to the protecting the environment.

Clause 5 Offence – fail to comply with technical code, New section 16 (2) and (3)

This clause creates a strict liability offence for not complying with a technical code.

The offence applies to regulated utilities and states that an offence is committed if a technical code applies to a regulated utility, and the regulated utility fails to comply with a requirement of the technical code.

The maximum penalty for this offence is 30 penalty units and it is a strict liability offence.

The maximum penalty unit of 30 is in contrast to the existing offence in s 16 of the Act which is set at 2000 penalty units. It is envisaged that this offence will be used for minor non-compliances with requirements of technical codes, when there is a clear obligation to do or not do something under the code, and this is breached. The offence will apply to mandatory requirements of technical codes that do not have an element of subjectivity and do not require a fault element.

The application of technical codes to regulated utilities, and the requirements within them, is an important and well-known part of the utilities regulatory framework in the ACT. Regulated utilities are required to hold a licence under the Utilities Act or an operating certificate under this Act. The offence only applies to regulated utilities and not the general public.

It is appropriate that there is a strict liability offence for minor non-compliances with technical codes as an additional enforcement option under the Act. This complements the existing offence provision which contains a negligence fault element. The defence of reasonable mistake of fact applies to this offence through section 36 of the Criminal Code.

In the context of this bill, the strict liability offence is likely to have an infringement notice scheme developed that may be used to issue fines for minor non-compliances with a soon to be developed vegetation management technical code.

Clause 6 Section 30, Meaning of interference – part 5

This clause inserts a new definition of *interference* for Part 5 which includes a new subsection 30(1)(b) which excludes the encroachment of vegetation on unleased land, rural leased land and national land from this definition.

Clause 7 New part 5A

This clause inserts a new part 5A into the Act. New Part 5A provides for vegetation and electrical infrastructure management. This part consolidates various provisions relating to vegetation management and electrical infrastructure management which exist elsewhere in ancillary and subordinate legislation, and inserts new relevant provisions for ease of interpretation.

New division 5A.1 General

This includes new section 41A which inserts a new definition of *responsible utility* applicable to this part as being the responsible utility for an electricity network. This definition includes both distribution and transmission networks as defined in section 7 of the Utilities Act. It also incorporates the definition of *rural lease* from the *Planning and Development Act 2007* for application in this part; and defines *rural leased land* as meaning land in relation to which a rural lease is granted.

New section 41B allows any of the functions exercisable by a responsible utility under new part 5A to be undertaken on National Land subject to agreement with the Commonwealth, similar to section 107 of the Utilities Act.

New division 5A.2 Vegetation management

New division 5A.2 includes new section 41C which defines various components of overhead electrical infrastructure, and is directly reproduced from the Utility Networks (Public Safety) Regulation as it is relevant to this part.

New section 41D relates to vegetation clearances from aerial lines. Subsection 41D(1) establishes the regulated utility as being responsible for clearing vegetation near aerial lines on all land in the ACT with the exception of urban leased land (urban backyards), which is dealt with under the Utility Networks (Public Safety) Regulation. For rural land, this section does not differentiate between the responsible utility's assets and private infrastructure as it is intended to ensure the utility is responsible for vegetation management on all rural leased in the interests of bushfire safety. National Land remains subject to agreement as per section 41B.

New subsection 41D(2) gives the responsible utility power of entry onto land to undertake any activity or work that is *reasonably necessary* for the clearance of vegetation near aerial lines, and notes that a responsible utility must give notice to the owner of the land. The term *reasonably necessary* is inserted as a limitation on the types of activity and work that can be undertaken and ensures that the work is sufficiently related to and necessary for maintaining the vegetation clearances outlined in the table in s 41D.

New subsection 41D(3) provides a further limitation on the ability to undertake activities and work in (2) by stating that activities or work must be undertaken in accordance with an applicable technical code. Technical codes can be made under the existing Part 3 of the Act and are approved by the Minister. A technical code for vegetation clearance will be prepared that prescribes how clearance activities must be undertaken, the accreditation requirements of contractors undertaking the work, and a role for the conservator in the oversight of the works plan. The code will contain practices that must be followed to ensure consideration is given by the responsible utility to the manner in which trees are pruned as well as adhering to prescribed minimum clearances so that, for example, a branch is not left dangerously overhanging an aerial line where all branches below which may have provided structural support have been trimmed simply because it is just outside of the minimum clearances.

New subsection 41D(4) creates an offence for the responsible utility if they allow any part of a tree or other vegetation to be too close to an aerial line for which they have responsibility. There is a maximum penalty of 10 penalty units recognising the minor nature of these offences, and the potential for large numbers of offences to be committed if vegetation management is not delivered effectively. It is intended that this penalty will apply for each individual tree contravening this section.

Subsection 41D(5) states that the offence in subsection (4) is a strict liability offence. The offence is appropriately determined to be strict liability as it does not contain fault elements and is regulatory in nature. Whether an offence is committed is determined by reference to the minimum distances set out in the table in s 41D. S 41E also prescribes the measurement method for an offence under s 41D(4).

Therefore, whether an offence has been committed is based on an objective assessment of whether the vegetation encroaches on the minimum distances set out in the Act.

Subsection 41(D)(6) provides the responsible utility with the defence of reasonable excuse if charged with committing an offence under this section.

New subsection 41D (7) explains that a tree or vegetation is too close to an aerial line if it is within the minimum distance from any part of the line worked out in accordance with the table shown at 41D. Subsection 41D(8) clarifies that this also applies to registered trees under the *Tree Protection Act 2005*. It is noted under subsection 41D(8) that an offence applies under the Tree Protection Act so as to provide consistent information about other laws that are likely to apply in relation to vegetation, as this new division specifically relates to vegetation management.

New section 41E explains that the minimum distance from an aerial line is to be measured from the nearest point to which the line sags or swings. This corresponds with section 26 of the Utility Networks (Public Safety) Regulation which relates to taking measurements for establishing clearances from other objects such as vehicles and non-flammable materials. It is included in this new section to ensure that distances are correctly measured and not assumed, as there can be a significant difference between the measurement taken at the point where an aerial line joins the pole compared to the middle of the span, particularly for long spans.

New division 5A.3 Electrical infrastructure management

New section 41F defines *electrical infrastructure* for the new division 5A.3, using the same definition as that provided under the Utilities (Technical Regulation) Act for use in Part 7 Network boundaries and isolated infrastructure. A definition of *network boundary* is provided and means the boundary between an electricity network and customers' premises. Reference is made to existing section 53 of the Act which provides for working out the network boundary.

New section 41G provides for the maintenance of electrical infrastructure within the network boundary. This section provides that for infrastructure within the network boundary, the responsible utility is responsible for maintaining the infrastructure. This applies to all electrical infrastructure within the boundary, regardless of the land type on which it occurs. This is consistent with the approach under the Utilities Act where licensed utilities are responsible for their own network infrastructure. This provision explicitly assigns legislative responsibility to the responsible utility as it is best placed to manage and maintain infrastructure to appropriate standards, thereby mitigating the bushfire risk posed. This provision is contrasted to the position in s41I which sets out the responsible utility's role for infrastructure outside the network boundary.

New section 41H reflects existing section 106 of the Utilities Act which provides powers of entry for the responsible utility to meet their legislative responsibilities under section 41G regarding the maintenance of electrical infrastructure. This clarifies that the responsible utility may enter and occupy land and undertake any reasonably necessary work on the land to maintain electrical infrastructure.

New subsection 41H(2) provides a further limitation on the ability to undertake activities and work in s41H(1) by stating that activities or work must be undertaken in accordance with an applicable technical code. Technical codes can be made under the existing Part 3 of the Act and are approved by the Minister. As a licensed utility under the Utilities Act, the responsible utility already has an obligation to maintain their infrastructure to ensure safety. As a public authority under section 40B of the Human Rights Act the responsible utility is bound to act consistently with human rights, and will use this power in the same manner in which the existing power under the Utilities Act is used, that is to undertake non-urgent maintenance during normal business hours. Subsection 41H(3) provides a definition of the maintenance of electrical infrastructure for the purpose of s41(H)(1)(b). Subsection 41H(4) clarifies that this also applies to registered trees under the *Tree Protection Act 2005*. It is noted under subsection 41H(4) that an offence applies under the Tree Protection Act so as to provide consistent information about other laws that are likely to apply in relation to vegetation, as this new division specifically relates to vegetation management.

New section 41I requires the responsible utility to inspect electrical infrastructure outside the network boundary, specifically on rural leased land. Subsection 41I(2) requires the utility to inspect the infrastructure at least once every three years to check if it is being maintained adequately and is in a safe state. The utility is also given a power of entry to carry out the inspection. This is primarily to enable the utility to assess the risk of the private infrastructure causing an ignition and subsequent bushfire due to the condition of the pole or powerlines. Deterioration of a pole may result in it falling and bringing powerlines into contact with the ground or vegetation, and this section establishes the responsible utility as being best placed to assess the risk of that occurring.

New subsections 41I(3) and (4) apply if the responsible utility carries out an inspection under 41I(1) and establishes that electrical infrastructure on the land poses a significant risk of causing a bushfire, by allowing the responsible utility to give an owner of rural leased land written notice advising them to undertake repairs to the infrastructure to restore it to a safe state. This notice must advise the owner of the repairs required to be undertaken to restore the electrical infrastructure to a safe state, require the owner to take the action within a stated period and contain a statement about the owner's right under s 41M. The notice must also contain a statement about the action that will be undertaken by the responsible utility under subsection 41I(6) if they do not comply with the notice, such as entering the responsibility utility having the power to do whatever is necessary to repair and restore the infrastructure to a safe state, and that the reasonable expenses incurred by the utility in doing this work are a debt owing to the utility by the owner. This essentially provides the owner with the opportunity to undertake the work themselves, before the utility can perform the work. Ultimately, the utility is responsible for ensuring the work is done if the owner does not act on the notice.

New subsection 41I(5) establishes a reasonable period of not less than 14 days to expect the rectification of unsafe infrastructure. The determination of what is a reasonable period will depend on a number of factors, including the risk posed by the unsafe equipment and the type of work required to be undertaken. The responsible utility is provided the power to undertake the work in urgent circumstances, to immediately address an unacceptable bushfire risk. The utility is best placed to make an assessment about the safety of electrical infrastructure and is appropriate entity to be able to issue a notice as it performs functions of a public nature in distributing electricity.

New subsection 41I(7) provides that in urgent circumstances the responsible utility must make unsafe infrastructure safe at their own expense without providing notice to the owner. New subsection 41I(8) requires the responsible utility to notify the owner and the technical regulator about the urgent action undertaken as soon as practicable after taking the action under (7).

New subsection 41I(9) clarifies that this section also applies to registered trees under the Tree Protection Act. It is noted that an offence applies under the Tree Protection Act so as to provide consistent information about other laws that are likely to apply in relation to vegetation, similar to section 41H. Consequential amendments are made to the Tree Protection Act below, which provide defences to offences under that Act where the work is authorised under a section of this Act.

New subsection 41I(10) defines *urgent circumstances* for this section. The urgent circumstances are based on an existing definition in section 32 of the Act.

New division 5A.4 Performance of management operations

New section 41J defines *management operations* undertaken by the responsible utility for division 5A.4. This definition also specifies that *management operations* includes work under 41I(6) where the utility is required to restore and repair electrical infrastructure if an owner has not complied with a notice given to do so, in relation to electrical infrastructure outside the network boundary.

New section 41K is inserted to place an obligation on the responsible utility to take all reasonable steps to ensure that, when carrying out management operations, it causes as little inconvenience, detriment and damage as practicable. This general obligation to limit impacts is aimed at ensuring the right to privacy and home in s 12 of the Human Rights Act is considered by the responsible utility when undertaking management operations and is not arbitrarily limited.

New section 41L contains notice provisions for management operations undertaken by the responsible utility on private land. Under section 41L(2), before the responsible utility starts management operations, it must give the owner written notice of the proposed operations.

New subsection 41L(3) requires the notice to be given a reasonable period of not less than 7 days before the management operations start and requires details about the nature of the operations to be carried out and the period during which the activity will be carried out. Subsection 41L(4) allows the owner to waive all or part of the minimum notice period under subsection (3)(a). New subsection (5) provides for urgent circumstances, in which the notice period does not apply, with the effect being that the management operations can be undertaken immediately.

To ensure consistency with existing provisions in the Utilities Act (see section 109), a requirement to provide reasonable notice of at least 7 days is imposed on the utility. This ensures a balance between the need to maintain network infrastructure and protect public safety, and the right to privacy and home. This provision also allows for the responsible utility to enter land immediately, and without issuing notice, in urgent circumstances where it is necessary to protect the integrity of the network, the health and safety of people, public or private property, or the environment. New section 41M establishes rights for the owner in a dispute relating to management operations outside the network boundary. Specifically, section 41M applies where the owner has been given a notice under s 41L(4) (to undertake works) or 41L(3)(b)(iv) (notifying that the utility will undertake works). In these instances, the owner may make a submission to the responsible utility about the repairs, or propose a different period for the repairs to be carried out. If the owner and responsible utility cannot agree on the repairs, or the period for the repairs to be carried out, either the utility or the owner can apply to ACAT for a determination of the repairs that are required or the period in which they must be completed.

This provision supports the right to a fair trial in section 21 of the Human Rights Act by allowing the owner to dispute the type of work required, or the time period in which it is proposed to be completed.

As per the operation of sections 41I and 41L, this only applies to management operations outside the network boundary and in non-urgent circumstances.

Clause 8 Dictionary, note 2

This clause inserts the terms *conservator of flora and fauna*, *national land* and *territory land* into the Dictionary, note 2 and notes that the terms are defined in the Legislation Act.

Clause 9 Dictionary, new definitions

This clause provides definitions in the dictionary to the Act for a number of terms used in part 5A and by reference back to the definitions of those terms in new section 41C.

Clause 10 Dictionary, definition of *occupier and owner*

This clause establishes that there are now two definitions of occupier – one applicable to part 5A (Vegetation and electrical infrastructure management) which is at section 41A; and one applicable to part 9 (Enforcement) which is at section 76.

This clause also establishes that there are now two definitions of owner – one applicable to part 5A (Vegetation and electrical infrastructure management) which is at section 41A; and one in relation to a dam or proposed dam, for Part 8 (Dams safety)-, which is at section 57.

Clause 11 Dictionary, new definitions

This clause refers to section 41J for the definition for *private land* and *public land* in division 5A.4 (Performance of management operations).

Clause 12 Dictionary, definition of *responsible utility*

This clause substitutes the definition for *responsible utility* and provides two definitions for this term: for the Act generally; and specifically for part 5A, by referring to section 41A.

Clause 13 Dictionary, new definitions

This clause includes a reference to the Planning and Development Act for the definition of rural lease for part 5A. For the definition of *rural leased land* and *U* (nominal voltage) for part 5A, it refers to section 41A and 41C respectively.

Schedule 1 Consequential amendments

Part 1.1 Tree Protection Act 2005

[1.1] Section 19(1)(d)(iii)

This clause substitutes a new section 19(1)(d)(iii) into the *Tree Protection Act 2005*. Section 19 of the Tree Protection Act contains exceptions to tree damaging and prohibited groundwork offences. Currently, section 19(1)(d)(iii) lists anything done in relation to a regulated tree under a network protection notice given under section 32 of the *Utilities (Technical Regulation) Act 2014* as an exception to an offence.

This clause makes consequential amendments to section 19(1)(d)(iii) by adding anything done under ss 41D, 41H and 41I to this list. These consequential amendments are consistent with the existing section 19 and are necessary to ensure that work undertaken to protect the electricity network does not constitute an offence under the Tree Protection Act.

[1.2] New section 19(1)(ea)

This clause inserts a new subsection 19(1)(ea) into the *Tree Protection Act 2005*. Section 19 of the Tree Protection Act contains exceptions to tree damaging and prohibited groundwork offences. Currently, section 19(1)(e) lists anything done in relation to a registered tree under stated provisions of the Utilities Act as an exception to an offence where it is done for the purpose of protecting life or property and it is not practicable because of the urgency of the situation to obtain an approval under section 29 of the Tree Protection Act.

This clause inserts a new section 19(1)(ea) into the Tree Protection Act as a consequential amendment to new provisions inserted by this amending Act.

Specifically, new section 19(1)(ea) adds anything done under ss 41D, 41H and 41I as exceptions to offences for registered trees, where the work is done for the purpose of protecting life or property and it is not practicable because of the urgency of the situation to obtain an approval under section 29 of the Tree Protection Act.

This consequential amendment is consistent with the existing section 19(1)(e) and is necessary to ensure that work undertaken to protect life or property, including maintaining the electricity network, does not constitute an offence under the Tree Protection Act.