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**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**TENTH ASSEMBLY**

**INDEPENDENT COMPETITION AND REGULATORY COMMISSION  
AMENDMENT BILL 2024**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004, s 37*)**

**Presented by  
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# INDEPENDENT COMPETITION AND REGULATORY COMMISSION AMENDMENT BILL 2024

The Bill is **not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

## OVERVIEW OF THE BILL

This Explanatory Statement relates to the Independent Competition and Regulatory Commission Amendment Bill 2024 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to inform its debate. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill, it is not, and is not meant to be, a comprehensive description of the Bill. Provisions are not to be taken as an authoritative guide to the meaning of the provision, which is a task of court interpretation.

The Bill aims to introduce new civil regulatory powers that would improve the Independent Competition and Regulatory Commission's (ICRC) enforcement capabilities and provide it with comparable enforcement powers to other economic regulators of utilities and energy retailers. It establishes a new part under the *Independent Competition and Regulatory Commission Act 1997* and will enable the ICRC to have the same capacity as the Australian Energy Regulator (AER) to apply civil enforcement capabilities to existing corporate conduct obligations in the *Utilities Act 2000*, *Consumer Protection Code*, *ACT Retail Electricity (Transparency and Comparability) Code* and the *Electricity Feed-in Code*.

At present, the ICRC is the only utility regulator in Australia that does not have the capacity to use civil law mechanisms to seek compliance with utility law obligations.

The amendments to the *Independent Competition and Regulatory Commission Act 1997* include:

1. inserting a new part 9A which provides for the enforcement of civil penalty provisions including enforceable undertakings, civil penalty notices, enforcement orders and injunctions; and
2. inserting a new schedule 5 which maps existing conduct obligations to a civil penalty tier.

The amendments to the *Utilities Act 2000* include:

1. amending sections to raise criminal penalty amounts for corporations in relation to offences which are also civil penalty provisions.

Modernisation of the ICRC's capabilities will improve the effectiveness of its regulatory mechanisms and promote greater levels of compliance to protect consumer interests. The current absence of graduated civil enforcement options reduces the ICRC's capacity to effectively ensure the compliance of utility providers with obligations that aim to protect consumers compared to other utility regulators in Australia.

The adoption of this Bill will assist the ICRC to promote compliance by utility providers with laws governing the expected service levels for electricity, gas and water, and to ensure National Energy Retail Law (NERL) retailers are transparent in their market price offerings.

## **CONSULTATION ON THE PROPOSED APPROACH**

Targeted consultation occurred in the development of the Bill and allowed for provisions to be informed by feedback from key stakeholders. This has helped to ensure its implementation is undertaken in accordance with community expectations.

In September 2023, the ACT Government sought feedback on the merits of providing the ICRC with comparable powers to other economic regulators in Australia. This provided key stakeholders including utilities, NERL retailers, industry and consumer peak bodies with an opportunity to provide feedback on the proposal.

Key feedback from the consultation process included:

- Stakeholders recognising that the ICRC does not have the flexibility of other regulators to take civil action in the event of problematic conduct;
- Understanding that a regulatory gap exists, there was support for additional enforcement powers that will assist the ICRC in securing compliance in day-to-day matters;
- Support was provided for additional enforcement powers that result in better consumer protection outcomes and clearer expectations for utilities.

Overall, the consultation process indicated that modernisation is appropriate to ensure the ICRC has the same flexibility to address non-compliance with the law as counterpart utility regulators.

## **CONSISTENCY WITH HUMAN RIGHTS**

The Bill does not engage human rights. Section 54ZE states that an individual is not liable under Part 9A for a contravention of a civil penalty provision if the contravention has a corresponding offence. A corresponding offence is defined as an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. All of the civil penalty provisions set out in Schedule 5 have a corresponding offence, meaning that individuals cannot be liable for civil penalties under the Bill.

# Independent Competition and Regulatory Commission Amendment Bill 2024

## *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Independent Competition and Regulatory Commission Amendment Bill 2024**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA  
Attorney-General

## CLAUSE NOTES

### **Clause 1      Name of Act**

This clause provides that the name of the Act is the *Independent Competition and Regulatory Commission Amendment Bill 2024*.

### **Clause 2      Commencement**

Clause 2 provides that the Act Commences six months after its notification day.

### **Clause 3      Legislation amended**

This clause identifies the legislation that will be amended is the *Independent Competition and Regulatory Commission Act 1997* and the *Utilities Act 2000*.

### **Clause 4      New part 9A**

Clause 4 inserts part 9A which provides for the enforcement of civil penalty provisions.

These provisions replicate civil enforcement provisions available to the AER in the *National Energy Retail Law (ACT) Act 2012*, *Electricity (National Scheme) Act 1997* and *National Gas (ACT) Act 2008*, which give effect to national laws and regulations set out in the *National Energy Retail Law (South Australia) Act 2011*, *National Electricity (South Australia) Act 1996* and *National Gas (South Australia) Act 2008*. In doing so, the laws of the ACT provide the Australia Energy Regulator with the same capacity to bring about compliance in the ACT using a civil law framework as other jurisdictions.

The Bill also replicates provisions from the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) to provide a consistent framework for the interaction of a regime that encompasses both civil and criminal liability. This explanatory statement uses the same explanatory material from *Regulatory Powers (Standard Provisions) Bill 2014* for relevant clauses.

Noting that the Bill replicates provisions of national law schemes, this explanatory statement adopts the same explanatory material from national law schemes for relevant clauses.

#### New division 9A.1 Preliminary

##### *54A – Definitions—pt 9A*

The new section includes definitions of ‘conduct’, ‘corresponding offence’ and ‘court’.

##### *54B – Part does not limit other powers of court*

This section clarifies that the part does not limit other powers of the court.

#### New division 9A.2 – Enforceable undertakings

##### *54C – Enforceable Undertakings (s 288 of the National Energy Retail Law)*

This allows the ICRC to accept enforceable undertakings.

##### *54D – Application for enforcement of undertakings (s 288 of the National Energy Retail Law)*

This allows the ICRC to enforce enforceable undertakings.

#### New division 9A.3 – Civil penalty notices

##### *54E – Service of civil penalty notice (s 277 of the National Gas Law)*

Provides that the ICRC may serve a civil penalty notice for breaches of relevant civil penalty provisions.

##### *54F – Contents of civil penalty notice (s 278 of the National Gas Law)*

Provides for the contents of the civil penalty notice.

##### *54G – Amount payable under civil penalty notice (s 279 of the National Gas Law)*

Sets out the amount of the civil penalty notice.

##### *54H – Time for payment of amount (s 281 of the National Gas Law)*

Provides for when the ICRC may accept late payment of a civil penalty notice.

##### *54I – Effect of payment of amount (s 284 and 285 of the National Gas Law)*

Provides for expiation of a breach subject to a civil penalty notice.

Provides that payment of a civil penalty notice is not to be taken to be an admission of a breach or of liability.

##### *54J – Withdrawal of civil penalty notice (s 282 of the National Gas Law)*

Provides that the ICRC may withdraw an infringement notice.

##### *54K – Conduct contravening multiple civil penalty provisions (s 237 of the National Gas Law)*

Provides for liability for one civil penalty in respect of the same conduct constituting a breach of two or more civil penalty provisions.

##### *54L – Effect of civil penalty notice on enforcement order proceedings (s 280 of the National Gas Law)*

The ICRC may issue a civil penalty notice in relation to an alleged contravention, which the company may choose to accept. During the time the notice is valid, and has not been withdrawn, the ICRC must not apply to the court for an enforcement order.

#### New division 9A.4 – Enforcement orders

##### *54M – Application for enforcement order (s 230 and s 231 of the National Gas Law)*

Provides for the time limit within which proceedings may be instituted.

Provides for the enforcement orders that may be made in proceedings in respect of breaches of a civil penalty provision.

##### *54N – Deciding civil penalty for civil penalty order (s 234 of the National Gas Law)*

Sets out matters to be taken into account in determining civil penalties.

##### *54O – Enforcement order proceedings are civil proceedings*

Clarifies that an enforcement order proceeding is a civil proceeding for all purposes.

##### *54P – Proceedings may be heard together (s 86 of the Regulatory Powers Act)*

Clarifies that a court may hear two or more proceedings for civil penalty orders simultaneously. This will streamline the process for civil proceedings, remove the need for a person to be subject to multiple proceedings, and thereby reduce legal costs for the person and the ACT.

##### *54Q – Civil proceedings after criminal proceedings (s 88 of the Regulatory Powers Act)*

Provides that a court cannot make an enforcement order against a person who has been convicted of a criminal offence for the same, or substantially the same, conduct.

##### *54R – Criminal proceedings during civil proceedings (s 89 of the Regulatory Powers Act)*

Stays civil proceedings if criminal proceedings commence or have commenced and relate to the same, or substantially the same, conduct. This is to prevent any information that arises during criminal proceedings prejudicing civil proceedings. If the criminal proceedings result in a conviction, civil proceedings related to the same, or substantially the same, conduct will be dismissed and costs for the civil proceedings not awarded. Civil proceedings may resume if the person is not convicted of the offence.

##### *54S – Criminal proceedings after civil proceedings (s 90 of the Regulatory Powers Act)*



Clarifies that criminal proceedings may commence after civil proceedings, even in the event the civil proceedings result in an enforcement order. This recognises the importance of criminal proceedings and criminal penalties in dissuading and sanctioning contraventions of a civil penalty provision and ensures that criminal remedies are not precluded by earlier civil action.

*54T – Evidence given in civil proceedings not admissible in criminal proceedings (s 91 of the Regulatory Powers Act)*

Provides that evidence given by an individual during proceedings for an enforcement order cannot be used in any criminal proceedings, against the same individual relating to the same conduct. This ensures that information or documents produced during civil proceedings are not relied upon to support subsequent criminal proceedings, unless they are criminal proceedings relating to falsifying evidence in civil proceedings. While it is appropriate to allow criminal proceedings after civil proceedings have ended, given the overriding importance of the criminal justice system, criminal proceedings not related to falsifying evidence must rely upon evidence gathered during independent investigations, not evidence from prior civil proceedings.

*54U – Conduct contravening multiple civil penalty provisions (s 84 of the Regulatory Powers Act)*

Clarifies that a person's conduct may contravene more than one civil penalty provision. An enforcement order proceeding may be started in relation to any or all provisions allegedly contravened by a person's conduct, although a person may only be held liable for one pecuniary penalty for the same conduct.

*54V – Multiple contraventions (s 85 of the Regulatory Powers Act)*

Clarifies that a court may order that a person pay a single civil penalty for multiple contraventions of a civil penalty provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions for the same or similar conduct. This provision is intended to minimise court administration and consolidate legal proceedings. The penalty must not exceed the sum of the maximum penalties that could be ordered if there were separate proceedings for each contravention.

New division 9A.5 – Injunctions

*54W – Application for injunction (s 231 of the National Gas Law)*

Provides for injunctions that may be made in proceedings in respect of breaches of a civil penalty provision.

*54X – Discharging or varying injunctions (s 276 of the National Gas Law)*

Allows the court to discharge or vary injunctions.

## New division 9A.6 – Other provisions about liability

### *54Y – Meaning of evidential burden—div 9A.6*

Defines evidential burden.

### *54Z – Ancillary contraventions (s 92 of the Regulatory Powers Act)*

Supports the enforcement regime by ensuring that conduct ancillary to the contravention of a civil penalty provision is considered to be a contravention of the provision itself. Ancillary conduct includes any attempt to contravene a provision that does not succeed, aiding or inducing a contravention of a civil penalty provision, and any conspiracy to contravene a civil penalty provision.

### *54ZA – State of mind (s 94 of the Regulatory Powers Act)*

Provides that it is not necessary to prove a person's state of mind in civil penalty proceedings under this part. This applies only to proceedings for contravention of civil penalty provisions, not for ancillary contravention of civil penalty provisions, nor where the civil penalty provision or a provision that relates to the civil penalty provisions expressly provides otherwise.

It is appropriate that a person's state of mind does not need to be proven for civil penalty contraventions, on the basis civil penalties are deterrent in nature and do not constitute criminal liability.

### *54ZB – Mistake of fact (s 95 of the Regulatory Powers Act)*

Provides that a person cannot be held liable for a contravention of a civil penalty provision if their actions arose from a legitimate mistake of the fact. This clause is significant because of 54ZA stating that, in these types of proceedings, it is unnecessary to prove a person's state of mind. This has an effect on civil proceedings similar to the effect strict liability has on criminal proceedings. To ensure that 54ZA does not result in liability for simple errors of fact, this clause provides a 'defence' to civil penalty proceedings on the grounds that a person's conduct was the result of a considered but reasonable error of fact.

The person who asserts that a particular course of action resulted from a mistake of fact has the burden of proving the matter. This is appropriate on the basis that the knowledge of the person's state of mind at the time of the conduct is peculiar to that person.

### *54ZC – Burden of proof for exceptions etc (s 96 of the Regulatory Powers Act)*

Provides that if a person who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating a civil penalty provision, that person bears the evidential burden of proving that matter. This is appropriate on the basis that knowledge of the matter would be peculiar to that person.

#### *54ZD – Extended liability of corporations (s 97 of the Regulatory Powers Act)*

Provides that a corporation is responsible for the actions of an employee, agent or officer of a body corporate, acting in the legitimate scope of their employment.

#### *54ZE – Limited liability of individuals*

Provides that individuals are not liable under Part 9A for a contravention of a civil penalty provision if the contravention has a corresponding offence.

A corresponding offence is defined as an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. All of the civil penalty provisions set out in Schedule 5 have a corresponding offence, meaning that individuals cannot be liable for civil penalties under the Bill.

While the AER can take civil action against individuals for their involvement in breach of substantive obligations, it does not have the capacity to undertake a criminal prosecution of an individual in the same circumstances. Instead, the AER uses its regulatory discretion to take civil actions against individuals in instances of serious misconduct.

Given the ICRC has the existing capacity to refer matters to the Director of Public Prosecutions for serious misconduct through a criminal prosecution stream, the Bill does not seek to additionally provide the ICRC with the capacity to take civil action against individuals.

#### *54ZF – Exercise of enforcement functions under Utilities Act 2000*

Provides that an ICRC inspector may exercise their existing enforcement capacities under the *Utilities Act 2000* for the purpose of investigating, monitoring and enforcing compliance with a civil penalty provisions.

### **Clause 5      New schedule 5 – Civil penalty provisions**

The Bill adopts the level of corporate civil penalty amounts currently supported under ACT law for companies, when those conduct obligations are enforced by the AER, consistent with the approach in the National Electricity, Gas and Energy Retail laws and regulations, which classify each civil penalty provision into one of three tiers.

Clause 5 inserts a new schedule which serves to map existing conduct obligations to those civil penalty tiers.

#### New part 5.1 – Preliminary

##### *5.1 – Definitions—sch 5*

This section includes definitions of ‘adjusted turnover’, ‘Consumer Protection Code’, ‘Electricity Feed-in Code’ and ‘Transparency and Comparability Code’.

## 5.2 – Meaning of tier 1 civil penalty, tier 2 civil penalty and tier 3 civil penalty—sch 5

This section defines the maximum civil pecuniary penalty that can be awarded by a court with respect to the three civil penalty tiers which classify each civil penalty provision. These maximum civil pecuniary penalties have been made identical to those currently supported under ACT law when those conduct obligations are enforced by the AER.

### New part 5.2 – Civil penalty provisions

This part maps similar conduct obligations with counterpart penalties. This assists to ensure a corporation subject to proceedings by the AER or ICRC will be subject to the same maximum penalties.

As an example, failure to supply electricity to a person on life support is currently a Tier 1 breach for the AER and would be for the ICRC. Failure to comply with an industry code requirement on price transparency is currently a Tier 3 breach for the AER and would be for the ICRC.

Existing ACT conduct based obligations that did not have a similar equivalent in national energy laws were matched to the civil penalty tier that best reflected their level of severity within the tier structure.

As an example, section 20.5 of the Consumer Protection Code places an obligation on a utility, in restricting water supply to a premises, to not restrict the flow rate of water to a residential premises below two litres per minute. This obligation is categorised as a Tier 2 breach in consideration of its seriousness on residents, while noting the same conduct would also attract sanction under other laws of the ACT, but not potentially being as serious as failure to provide electricity to a person life support, which attracts a Tier 1 penalty under national energy laws.

### **Clause 6 Dictionary, new definitions**

The new section includes definitions of ‘civil penalty notice’, ‘civil penalty order’, ‘civil penalty provision’, ‘conduct’, ‘corresponding offence’, ‘court’, ‘enforcement order’, ‘enforcement order proceeding’, ‘evidential burden’ and ‘related corporation’.

### **Schedule 1 Other amendments—Utilities Act 2000**

This schedule amends sections in the *Utilities Act 2000* to raise criminal penalty amounts for corporations in relation to offences in the *Utilities Act 2000* which are also civil penalty provisions.

Criminal penalty amounts were raised to match those of the civil penalties. This step was taken to ensure the criminal enforcement pathway remains relevant noting court ordered civil penalties available to the AER are around five times greater at present than available should the ICRC refer a matter to the Director of Public Prosecutions for criminal prosecution.

The criminal penalty amounts are expressed in dollar values which are identical to the civil penalties that may be awarded by a court in proceedings by the AER.