



Application to the ACCC for Authorisation

**Pilbara ISO Co Limited in respect of the Pilbara Electricity Networks
regulatory regime**

DATE 7 November 2022

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Glossary

Alinta	Alinta DEWAP Pty Ltd (ACN 058 070 689)
Associate Member	A person who meets the eligibility requirements for associate membership of the Company as set out in the Company's constitution and is accepted by the board of the Company as an associate member
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Company	Pilbara ISOCo Limited (ACN 650 785 783)
Coordinator	The Coordinator of Energy, holding office under the <i>Energy Coordination Act 1994</i>
EI Act	<i>Electricity Industry Act 2004 (WA)</i>
ENAC	<i>Electricity Network Access Code</i> , made under part of the EI Act
Explanatory Memorandum	The Explanatory Memorandum for the <i>Electricity Industry Amendment Bill 2019</i> , which inserted Part 8A into the EI Act
Horizon	Regional Power Corporation trading as Horizon Power (ABN 57 955 011 697)
ISO	The Company, appointed by the Regulations to fulfil the functions of Independent System Operator under the Pilbara regime
Members	Alinta, Horizon and Rio Tinto
NEL	<i>National Electricity Law</i>
NEM	The National Electricity Market which covers the eastern and southern Australian states, regulated by the NEL and NER
NER	<i>National Electricity Rules</i>
NSP	Network service provider
NWIS	The north-west electricity interconnected system described more fully from paragraph 18
Pilbara regime	The suite of legislation comprising Part 8A of the EI Act, the Regulations, the PNAC and the PNR
PNAC	<i>Pilbara Networks Access Code</i> , made under Part 8A of the EI Act
PNR	Pilbara Networks Rules, made under Part 8A of the EI Act and the Regulations, and incorporating the <i>Harmonised Technical Rules</i>
Regulations	<i>Electricity Industry (Pilbara Networks) Regulations 2021 (WA)</i>

Rio Tinto	Pilbara Iron Pty Ltd (ACN 107 216 535)
WEM	The Wholesale Electricity Market, operating under the <i>WEM Rules</i> in the “South-West Interconnected System” of Western Australia, being the main network in the south-west corner of the State, covering Perth, and stretching between Geraldton, Kalgoorlie and Albany
WEM Rules	Wholesale Electricity Market Rules, made under part 9 of the EI Act

Application to the ACCC for authorisation of conduct (non-merger)

Section A: Introduction and background

Overview

1. Pilbara ISOC Co Limited (the **Company**) is the independent system operator (**ISO**) for the North-West Interconnected System (**NWIS**), an electricity grid serving mining, industrial, commercial and residential loads in Western Australia's Pilbara region.
2. The NWIS comprises several interconnected networks, each owned and operated by a different entity. Before the creation of the regime the subject of this application, there was no formal arrangement for the networks' coordinated operation, creating risks for the security and reliability of electricity supply. Also, none of the networks were "covered" for third party access.
3. To address this, in 2021 the State government created a specialist regulatory regime (the **Pilbara regime**) under Part 8A of the *Electricity Industry Act 2004* (**EI Act**), which:
 - (a) "covered" two of the networks for access;
 - (b) creates the ISO role; and
 - (c) gives the ISO, NSPs and other persons (**rules participants**) powers and responsibilities in order to:
 - (i) facilitate access to the covered networks in order to promote competition in the generation and supply of electricity; and
 - (ii) provide for the integrated operation of the various networks, to maintain and improve power system security and reliability.
4. The Company was incorporated to perform the ISO role. It is a public company limited by guarantee, owned by the NWIS's three primary network operators (known as "network service providers", or **NSPs**).
5. The regime commenced on 1 July 2021, and is being implemented through a transitional process targeted to be complete by 30 June 2023.
6. The regime aims to promote efficient investment in, and operation and use of, Pilbara network services for the long-term interests of Pilbara electricity consumers.¹ Given the importance of the Pilbara to the Western Australian and Australian economies, the regime is thus also expected to promote the interests of the wider Western Australian and Australian communities.

¹ See discussion of the Pilbara electricity objective at paragraph 28 below.

7. Despite the regime’s clear public benefits, certain aspects of the regime may require the Company, its members and other rules participants to engage in conduct which may contravene the *Competition and Consumer Act 2010 (CCA)*.

Requested authorisation

8. **Requested term:** 10 years (see section 3.4, page 44 below).
9. **Conduct:** The Company seeks authorization in respect of any conduct² that is required or permitted by the Pilbara regime. For this purpose, the expression “Pilbara regime” is confined to Part 8A of the EI Act and the delegated legislation made under Part 8A, being the Regulations, the PNAC and the PNR (including the Harmonised Technical Rules scheduled to the PNR).
10. **Amendments to the regime:** The Company requests that the above authorization apply in respect of the Pilbara regime (as described in paragraph 9 above) as it may be changed (amended, substituted or supplemented) from time to time under the *EI Act*, subject to the Company notifying the ACCC of each change promptly after it occurs. Changes to the Pilbara regime are subject to defined governance processes under the EI Act³ and any changes must be within power under the EI Act, including being consistent with the *Pilbara electricity objective* (see paragraph 28 below). The Code change and rule change processes are controlled by the government,⁴ independently of all proposed authorised persons.
11. **Authorised persons:** The Company (including its directors from time to time) and three classes of person, comprising (1) “system operations participants” (as defined in the PNR)⁵; (2) other selected “rules participants” (as defined in the PNR); and (3) Associate Members of the Company.

Background on the Pilbara region

The Pilbara region

12. The Company operates in the Pilbara region. This is defined⁶ as the area comprising four shires as shown in Figure 1:

² The Company proposes that “conduct” have the meaning given in section 4(2) of the CCA, including that it be read as “a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the engaging in of a concerted practice”.

³ **For the PNAC**, the Code change process is set out in s120H to 120J of the EI Act, and under s120G the PNAC is a disallowable instrument – all changes must be tabled in Parliament and are subject to disallowance by Parliament. **For the PNR**, the rule change process is governed by s120M of the EI Act and regulation 9 of the Regulations, with the detail set out in Appendix 2 of the PNR. The process includes extensive consultation both publicly, and with a specially-constituted advisory committee including representatives from all industry sectors (see PNR Appendix 2 clause A2.3.5).

⁴ **For the PNAC**, the Code change authority is the Minister. **For the PNR**, the rule change authority is either the Coordinator of Energy (a Departmental official) or the Minister.

⁵ This includes an NSP (presently Horizon Power) acting as ISO’s delegate in respect of the “ISO control desk” function, see paragraph 159 onwards, and paragraph 296.

⁶ “Pilbara region” is defined in the *Regional Development Commissions Act 1993* Schedule 1 as the local government districts of Ashburton, East Pilbara, Port Hedland and Roebourne. The Shire of Roebourne was granted city status on 1 July 2014 and is now named the City of Karratha.

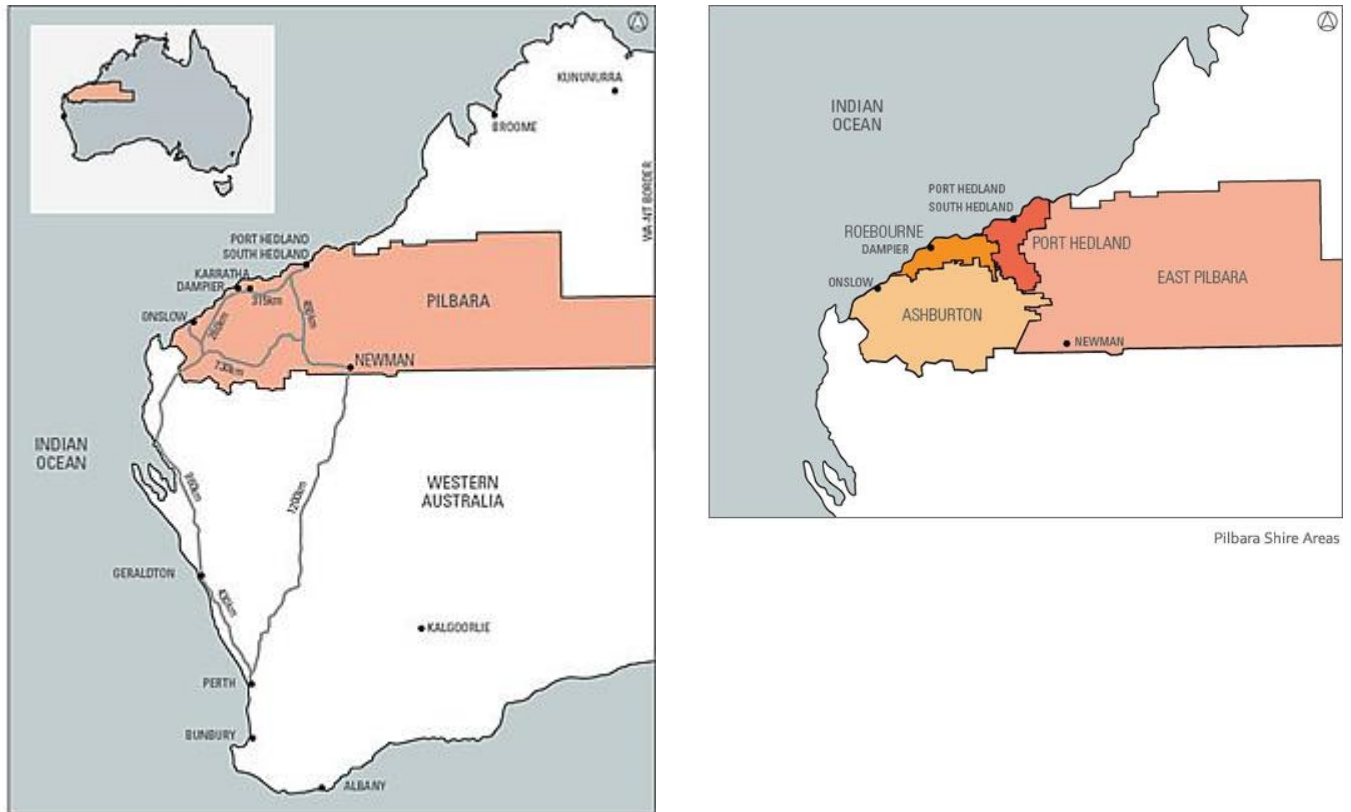


Figure 1 – The Pilbara region⁷

The Pilbara's electricity landscape

14. The Pilbara region's resource development activity is an important contributor to Australia's economic and export performance. It needs a secure and reliable electricity supply.
15. The Pilbara's electricity landscape comprises:
 - (a) the "North-West Interconnected System" (**NWIS**) (see next paragraph); and
 - (b) several other non-interconnected (i.e. islanded) systems supporting iron ore, gas, minerals and tourism industries and residential communities in the Pilbara.
16. The **NWIS** comprises interconnected electricity generation, transmission and distribution assets linking the major towns of Port Hedland and Karratha, and extending inland through Rio Tinto's network (as shown in Figure 2 below).⁸ It comprises:
 - (a) in the west, **Rio Tinto's** extensive network linking its port operations to its inland power stations and mines (shown in blue);
 - (b) in the east, **Alinta's** small network in Port Hedland, connecting its Port Hedland power stations to BHP's port facilities and to Horizon's network (shown in dark green);

⁷ Source: Development WA, 'Pilbara Maps'. Available [here](#).

⁸ Figure 2 is reproduced from [this link](#). It should not be relied on for anything beyond a general indication of the NWIS's approximate scope and overall configuration.

- (c) between them and interconnecting them, **Horizon's** coastal network centred around Karratha and Port Hedland (shown in orange).

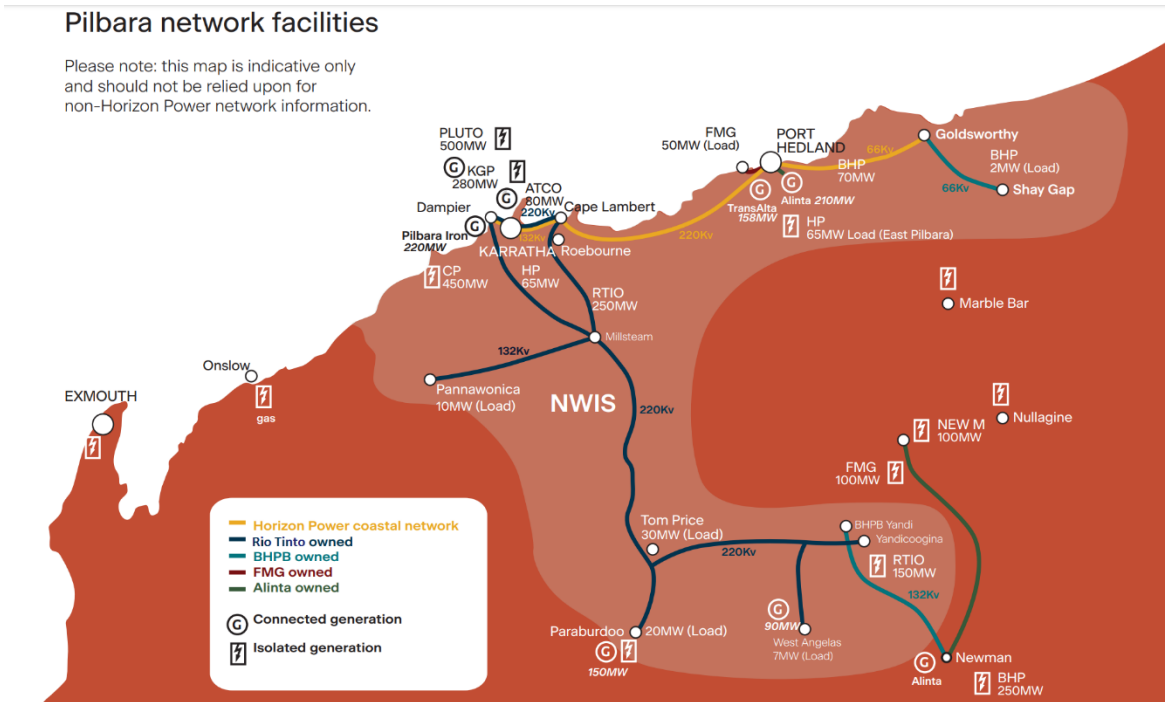


Figure 2 – The NWIS and other Pilbara networks (approximate)

17. Major electricity customers in the NWIS include the port operations of BHP, FMG, Roy Hill and other miners, Rio Tinto's port operations and inland mines, and industrial, commercial and residential loads.

Vertical integration

18. Horizon and Alinta are each vertically integrated businesses participating directly or through contractors in each of the generation, network and retail levels of the market. Rio Tinto is also vertically integrated, generating, transporting and consuming electricity for its own purposes.⁹
19. In this application, we refer to these three businesses as the **gentailer-NSPs**.
20. These gentailer-NSPs between them control, directly or by contract, almost 100% of the generating capacity in the NWIS. Thus, in addition to having collective dominance of the market for generation, wholesale supply and retail supply of electricity, the gentailer-NSPs are the main source of both essential system services (**ESS**)¹⁰ and balancing energy¹¹. We return to the implications of vertical integration at several points throughout this application.

⁹ Strictly speaking, Rio Tinto does supply some other consumers in towns in the Pilbara region, in accordance with State Agreement rights and obligations related to its mining operations.

¹⁰ ESS are discussed more fully starting at paragraph 112 below.

¹¹ Energy balancing is discussed more fully starting at paragraph 127 below.

21. Over time, this dominance by the gentailer-NSPs may change, as new renewable energy projects come online, and potentially TransAlta and ATCO may enter the market in their own right.

The Pilbara regime

Background to the reforms

22. In 2018, the then Minister for Energy decided under the *Electricity Networks Access Code 2004 (ENAC)* to “cover” Horizon’s network for third party access.¹² As a direct result of this decision, the Government undertook the reforms which resulted in the creation of the Pilbara regime.¹³

The Pilbara regime

Legislation

23. On 1 July 2021, the regime commenced. It is implemented under a new Part 8A in the *Electricity Industry Act 2004 (EI Act)*.¹⁴ The new Part empowers the introduction of a “light-handed” access regime in the form of the *Pilbara Networks Access Code (PNAC)*, and the creation of the *Pilbara Networks Rules (PNR)* to govern the integrated operation of the various networks. The PNR incorporate new *Harmonised Technical Rules (HTR)*. The legislative landscape is described more fully in **Schedule 1**.
24. Among other things, the regime provides for certain Pilbara networks’ operation to be overseen by an independent system operator (**ISO**) – the Company’s role.¹⁵

Extensive consultation

25. The Government undertook detailed and extensive consultation in developing the Pilbara regime, in a multi-year process which included representatives from NSPs, would-be access seekers, independent generators, major consumers, regulators and other interested parties. The Government sought throughout to achieve consensus support for the regime, and was largely successful despite the disparate stakeholder group.
26. This detailed engagement with a broad stakeholder group will continue. The PNR rule change process includes a formal role for a “Pilbara Advisory Committee”, comprising representatives from all these groups.¹⁶

¹² Minister for Energy, *Coverage of the Horizon Power electricity network in the North West Interconnect System, Final Coverage Decision*, 2 February 2018. Available [here](#).

¹³ The need for reforms consequential upon the coverage decisions was in fact foreshadowed by the Final Coverage Decision itself, and a list of likely reform topics was set out on page 47 of that Decision.

¹⁴ Inserted by the *Electricity Industry Amendment Act 2019*.

¹⁵ *Electricity Industry (Pilbara Networks) Regulations 2021* regulation 14

¹⁶ Under PNR, Appendix 2, rule A2.3.5, the Pilbara Advisory Committee is to include representatives of: rules participants; contestable customers; registered NSPs; excluded NSPs; small-use customers; the ISO and an independent Chair appointed by the Minister, with the criteria for independence prescribed in rule A2.3.8A.

The regime's two central goals

27. Section 119(1) of the EI Act¹⁷ makes it clear that the Pilbara regime exists to achieve two separate but related goals:
- (a) providing for and facilitating effective access to “covered” Pilbara networks¹⁸ (see from paragraph 35); and
 - (b) providing for the operation and management of Pilbara networks with a view to maintaining and improving their security and reliability¹⁹ (see from paragraph 40).

The Pilbara electricity objective

28. The Pilbara regime’s pursuit of these two goals is to be guided by the **Pilbara electricity objective**, which is expressed in terms very similar to the national gas and electricity objectives:²⁰

... to promote efficient investment in, and efficient operation and use of, services of Pilbara networks for the long-term interests of consumers of electricity in the Pilbara region in relation to –

- (a) *price, quality, safety, reliability and security of supply of electricity; and*
 - (b) *the reliability, safety and security of any interconnected Pilbara system.*
29. The Company must perform its functions under the PNAC in a manner that will or is likely to contribute to the achievement of the Pilbara electricity objective.²¹ Many of the Company’s functions under the PNR also require it to have regard to the Pilbara electricity objective.²²

The regime focusses on covered networks

30. The PNAC only applies to the two “covered” NWIS networks – Alinta’s and Horizon’s.
31. Although the PNR apply to all NWIS networks, their primary focus is Alinta’s and Horizon’s covered networks. Other Pilbara networks are dealt with in one of three considerably more limited ways.

¹⁷ In full, section 119(1) reads:

“(1) The purposes of this Part are —

- (a) to provide for light regulation of access to services of covered Pilbara networks; and*
- (b) to give effect to the relevant principles of the Competition Principles Agreement in respect of then provision of access to services of certain covered Pilbara networks; and*
- (c) to provide for the operation, management, security and reliability of the interconnected Pilbara system and other Pilbara networks.”*

¹⁸ EI Act s119(1)(a) and (b) and s120A

¹⁹ EI Act s119(1)(c) and ss120K, 120Q and 120W(4)

²⁰ Section 119(2). The national gas and electricity objectives appear, respectively, in section 23 of the *National Gas Law* and section 7 of the *National Electricity Law*.

²¹ PNAC section 13(1).

²² Including but not limited to developing the power system modelling procedure, undertaking system modelling in access applications and arbitrations, performing functions related to system coordination, determining the administered price for balancing energy, conducting reviews of ESS and balancing and settlement arrangements, developing constraint rules and constrained access procedures, assessing notices for new connections, and monitoring and reporting on the Pilbara Regime’s effectiveness. Respectively, PNR rules 121(2), 273(b), 170(c), 231(a), 247(1), 256(2)(a), 266, 270(3)(a) and 369(1).

32. First, in the NWIS, the PNR recognise that Rio Tinto's power system represents an independent system, designed and operated as part of Rio's integrated mining operations.²³ The PNR only apply to Rio Tinto's network in limited ways and for limited purposes, largely limited to managing the interconnection between the Rio Tinto network and Horizon's network, and any impact Rio Tinto's operations may have on the two covered networks or vice versa.²⁴
33. Second, also in the NWIS, although the PNR do regulate the three 'smaller' Port Hedland networks operated by BHP, FMG and Roy Hill to connect their port facilities to Horizon's and Alinta's covered networks, these networks are not regulated as "networks" in their own right. Rather they are treated as being part of the consumer facilities they serve, bringing a lower compliance burden for these three operators.
34. Third, outside the NWIS, although the PNR and PNAC do or may apply to non-NWIS networks, their application is much more limited.²⁵

First goal: Promote third party access, to promote competition

35. The Pilbara regime was triggered by the Minister's decision to cover Horizon's network.²⁶ As a result, a primary focus of the regime is to enable and facilitate the third party access which that coverage creates.
36. In particular, the PNR were created because a right to access a network is of limited value if not accompanied by:
 - (a) an effective way of accessing the various ancillary services, including ESS and an energy balancing service, at a fair price;
 - (b) fair and accountable processes for:
 - (i) determining connection standards and compliance;
 - (ii) if the network is constrained, determining and managing constraints;
 - (iii) managing system outages and contingencies; and
 - (c) to facilitate all of these, independent and accountable system modelling.
37. The processes described in paragraph 36 must balance the desire of a new entrant to connect to and use the grid at least cost, against other grid users' need for reliability and security, and the need to fairly share risk and cost between all participants.
38. The NWIS is unusual among access-regulated networks in Australia, because the two regulated NSPs, Horizon and Alinta, remain vertically integrated. As such, they likely compete with any access seeker in upstream and downstream markets, and so have an additional conflict of interest when managing access matters, compared with vertically disaggregated regulated NSPs in other regimes.

²³ PNR rule 8, definitions of "integrated mining network", "integrated mining system" and "Pilbara minerals business".

²⁴ PNR rule 5.

²⁵ See from paragraph 68 below.

²⁶ See *Final Coverage Decision*, footnote 12 above, section 7.4

39. Because of this, in addition to the normal ringfencing requirements on the regulated NSPs,²⁷ the Pilbara regime gives the critical tasks listed in paragraph 36 to the independent ISO – i.e. the Company. It does this to promote access and hence competition, as discussed in section 3.3 below (page 43). If these matters were left in the gentailer-NSP's hands, the access seeker may be concerned that the NSP, as its competitor in an upstream or downstream market, might get an unfair competitive advantage, by reason of its network operations role or its role as a supplier of ESS.

Second goal: Improve system operation by creating a single system operator

40. The Act recognises that an independent system operator offers the NWIS benefits other than just access facilitation.
41. Before the Pilbara regime was created, the NWIS had no single system operator. Each NSP was responsible for maintaining system security and reliability on its own network, and no one person was responsible for managing security and reliability across the NWIS as a whole. Rather, that task, together with the important task of conducting and reporting on post-incident investigations, was managed through ad hoc and relatively informal collaboration between the NSPs.²⁸
42. This was not satisfactory. In an interconnected power system such as the NWIS, each component can affect the operation of each other component across the whole system, i.e. across different NSPs' networks. An incident in Rio Tinto's network, can impact customers in both Horizon's and Alinta's networks, and vice versa. Responding to such incidents requires a coordinated response from a mixture of automated systems and human intervention.
43. The Explanatory Memorandum explained why this task should be placed in the hands of a single system operator:²⁹

[In many power systems] a single system operator is tasked with maintaining system security, determining how the automatic response systems should be configured, and making or directing the human interventions as necessary. This operator has the power to direct other system participants, e.g. telling generators to increase or decrease their output, or change their machine settings.

44. Before the reforms, Horizon had been acting de facto in this role, seeking to maintain security and reliability through a mixture of formal and informal arrangements.³⁰ But the Explanatory Memorandum observed that:³¹

... [Horizon] has no direct control over other generators or network operators.

Formalising a role for an independent system operator for the [NWIS] ... will enable a whole-of-system approach to power system operations, and also to other matters such as outage and contingency management, procurement of [ESS], and cost allocation and recovery.

²⁷ PANC Chapter 8; PNR rule 17

²⁸ Explanatory Memorandum, section 2.2.

²⁹ Explanatory Memorandum, section 2.6.2.1.

³⁰ Explanatory Memorandum, section 2.6.2.1.

³¹ Explanatory Memorandum, section 2.6.2.1.

The Company's creation and role

45. Under the Pilbara regime, the ISO's establishment and annual operation costs are borne by the registered NSPs.³² The intention is that this will directly or indirectly move these costs to network users, and ultimately to the electricity consumers who benefit from the network.
46. Although the NWIS supports some of Australia's largest exporters, it is quite a small network in terms of total installed generation and total energy consumed. And those exporters compete in highly competitive international markets, and are accordingly appropriately cost sensitive.
47. This influenced the regime's design in two important ways: first, by prompting the use of a participant-owned company to perform the ISO role; and second, by prompting the adoption of the "Administrative ISO" model.

Decision to use a participant-owned company as the ISO

48. As the reform process developed, and in light of stakeholders' focus on efficiency, the Government and stakeholders gave thought to the best way:
 - (a) to achieve optimum cost control by the ISO; and
 - (b) to maximise the extent to which the ISO was culturally and operationally aligned with the Pilbara industry's requirements and expectations.
49. The first of these tended to favour a not-for-profit operator, and the second to favour a small, specialist operator, rather than an existing established national or international entity.
50. Several options were explored, but the discussion was influenced by the success in WA of a previous similar model, in which the participant-owned REMCo administered the gas retail market scheme governing retailers and the network operator in the gas distribution systems.³³
51. Eventually, this approach was chosen. The members formed the Company, and the Government by regulation appointed the Company to perform the ISO function.³⁴

Measures to manage conflicts of interest

52. The obvious disadvantage of this approach is that the "independent" system operator is owned by market participants, whose nominee directors will sit on its board.

³² PNR rule 129(1)

³³ The REMCo model was the subject of its own authorisations:

- 2004 authorisation: Retail Energy Market Company Ltd – Application for Authorisation A40090 A40091 A40092. Related documents available [here](#).
- 2009 reauthorisation: Retail Energy Market Company Ltd – Authorisation – A91136 – 191138 & A91170 & A91171. Related documents available [here](#).
- 2016 variation: Retail Energy Market Company Ltd – Minor Variation – A91136 – 191138 & A91770 & A91171. Related documents available [here](#).

REMCo eventually transferred its functions to AEMO.

³⁴ Regulation 14

53. Clearly, for this model to work, the ISO must both be in fact, and be seen to be, independent from its NSP members' interests, both:
- (a) individually – each member must be confident that the ISO will not, in any of its activities, favour another member; and
 - (b) collectively – all other stakeholders (generators, retailers, consumers, access seekers) must be confident that the ISO will not show a bias against them, or in favour of all or some of its gentailer-NSP members.
54. This was achieved by multi-layered mechanisms described in section 9.4 below (see from paragraph 272).

The “administrative ISO” model (delegating the control desk function)

55. The second way that stakeholders' focus on efficiency shaped the regime was by the adoption of the “Administrative ISO” model.
56. In most power systems, the system operator will have its own dedicated 24/7 control desk, enabling it to operate the power system in real time, managing ESS and incidents, and coordinating or directing other participants as necessary.
57. This can be expensive. In circumstances where each of the NSPs had been operating their own networks reasonably satisfactorily, and (at the time³⁵) at least two of the NSPs had and would be continuing with 24/7 control desks of their own, stakeholders who would bear the cost of the new regime asked the Government to find a way of implementing the ISO without requiring an expensive duplicate control desk.
58. In consultation with stakeholders, the Government chose to adopt the “Administrative ISO” model. At the heart of this model lies a delegation by the ISO of all ‘real time’ control desk functions to Horizon³⁶ (discussed from paragraph 159, below), who already has a control desk. The ISO remains in overall administrative control, but the need for a duplicate control desk is avoided, saving the NSPs (and hence indirectly their customers) several millions of dollars per year.³⁷

Measures to manage the anti-competitive consequences of the delegation

59. From a competition perspective, the issue to be managed in the “Administrative ISO” model is that many of the most sensitive day-to-day operational decisions will be made not by the independent ISO, but rather by the vertically integrated gentailer-NSP Horizon, acting as the ISO's delegate. These decisions can impact directly on operational and commercial outcomes for other gentailer-NSPs and for the access seekers who may compete with them, and the consumers they supply.
60. Nonetheless, stakeholders including major consumers and potential access seekers strongly supported the economies of the “Administrative ISO” model as offering the most

³⁵ The Company understands that all three gentailer-NSPs now have 24/7 control desks.

³⁶ PNR rule 45

³⁷ AEMO's 2019 *Review of Independent System Operator Role in North West Interconnected System: Final Report* (available [here](#)) made a preliminary estimate of the costs of the “Administrative ISO” model at \$1.1m to setup and \$1.2m p.a. to operate, and of an “Operating ISO” model in which the ISO had its own control desk as \$5.7m to set up and \$4.8m p.a. to operate. Based on these estimates, in the first 10 years of the regime's operation the cumulative cost differential would be roughly \$40m.

efficient way of achieving the Pilbara regime's objectives, so the Government selected this model for the regime's commencement.

61. Because the ISO's independence is critical to the regime's success, the Pilbara regime includes a full suite of measures designed to manage this issue. They are set out in section 9.4 (paragraph 296, page 61).

Regime commencement and transitional period

62. The Pilbara regime began staged commencement on 1 July 2021. There is a transitional implementation period extending to 1 July 2023.³⁸
63. These transitional arrangements are needed because most of the ISO's substantive functions have important precursors.
64. For example, the ISO needs to develop and test a computer model of the power system before it can:
- (a) procure essential system services (discussed from paragraph 112), because the ISO needs a system model to determine how much of each essential system service needs to be procured, and where;
 - (b) assess access and connection applications (discussed from paragraph 143), because the ISO's job includes modelling the impact of those applications;
 - (c) develop constraint protocols and manage the constrained access regime (discussed from paragraph 147); because once again this requires the ISO to model the networks and any proposed constraint rules;
 - (d) develop or finalise the operating protocols, which will guide the giving of system operations directions (discussed from paragraph 148), because the protocols' instructions on what to do during an incident depend on knowing how the system will behave during that incident; and
 - (e) assess or grant technical exemptions (discussed from paragraph 143), because, of course, one cannot grant an exemption without first understanding its likely impact;
65. Likewise, the ISO needs to test and validate the Energy Balancing and Settlement (**EBAS**) engine, before it can undertake energy balancing and settlement and issue payment notes for ESS and balancing energy (discussed from paragraph 127).
66. Work on the system model and EBAS engine is under way.
67. During the transitional period, the ISO's functions are to be read as reasonable endeavours only,³⁹ and accordingly, the Company is presently performing a limited subset of its functions, in a limited way.⁴⁰ This arrangement allows time for the Company to develop its

³⁸ PNR rule 3(4)

³⁹ PNR rule A4.9 – "reasonable endeavours" is to be assessed having regard to the ISO's processes and available resources, including personnel, technical and modelling. In addition, a failure to perform a function is not a breach of the rules and if the ISO is unwilling or unable to perform a function, references to the ISO in the relevant rules are to be disregarded (rule A4.11).

⁴⁰ PNR rule 3(1) and the transitional arrangements in PNR Appendix 4

capabilities and processes, prepare procedures and a protocol framework, undertake initial system modelling, and seek the authorisation requested in this application. Appendix 4 to the PNR makes transitional provision for each of those matters.⁴¹

Authorisation sought in respect of the ISO's full geographic remit (the Pilbara region)

68. The below discussion focusses on the NWIS, because at present that is the only power system in which most of the ISO's functions have been enlivened, and because at present the Company's only members are the three main NWIS gentailer-NSPs.
69. Under the PNR, non-NWIS networks are divided into two classes.⁴² "**Class 2**" describes non-NWIS networks which are "covered" for third party access. There are currently no Class 2 networks. "**Class 3**" describes all other Pilbara networks, i.e. not NWIS, and not covered.
70. If a Class 2 network were to arise, the ISO's powers will extend to that network, at least to the extent necessary to give effect to third party access.⁴³ In that circumstance, some or all of the conduct described below would apply also to that network.
71. The ISO already has certain limited functions in respect of Class 3 networks, involving data gathering and reporting.⁴⁴
72. Authorisation is sought in respect of the ISO's full range of operation which may in future encompass Class 2 and Class 3 networks in the wider Pilbara region. This is already envisaged by the EI Act and so no expansion of the Pilbara regime is required to accommodate this potential future state.

Section B: Parties to the proposed conduct

1. The applicant

73. Blue boxes like the below set out the questions from the ACCC's Guidelines.

1. Provide details of the applicants for authorisation, including:

- 1.1. name, address (registered office), telephone number and ACN*
- 1.2. contact person's name, position, telephone number and email address*
- 1.3. a description of business activities*
- 1.4. email address for service of documents in Australia.*

⁴¹ For example: Sub-appendix 4.6 deals with essential system services; various provisions but especially rules A4.12 and A4.13 and Sub-appendices 4.3, 4.4, 4.9 and 4.10 deal with the various functions which require the ISO to have developed modelling capability; Sub-appendix 4.3 deals with access and connection; and Sub-appendix 4.5 deals with energy balancing and settlement (including ESS payment).

⁴² PNR rule 4

⁴³ PNR rule 29. The Government's policy position in developing this rule was that the PNR would automatically apply to the extent necessary to facilitate third party access, and that the decision could be made at the time as to whether the PNR should apply more fully than that, potentially up to full application as in the NWIS (WA Government *Pilbara Electricity Reforms – Scope of Application*, May 2020, section 2.2.2).

⁴⁴ PNR rule 4, describing the PNR's application to Class 3 networks. The rules which apply are found in PNR Chapter 10 (see PNR rule 275).

1.1 Applicant details

74. **Name:** Pilbara ISOCo Limited and its Directors
Registered Office: 18 Brodie-Hall Drive, Bentley WA 6102
Telephone number: [REDACTED]
ACN: 650 785 783
- The applicant requests that the authorisation cover Pilbara ISOCo Limited and its directors from time to time, plus the other persons described in section 2.

1.2 Contact person

75. **Name:** Matthew Bowen
Position: Partner, Jackson McDonald
Telephone number: [REDACTED]
Email address for service of documents in Australia: [REDACTED]

1.3 Description of business activities

76. The Company was registered on 7 June 2021 as a not-for-profit company limited by guarantee under the *Corporations Act 2001* (Cth). Its current members are the three main gentailer-NSPs.
77. The Company has been appointed as the ISO – the role for which it was created.⁴⁵
78. When fully up and running, the Company's statutory functions⁴⁶ in respect of the NWIS will involve: real-time power system monitoring and operation (currently through a delegate

⁴⁵ Regulation 14

⁴⁶ In formal terms, the ISO's functions under the *EI Act* section 120W(4) are:

- (a) to maintain and improve system security in any interconnected Pilbara system;
- (b) to facilitate overall network co-ordination and planning for interconnected Pilbara systems;
- (c) any functions [granted under the regulations, PNAC or PNR].

PNR rule 33 lists the ISO's other main functions as follows:

- (a) to administer or participate in the exemption regimes for these rules under Subchapter 3.1 and for the Metering Code and Customer Transfer Code under Subchapter 3.3, to participate in the exemption regime for the harmonised technical rules under Subchapter 3.2, and to maintain the register of exemptions under Subchapter 3.4;
- (b) to develop and administer procedures under Subchapter 3.6;
- (c) to administer the protocol framework under Subchapter 3.7;
- (d) to register entities and facilities, and receive, record and publish information and standing data under Subchapter 4.1 and manage communications under Subchapter 4.2;
- (e) to manage the visibility regime under Subchapter 4.3;
- (f) to create, maintain, manage and operate the power system model under Subchapter 4.4;
- (g) to undertake the budgeting function and recover fees under Subchapter 4.5;
- (h) to determine loss factors under Subchapter 5.2;
- (i) to oversee the generation adequacy regime under Chapter 6;
- (j) to undertake system coordination and outage scheduling under Subchapter[s] 7.3 and ... 7.4;
- (k) through the ISO control desk, to participate in system operations activities under Subchapter 7.5;
- (l) to undertake post-incident discussion and investigations under Subchapter 7.6 including in relation to matters referred under rule 84 {Referral of protocol matters};
- (m) to procure essential system services under Subchapter 8.1;
- (n) to undertake energy balancing under Subchapter 8.2 and settlement under Subchapter 8.3;
- (o) to develop and administer constraint rules under Subchapter 9.1;
- (p) to provide access and connection services under Subchapter 9.2;

under the “Administrative ISO” model, see paragraph 55 above); managing technical connection standards; managing ESS and balancing energy procurement and settlement; facilitating the three NSPs’ cooperative operation of the network, outage coordination and incident response and investigation; and holding the power system model needed to underpin all of these things. This conduct is discussed more fully in section 3.1, starting at paragraph 112, page 25.

79. The Company will also monitor NSPs’ and other participants’ compliance with the statutory regime.⁴⁷
80. The Company has limited functions in respect of non-NWIS Pilbara networks:⁴⁸
- (a) overseeing access and connection for any non-NWIS Pilbara network which may become “covered” for third-party access (there are currently none); and
 - (b) a limited data gathering and reporting role for other non-NWIS Pilbara networks.⁴⁹
81. We enclose a copy of the Company’s Constitution for your information.

2. Other persons to be protected

2. If applicable, provide details of the other persons and/or classes of persons who also propose to engage, or become engaged, in the proposed conduct and on whose behalf authorisation is sought. Where relevant provide:

- 2.1. name, address (registered office), telephone number and ACN*
- 2.2. contact person’s name, telephone number and email address*
- 2.3. a description of business activities.*

2.1 The proposed class of protected persons

82. The Company proposes that in addition to itself, the authorisation should extend to current and future:
- (a) “System operations participants” (as defined in the PNR);
 - (b) other selected “rules participants” (as defined in the PNR) on which the PNR or the PNAC confers a function (as defined in the *Interpretation Act 1984* (WA)⁵⁰; and
 - (c) Associate Members of the Company.

-
- (q) *to undertake network coordination and planning under Subchapter 10.1 and Subchapter 10.2;*
 - (r) *to publish information under Subchapter 11.1 and request information under Subchapter 11.3;*
 - (s) *to undertake rule compliance monitoring and enforcement under Subchapter 12.1;*
 - (t) *to develop rule change and procedure change proposals, and participate in the rule change and procedure change process, under Appendix 2; and*
 - (u) *any other function given under the Act, regulations, these rules or the Access Code.*

⁴⁷ Under PNR rule 307(1), the ISO must monitor the behaviour of all rules participants for compliance with the rules and may take enforcement action under Subchapter 12.1.

⁴⁸ Non-NWIS Pilbara networks refer to networks which are wholly or partly in the Pilbara region, but are not interconnected with the NWIS.

⁴⁹ See footnote 44.

⁵⁰ *Interpretation Act 1984*, s5: “**function** includes powers, duties, responsibilities, authorities, and jurisdictions”.

These classes of protected persons are described in more detail below.

2.2 Identification of protected persons

Class 1: System operations participants

83. The first and most important class comprises all PNR “system operations participants” from time to time.
84. Members of this class need authorisation because, outside the Company, the system operations participants are the people whose functions under the Pilbara regime make them most likely to engage in the conduct discussed throughout this application.
85. Under the PNR, the class of “system operations participant” is closed, and encompasses five categories:⁵¹
- (a) **The ISO:** This is the Company, which is proposed to be authorised in its own right.
 - (b) **The ISO’s delegates:** Initially the only delegate will be Horizon Power as ISO’s control desk delegate. There may be a small number of other delegates in future, although none are planned.
 - (c) **Registered NSPs:** Every NWIS NSP is required to register with the ISO, unless its network is an “excluded network”.⁵² At present the three registered NSPs are the Company’s members, Horizon, Rio Tinto and Alinta. A small number of networks (likely <5) may connect to the NWIS in the next 10 years.
 - (d) **Registered controllers:** These are the operators of certain generation facilities and consumer facilities connected to the NWIS.⁵³ Some controllers must register, e.g. if they are connected to a “covered” network, and some are only required to register if the ISO determines that their facility should be registered. The Company expects to register no more than about a dozen such facilities.
 - (e) **ESS providers:** This is anyone who is contracted under the PNR to provide essential system services (i.e. FCESS or SRESS), or is otherwise required to provide those services by the PNR (see paragraph 112 below).

Ascertainability of Class 1

86. The Company considers that the members of this class would be readily ascertainable at any time from the Company’s records. The ISO must publish the details of each delegate,⁵⁴ and a list of all registered NSPs and registered controllers.⁵⁵ There is no general obligation to publish the names of contracted ESS providers, but the details would have been disclosed in the public consultation process required before the ESS contract is signed, and

⁵¹ See definition of “system operations participant” in the Glossary, PNR rule 8.

⁵² PNR rule 91(1)

⁵³ PNR rule 91(2) and 93

⁵⁴ PNR rule 39(5)

⁵⁵ PNR rule 95

the ISO will hold a contract with each.⁵⁶ Uncontracted secondary FCESS providers would have been identified and formally notified.⁵⁷

Class 2: Selected rules participants

87. The second class proposed for protection comprises certain PNR “rules participants” from time to time.
88. Under the PNR, the class of “rules participant” is open, comprising anyone on whom the PNR confers a function or benefit.⁵⁸ This includes all system operations participants (i.e. Class 1 above), but also network users (i.e. those who have contracted to receive network services from an NSP), “payers” and “payees” for ESS and balancing energy, balancing “nominators”, “balancing nominees”, and any unregistered facility controllers.
89. Although to a lesser extent than system operations participants, rules participants have functions and responsibilities under the PNR.⁵⁹
90. It’s likely the case that some rules participants would not need the protection of the authorisation, simply because they’re unlikely to engage in conduct which creates risks of the type considered by this application.
91. But some rules participants, who are not system operations participants, may sometimes need to engage in conduct which does create such risks.
92. To balance these two factors, it is proposed to extend the protection under this class to some but not all rules participants, namely:
 - (a) anyone who is a “payer” or “payee” under Chapter 8 of the PNR from time to time;
 - (b) anyone who is a “nominator” or “balancing nominee” under Chapter 8 of the PNR from time to time;
 - (c) anyone who is a member of an “NSP group” or “controller group” to which a registered NSP or registered controller (as applicable) belongs from time to time; and
 - (d) any other rules participant proposed to the ACCC by the Company from time to time, and accepted by the ACCC as being appropriate for inclusion in this class.
93. The first two categories are included because payers, payees, nominators and balancing nominees will be actively involved in ESS and balancing transactions, and so at risk of engaging in illegal conduct (see from paragraph 112). In addition, these two categories are the rules participants (other than system operations participants) who are most likely to be engaged in the relevant operational activities (see from paragraph 148) and in other operational discussions, collaboration and investigations (see from paragraph 150).

⁵⁶ PNR rule 200(1)(b)

⁵⁷ PNR rule 205(5). All SRESS providers will be contracted: PNR rule 214.

⁵⁸ See definition of “rules participant” in the Glossary, PNR rule 8

⁵⁹ For example, rules participants must:

- provide modelling information – PNR rules 117(1) and 120(2)
- participate in post incident investigations including providing a report – PNR rule 195(b)
- participate in Chapter 10 reporting
- provide information under Subchapter 11.3, and under rule 312 (compliance)
- comply with compliance directions under rule 213(6)(a)(ii)

94. The third category is included because the PNR contain mechanisms designed to simplify compliance and registration for rules participants which comprise more than one entity. These are modelled on similar provisions in other regimes.⁶⁰
95. Thus, if more than one entity owns, operates or controls a network (an “NSP group”), one of the entities can be the regulatory “face” of the group.⁶¹ A similar rule applies if more than one entity owns, operates or controls a facility (a “controller group”).⁶²
96. In these situations, only one of the entities is allowed to be registered under the PNR.⁶³
97. The Company therefore proposes that if the authorisation applies to a member of the “NSP group” or “controller group” (as defined in the PNR) and to which a registered NSP or registered controller (as applicable) belongs from time to time, then it should extend to all members of that group.
98. The fourth category would be there to address case by case any situation in which some other rules participant credibly identifies a CCA risk. It would, for example, remove any distorting incentive for a facility operator to seek unnecessary registration.

Ascertainability of Class 2

99. The Company considers that the members of this class would be readily ascertainable at any time from the Company’s records. Payers and payees are shown on each contract note issued by the Company under Chapter 8.3. Each nominator’s details must be provided to the ISO under PNR rule 220(3)(c), as is the case for each balancing nominator’s details under PNR rule 222(2)(c).
100. For NSP group and controller group members, the group must nominate which member of the group will be registered by notice to the Company.⁶⁴ The Company could provide these notices to the ACCC.
101. The Company could give the ACCC details of any other rules participant it proposes.

Class 3: Company associate members

102. Under the Company’s constitution, the following may apply to become members:
- (a) “NSP Members” if they become “registered NSPs” under the PNR; or
 - (b) “Associate Members” if they have an interest in the NWIS and wish to further the Company’s objects.⁶⁵
103. Because NSP members must be registered NSPs, they will be authorised under Class 1 above. This final Class 3 is proposed in case the Company ever has Associate Members.

⁶⁰ For example sections 9 and 10 of the National Gas Law.

⁶¹ PNR rule 18

⁶² PNR rule 19

⁶³ PNR rule 20

⁶⁴ PNR rule 20(2)(a)

⁶⁵ The Objects of the Company are set in clause 2 of its Constitution as:

- (a) to perform the functions given to it under the *Electricity Industry Act 2004*; and
- (b) to undertake any other thing or activity which is incidental or ancillary to the attainment of the above objective.

104. There are currently no Associate Members and no current applications for Associate Membership.
105. Without suggesting that any of the following may be considering such an application, it is possible that in future one or more of the following, or other members of these classes, may wish to apply for Associate Membership:
- (a) power station operators – e.g. ATCO and TransAlta;
 - (b) the operators of other smaller “excluded networks” connected to the NWIS – e.g. BHP, Roy Hill and FMG;
 - (c) major electricity consumers – e.g. Woodside.

Ascertainability of Class 3

106. The Company considers that the members of this class would be readily ascertainable at any time from the Company’s records.

2.3 A description of business activities (where relevant)

107. The business activities of the Company’s three current members are as follows:
- (a) **Horizon** — relevantly, a network service provider operating a coastal network centred around Karratha and Port Hedland. This network is a covered network subject to the access regime in the Pilbara Networks Access Code. Horizon Power is also an electricity generator and retailer (**gentailer**) in the NWIS.
 - (b) **Alinta** — relevantly, a network service provider operating a network in Port Hedland connecting its Port Hedland power station to BHP’s port facilities and to Horizon Power’s coastal network. Alinta is also an electricity generator and retailer in the NWIS.
 - (c) **Rio Tinto** — members of the Rio Tinto group of companies and unrelated joint venture participants own an extensive electricity network servicing power stations and mines, and linking port operations at Dampier and Cape Lambert. A member of the Rio Tinto group – Pilbara Iron Pty Ltd – manages and operates the network for those owners.
108. Other potential protected persons may be generators, retailers or major consumers. The consumers will largely be involved in the business of resource extraction, processing and export, servicing or supporting such businesses, or tourism.

Section C: The proposed conduct

3. The conduct, its potential CCA implications and its rationale

*3. Provide details of the proposed conduct, including:
3.1. a description of the proposed conduct and any documents that detail the terms of the proposed conduct*

3.2. the relevant provisions of the Competition and Consumer Act 2010 (Cth) (the Act) which might apply to the proposed conduct [examples given]

3.3. the rationale for the proposed conduct

3.4. the term of authorisation sought and reasons for seeking this period. By default, the ACCC will assume you are seeking authorisation for five years. If a different period is being sought, please specify and explain why.

3.1 Description of the proposed conduct

Outline of this section 3.1

109. As outlined in paragraph 9 above, the Company seeks authorization in relation to conduct which is required or permitted by the Pilbara regime. The specific conduct discussed in this section 3.1 is not an exhaustive list of all conduct which is required or permitted by the Pilbara regime, but covers the main categories which are likely to be relevant from a CCA perspective.
110. The proposed conduct is discussed under the following headings:
- (a) the Company's centralized procurement and allocation of ESS and payments (from paragraph 112);
 - (b) the Company's management of the centralized energy balancing regime and payments (from paragraph 127);
 - (c) the Company's procurement of whole-of-system modelling services (from paragraph 136);
 - (d) the NSPs' and the Company's approval of new connections (from paragraph 143);
 - (e) the NSPs' and the Company's management of constrained access (from paragraph 147);
 - (f) the NSPs' and the Company's operational decisions, directions, actions and protocols (from paragraph 148);
 - (g) the NSPs' various other collaboration and coordination, with and without the Company (from paragraph 151);
 - (h) the Company's delegation of its real-time control desk function to Horizon (from paragraph 159); and
 - (i) information sharing between NSPs and the Company (from paragraph 164).
111. In each case it should be noted that the purpose of the proposed conduct is the implementation and facilitation of the pro-competitive Pilbara regime and not a prohibited purpose under the CCA. However, out of an abundance of caution the Company seeks authorisation for itself and the classes of persons described above.

Procuring and allocating essential system services (ancillary services)

112. Every power system, to operate securely and reliably, needs a formal or informal arrangement for various ESS (essential system services). The Pilbara regime provides for

frequency control ESS to maintain the system at 50 Hz (**FCESS**), and spinning reserve ESS to ensure that the system will remain stable even if a generator trips off (**SRESS**).⁶⁶

Procurement process

113. Before the Pilbara regime commenced, ESS were provided by each gentailer-NSP individually. If the NSP sought to charge another person for ESS, the procurement process and pricing were opaque.
114. As ISO under the Pilbara regime, the Company will procure ESS centrally through an independent and transparent process. This will facilitate access and ensure that consumers (who directly or indirectly ultimately bear the cost of ESS) benefit from more efficient ESS prices.
115. Anyone with a suitable power station connected to a power system can offer to supply ESS to the system. In the National Electricity Market (**NEM**) or the Wholesale Electricity Market which operates in WA's South-West Interconnected System (**WEM**), AEMO administers a dynamic auction for ESS every trading interval. For the Pilbara, the Government judged that the market is not sufficiently deep or mature to support such an auction, and there is no central wholesale electricity market in which the auction could occur.
116. Instead, once the transitional period is over, the Company will periodically undertake a suitable, and probably competitive⁶⁷, procurement process for ESS in accordance with PNR Chapter 8.1.

⁶⁶ To explain this in a little more detail:

- Every power system (aka "**grid**") runs at a specified frequency – i.e. the rate at which AC current cycles from positive to negative and back again. In the NWIS, as in the rest of Australia, the required frequency is 50 Hz. The main determinant of system frequency is the balance between electricity entering the grid (generation) and electricity exiting the grid (consumption, aka "**load**").
- To maintain a constant frequency, generation must exactly equal load. If generation exceeds load, power system frequency increases. If generation is less than load, frequency falls. In both scenarios, if the divergence from 50 Hz becomes too great, grid security and reliability are threatened, and the grid becomes susceptible to blackouts and equipment damage.
- Load fluctuates constantly, as consumers switch things on and off. Generation can fluctuate as plant comes online or "trips" (i.e. disconnects itself from the grid for operational reasons). Outages in power lines can affect either or both of generation and load.
- Essential system services aim to keep the grid running at 50 Hz, especially where something disrupts the power system, e.g., a generator trips off or an electrical line fails (collectively all such events are called "**contingencies**").
- The "frequency control" service (**FCESS**) involves a designated power station operator configuring its power station to closely monitor system frequency and increase or decrease its output to maintain 50 Hz in the power system at all times.
- The "spinning reserve" service (**SRESS**) involves a power station operator ensuring that it runs its generators at less than maximum capacity, so as to leave some already-spinning 'headroom'. This means that, if another generator trips off, rather than needing to wait for a new generator to start up, the already-spinning machines can increase their output using that headroom, to rapidly fill in the "gap" in output left by the tripped machine.
- If the power system is to survive islanding events, in which the grid temporarily separates into two electrically-unconnected systems, ESS arrangements need to be in place for all islands. An island without FCESS and SRESS in place will be unreliable, because a single contingency can cause a blackout.

⁶⁷ PNR rules 200, 203 and 214

117. Under this process, the Company will contract with **primary providers** of FCESS⁶⁸ and SRESS.⁶⁹ The contracts will establish the price the ESS provider is to be paid,⁷⁰ and require it to hold capacity available in its power station to provide the services as needed and, for FCESS, to actively control the NWIS's frequency.⁷¹ The contract will specify the price the ESS provider is to be paid for this service. The payment mechanism is discussed shortly (see from paragraph 124).
118. The Company will also nominate one or more **secondary FCESS providers**, who can take over frequency control if the primary FCESS provider is unavailable, either due to a plant outage or because the grid separates into islands. The nominated secondary FCESS providers must specify a price for their service. The Company will hold them in reserve in a dispatch merit order based on price and geographical location.⁷²
119. Because there is only a small number of potential secondary FCESS providers,⁷³ and in some islanding scenarios an island will have only a single viable candidate,⁷⁴ it was judged unnecessary and inefficient to have the ISO enter into contracts with these providers. Rather, their obligation to perform, and right to be paid, are implemented directly in the PNR.
120. To prevent price gouging or other manipulation by this limited pool of secondary FCESS providers, their price bids are subject to an administered price cap determined by the Company from time to time to reflect a reasonable cost of providing the service.⁷⁵ This determination will be subject to the various accountability measures described in section 9.4 (from paragraph 271, page 57).
121. There is no comparable "secondary SRESS service".

Allocation and payment process

122. FCESS and SRESS services are not really supplied to any particular market participant. Rather, all market participants benefit from the services they provide.
123. The Pilbara regime's ESS payment rules⁷⁶ are intended to approximate a simplified "causer pays" outcome. They determine who are to be the "payers" from time to time, and how ESS providers' charges are to be apportioned between them.⁷⁷
124. In the NEM and the WEM, the system operator (AEMO) takes on responsibility for paying ESS providers, and then recovers the cost from market participants. This exposes the system operator to prudential risk, which means that it must require all market participants

⁶⁸ PNR rule 203

⁶⁹ PNR rule 214

⁷⁰ FCESS: PNR rule 204. SRESS: PNR rule 214(5).

⁷¹ FCESS: PNR rule 203. SRESS: PNR rule 213.

⁷² PNR rules 205 – 206

⁷³ At present, the only power station operators capable of providing FCESS and SRESS in the NWIS are Horizon (through its contracts with ATCO and TransAlta), Rio Tinto and Alinta. If islanding occurs, the pool available to a given island will be smaller.

⁷⁴ For example, a not infrequent islanding event involves the eastern and western parts of the NWIS separating from each other, followed by the Rio Tinto system disconnecting from Horizon's Karratha network. When this happens, the only substantial power station remaining to provide power, FCESS and SRESS to the Karratha region is ATCO's Horizon-contracted Karratha Power Station.

⁷⁵ PNR rules 206(2) and (3)

⁷⁶ PNR Subchapter 8.3

⁷⁷ PNR rules 227 and 229

to provide security. This is an administrative burden for all concerned, makes the market more expensive, and can be a barrier to market entry.

125. The PNR eliminate the ISO's prudential exposure, by ensuring that the Company is never responsible for paying the ESS providers, even when it has a contract with them as is the case with the primary providers. Instead, the payment obligation falls on the designated "payers" from time to time. The Company operates the "**EBAS engine**" (for "Energy Balancing and Settlement") to implement the PNR's ESS payment rules, and issues "payment notes". Each payment note creates an enforceable obligation on a specified payer to pay the specified amount to the specified payee. This way, the ESS providers, and not the ISO, carry the prudential risk. The providers can, if they wish, factor this risk into their price offers.
126. The above arrangements mean that the Company is in effect acting as a collective procurer of ESS for the benefit of all market participants, and in doing so is effectively setting the price for all ESS bought and sold in the NWIS. In the absence of the PNR, each NSP would need, and would be free, to make its own arrangements for FCESS and SRESS, which it could either provide itself (because it's also a gentailer) or procure from network users or otherwise.

Managing energy balancing

127. As ISO, the Company will also manage centralized energy balancing and settlement using its EBAS engine.
128. In every power system, in most trading intervals, each market participant will have a positive or negative energy imbalance, because its aggregate generation output in that interval will never precisely match its aggregate consumption, and sometimes also because of unexpected events such as generator or consumer outages. Despite these individual imbalances, the FCESS and SRESS providers will always manage the system so that total generation in an interval closely matches total consumption.
129. In commercial terms, each participant with a positive imbalance in a trading interval (over-generating) is informally supplying energy to one or more participants with a negative imbalance in that trading interval (under-generating). In the next trading interval the roles may be reversed.
130. Because electricity flows where it wishes to meet these imbalances, there will often not be a contractual relationship to cover this informal supply. Indeed, it's often not possible to identify which particular supplier of balancing energy supplied a given acquirer of such energy. Rather, in practical commercial terms everyone with a positive imbalance for a trading interval supplies energy into a collective physical 'balancing pool', and everyone with a negative imbalance in that trading interval acquires energy from that pool.
131. In power systems with a wholesale energy market, such as a *gross pool* as in the NEM or a *residual pool after bilateral trades* as in the WEM, each market participant's imbalance can be resolved through the wholesale spot market. The pool balancing mechanism allows suppliers to be linked with acquirers through AEMO, and the spot price bidding mechanism determines a suitable balancing price.
132. The Pilbara market lacks these mechanisms, so Subchapter 8.2 of the PNR sets out how to determine and apportion imbalance flows between participants, and Subchapter 8.3 sets out how the energy involved is to be paid for. In place of a market settlement price, the

Company will determine an administered price for balancing energy.⁷⁸ Once again, its determination will be subject to the various accountability measures described in section 9.4 (from paragraph 271, page 57). The Company presently intends to set this price at a level which approximates the short run marginal cost of electricity production in the NWIS.

133. The Company will then run the EBAS engine to determine imbalance quantities and payment amounts. It has no material discretion in these calculations – the process is determined by formulae set out in the PNR.⁷⁹ The Company will then issue payment notes linking payers with payees. As with ESS, the payment note creates an enforceable obligation for the payer to pay the payee the amount specified.⁸⁰
134. The Company does not benefit from the payment process. It may on occasion be a payee if there are surplus funds after the settlement of balancing payments,⁸¹ but these receipts will be rebated back to network service providers.⁸²
135. The effect of the above is that the Company will be setting the price at which market participants supply and acquire balancing energy. If the PNR were not there, network users would need, and be free, to negotiate commercial arrangements to settle these flows with their NSPs, or alternatively the flows would occur without payment, either of which would be vulnerable to exploitation.

Whole-of-system modelling

136. As ISO, the Company will acquire whole-of-system modelling services for the benefit of NSPs and other rules participants.
137. System modelling is an important part of power system operations. It is needed during the connection process for generators and large loads, to assess the impact the new connection will have on system stability and whether any technical requirements need to be imposed.⁸³ It is also essential for operational planning, such as determining how much ESS to procure in which locations,⁸⁴ how to respond to various contingencies (line outages, plant failures),⁸⁵ and how to manage any congestion which may arise on the network.⁸⁶
138. All market participants benefit from the procurement of modelling services, because the modelling contributes to a reliable, secure and optimised power system.
139. System modelling is typically outsourced to a specialist engineering contractor.
140. Before the new regime, each NSP was responsible for determining when to undertake modelling and what questions the modelling should address, and also for procuring

⁷⁸ PNR rule 231

⁷⁹ The ISO does have discretion about how it allocates obligations in the sense of which particular payer pays which particular payee, but this can have no commercial effect because the ISO must ensure that each payer pays, and each payee receives, neither more nor less than the amount determined under the rules (PNR rule 239(2)). Arithmetically, for any given suite of payers and payees, there will be almost infinite possible permutations of payment notes to achieve this result. The ISO is free to choose the most convenient.

⁸⁰ PNR rule 240.

⁸¹ PNR rule 237(1)(b)

⁸² PNR rule 237(2)

⁸³ PNR Subchapter 9.2

⁸⁴ PNR rules 202 and 211

⁸⁵ PNR Subchapter 3.7

⁸⁶ PNR Subchapter 9.1

modelling services on its own behalf. Under the new regime, each NSP remains responsible for having or procuring its own model of its own network, and hence procuring the necessary modelling services, to support its own operational and planning purposes in respect of its network. But responsibility for holding and operating the *system-wide* model (i.e. the model which incorporates all networks) has been moved to the ISO. This brings benefits for access seekers as the modelling is conducted by an independent party and should lead to a more reliable and secure system.

141. The effect of the regime is thus to replace a system of individual procurement by NSPs for whole of system modelling, with one in which, for system-wide modelling, the ISO procures the services centrally.
142. Nothing in the PNR prevents NSPs or others from undertaking or procuring their own system-wide modelling, in parallel with the ISO and in addition to modelling their own network,⁸⁷ but the NSPs cannot opt out of the ISO's central procurement model.

New connection approvals

143. Before the reforms, each NSP had monopoly power to permit or reject new connections, and so could if it wished block any competitor from entering the market.
144. Now, the covered NSPs' role of **approving new network connections** is regulated and subject to the Company's oversight.⁸⁸ As such, NSPs and the Company will each be a gatekeeper as to whether new entrants can access network services or participate in the generation or retail markets but this is subject to a transparent and accountable process as described in paragraph 146 below.
145. Similarly, NSPs and the Company will also have power to **grant or withhold exemptions** from some of the PNR's requirements.⁸⁹ Once again this allows them to block or permit access and hence market participation but again this is subject to the overall regulatory regime which brings transparency and accountability.
146. The Pilbara regime now provides transparency and accountability in relation to connection applications. Previously, the process was entirely opaque and at the NSP's discretion. The PNAC sets out information that must be published by NSPs, including pricing methodologies and a user access guide. Under the PNR, the ISO supervises the standards to be applied by a registered NSP for new connections and provides modelling services. Ultimately, the ISO is tasked with ensuring system security is maintained as new connections are approved. There is also a comprehensive disputes regime which includes referral to an independent arbitrator in the event of a dispute arising in respect of a connection application.

⁸⁷ PNR rule 110

⁸⁸ PNR rule 269 designates the NSPs as having the primary approval role for new connections. PNR rule 270 sets out the ISO's oversight role, and its power to disallow a new connection.

⁸⁹ PNR rule 64 enables NSPs to grant exemptions from the technical rules, in respect of their own networks only. PNR rule 57 allows the ISO to grant an exemption from any provision of the PNR, including the technical rules.

Constrained network access

147. The Company and the NSPs each have the role of managing constrained access to the network,⁹⁰ by developing limit advices and constraint rules, and issuing constraint directions. These can place limits on generators' ability to generate electricity, network users' ability to access or utilise network services, and consumers' ability to buy and consume electricity. These limitations may be permanent or temporary.

Operational actions, directions and protocols

148. A power system requires careful operation, before, during and after real time. As discussed above (see from paragraph 55), under the "Administrative ISO" model the Pilbara regime allocates most of the real-time operational activities to the three gentailer-NSPs, but appoints the ISO with overall supervision of operational matters, especially before and after real time.
149. Accordingly, the NSPs, and to some extent the Company, each have the roles of **taking operational actions**⁹¹ and **issuing mandatory system operations directions** to third parties.⁹² These actions and directions may disrupt people's participation in various markets. For example, because such actions or directions can limit electricity injections into the grid, transfers through the grid, or withdrawals from the grid,⁹³ they may temporarily or permanently hinder generators' ability to access the wholesale electricity market, or retailers' and consumers' ability to access the retail electricity market.
150. To guide these decisions and directions, the ISO and NSPs must collaborate in advance (i.e. before real time) to **establish operational protocols**,⁹⁴ which govern how the ISO control desk, NSPs and others respond to system incidents. A protocol may empower an

⁹⁰ PNR Subchapter 9.1. In addition to other obligations, the ISO is to consult with the NSPs in developing and publishing all necessary constraint rules for covered networks in the power system (PNR rule 256(1)(a)). "Constrained access" refers to a regime in which generators do not have a guaranteed right to deliver energy into the grid. Rather, generators' output may be reduced as necessary, to ensure that grid segments do not get overloaded.

⁹¹ NSPs' and ISO's operational powers are set out in the following rules:

System state	NSP operational powers	ISO operational powers
Normal	185(1)	185(2)
Pre-contingent	186(2)	186(1)
Post-contingent	187(2)	186(1)
Emergency	189(a) and 190	189(b) and 191

⁹² Under PNR rule 185(1) NSPs have the power to direct users of their own network and the controllers of facilities connected to their own network. In certain circumstances, a protocol may designate the ISO control desk to be the "incident coordinator", in which case it gets powers of direction as set out in the protocol and rule 188(2). The ISO itself has certain limited power of direction, e.g. in pre-contingent situations under rule 186 and in emergencies under rule 189.

⁹³ The note under PNR rule 188(3) gives examples of the things a system operations direction may do, including increasing or decreasing electricity injection and withdrawal.

⁹⁴ PNR rule 77 (read with rule 76(1)) requires the ISO to develop and maintain a protocol framework, containing protocols to deal with contingencies, islanding events, circumstances where power system is outside the technical envelope or outside normal operating conditions, or circumstances which call for pre-contingent actions. PNR rule 78 requires this to be a consensus document between (at least) the ISO and NSPs.

NSP⁹⁵ or the ISO control desk⁹⁶ to issue system operations directions. Protocols,⁹⁷ and directions given under them,⁹⁸ have mandatory effect.

Other collaboration and coordination

151. The ISO and NSPs must also participate in fortnightly **system coordination meetings** to discuss and resolve “system coordination matters”⁹⁹ such as scheduling for network and plant outages, and management of impending events which may impact security, reliability or network capacity. The objective is that operational matters such as this be handled in an informal, open and collaborative manner,¹⁰⁰ with matters resolved by consensus wherever practicable.¹⁰¹
152. There is also an obligation to **liaise as necessary** between scheduled meetings.¹⁰²
153. These meetings or liaisons could result in collective decisions being made under which NSPs or the ISO use the powers discussed above¹⁰³ to place limitations on certain generators’ ability to export electricity into the grid, the capacity of certain network elements to provide network services, or the ability of certain consumers to draw electricity from the grid. This could amount to an arrangement or understanding to restrict the supply or acquisition of certain goods or services. These restrictions will usually be temporary, and will be implemented for benign (and pro-competitive) operational reasons, but could nonetheless affect persons’ ability to access network services or the wholesale or retail electricity markets.
154. The regime recognises that this cooperation must be carefully managed when, as here, the NSPs or their related bodies corporate are also competitors. Accordingly, the PNR impose specific restrictions, over and above the normal confidentiality regime,¹⁰⁴ requiring information exchanged during system coordination discussions to be quarantined within the NSPs’ operational staff, and used only for system operations purposes.¹⁰⁵
155. Pending this authorisation application, the NSPs have developed protocols for these meetings and discussions to ensure that they do not stray into anti-competitive matters.
156. In a similar vein, the ISO and NSPs, and others as necessary, must collaborate in **post-incident discussions and investigations** with a view to improving the rules and procedures and power system operation, and holding rules participants accountable, in order to maintain and improve power system security and reliability.¹⁰⁶

⁹⁵ PNR rule 80(2)(c)

⁹⁶ PNR rule 80(2)(b)

⁹⁷ PNR rule 85

⁹⁸ PNR rule 86

⁹⁹ PNR rule 167

¹⁰⁰ PNR rule 173

¹⁰¹ PNR rule 170(d)

¹⁰² PNR rule 175

¹⁰³ See footnotes 91 and 92.

¹⁰⁴ The confidentiality regime appears in Subchapter 11.2. Rule 176(2) explicitly preserves that regime undiminished.

¹⁰⁵ PNR rule 176

¹⁰⁶ See the objective in PNR rule 193, and Subchapter 7.6 generally.

157. These discussions and investigations are governed by the same rules about information as the system coordination meetings discussed in paragraph 154 above,¹⁰⁷ and could similarly result in operational decisions which restrict certain persons' ability to access markets.
158. In addition to the specific areas of consultation and cooperation discussed above, the PNR throughout place an emphasis on **collaborative management of the power system**, for the collective benefit of electricity consumers.¹⁰⁸ Any of these discussions could lead to an arrangement in which someone's access to a market was restricted.

Delegation of real-time control desk activities

159. As discussed above (from paragraph 55) the "Administrative ISO" model permits the Company to **delegate its real-time control desk activities** to Horizon Power.¹⁰⁹ The Company has made an interim delegation to Horizon which seeks to preserve the pre-regime status quo until 16 January 2023 or such other date as the parties may agree in writing. Subject to receiving the authorisation requested in this application, the Company proposes to appoint Horizon fully to the role in due course.
160. When the power system is operating normally, the ISO control desk function is limited to monitoring the system and other administrative functions.¹¹⁰ However, if a contingency occurs,¹¹¹ or the system is in a pre-contingent state,¹¹² or there is an emergency,¹¹³ the ISO control desk has the function of maintaining the power system in a secure state, or returning it to a secure state, and has a broad power to give directions¹¹⁴ to rules participants.
161. Accordingly, by delegating the control desk function to Horizon, the Company will be placing considerable operational power and discretion in the hands of one market participant, which could be used to discriminate against other market participants – Company members and otherwise albeit for a limited purpose.
162. Before the regime, Horizon filled a de facto role of system operator, through a mixture of informal consent arrangements and bilateral contractual rights under connection

¹⁰⁷ PNR rule 194(3)

¹⁰⁸ For example:

- NSPs are given a general function of "communicating and collaborating with other rules participants in accordance with these rules" (PNR rule 36(c)).
- The ISO control desk, NSPs and others may manage incidents informally and collaboratively rather than formally activating a protocol (PNR rule 83(2)) – meaning that the outcomes discussed in paragraph 154 above, such as temporary restrictions on access to wholesale and retail markets, could also be reached by informal agreement.
- The PNR require the protocol framework to be developed by consensus between (at least) the ISO and NSPs, where possible (PNR rule 78).
- The ISO and NSPs are to collaborate when it comes to modelling future scenarios across the power system (PNR rule 115).
- Subchapter 7.5, which deals with power system operation, emphasises that the objective of system security is to be achieved in a way which "as far as practicable relies on informal collaboration and cooperation" (PNR rule 184(2)(a)).
- The ISO, NSPs and others are to collaborate regarding how the regime's reporting objectives are best to be realised (PNR rule 276(1)).

¹⁰⁹ PNR rule 45.

¹¹⁰ PNR rule 185(2) explicitly does not give the control desk the function of operating the NWIS or giving directions, during normal operating conditions – see the {note} before rule 186(2)(d).

¹¹¹ PNR rule 187(1)

¹¹² PNR rule 186(1)

¹¹³ PNR rules 189(b) and 191

¹¹⁴ PNR rules 188(2) and 189(b)

agreements. The effect of the regime and the ISO's delegation is thus to formalise an existing state of affairs, although it does give Horizon stronger powers to make mandatory directions than existed in the past.

163. Section 9.4 sets out the layered protective mechanisms included in the regime, to preserve competitive outcomes in this regard (paragraph 296, page 61).

Information sharing

164. As described above, important aspects of the regime are that:
- (a) the ISO is to have overall responsibility for the NWIS's security and reliability, and for whole-of-system modelling; and
 - (b) the ISO and NSPs are to collaborate and coordinate on a wide range of system operation, planning and incident investigation matters.
165. These necessarily require rules participants to share confidential and commercially sensitive information with the ISO and, on occasions, with each other. This may from time to time include information relevant to the parties' and their customers' various competitive positions.
166. Before the regime, this subject was dealt with through ad hoc formal and informal confidentiality arrangements between market participants, or by limiting disclosure in ways which may not have been optimum for system security and reliability.
167. The regime formalises the obligations to disclose relevant information, but also includes important protections, namely:
- (a) in addition to the normal rules about confidentiality mentioned at paragraph 296(d), further (and stricter¹¹⁵) specific rules about confidentiality in connection with modelling¹¹⁶ and limitations on the disclosure of confidential information in modelling results¹¹⁷;
 - (b) the ISO may establish procedures in respect of matters including cooperation between NSPs and the ISO,¹¹⁸ communication and information-sharing,¹¹⁹ cross-network visibility of data¹²⁰ and power system modelling,¹²¹ all of which may impose additional protections around disclosure and use of competitively sensitive information, should that prove necessary;
 - (c) as noted at paragraph 154 above, there are specific rules limiting the disclosure and use of information disclosed in the course of system coordination discussions;¹²² and

¹¹⁵ PNR rule 120(5) makes it clear that the restrictions in respect of modelling information prevail over the general disclosure right.

¹¹⁶ PNR rule 120

¹¹⁷ PNR rule 119(2)

¹¹⁸ PNR rule 53

¹¹⁹ PNR rule 103

¹²⁰ PNR rule 105(1)

¹²¹ PNR rule 121

¹²² PNR rule 176

- (d) the pro-competitive controls described in section 9.4 below (see from paragraph 272) also provide protection here.

3.2 CCA provisions which might apply to the proposed conduct

Introductory remarks

Risk that collaboration could lead to arrangement or understanding

168. The Pilbara regime's emphasis on discussion, collaboration and consensus in the pursuit of efficient and effective system operations, and the need for information-sharing at various points, raises a risk that the participants in those discussions might be found to have reached a contract, arrangement or understanding having a prohibited purpose or effect under the CCA.

Does the Company's constitution "indirectly enable" a prohibited cartel purpose or effect?

169. The Company's constitution does not contain a cartel provision. However, there is a potential theoretical risk that the Company's constitution may be seen to be "indirectly enabling" a prohibited cartel purpose or effect if it is considered an agreement which *indirectly* enables the members to, for example, control prices, by allowing them to exercise the ISO's price-controlling function under the PNR.
170. This "indirect enablement" analysis relies on a very broad reading of the word "indirect" where it appears in the opening words of s 45AD(3), but more importantly has at least two factual weaknesses. First, the members would have achieved nothing in forming the Company, had the Governor not made the relevant regulation¹²³ appointing the Company to be the ISO. This breaks the causal nexus between the constitution and any offending purpose/effect. Second, to describe the Company's constitution as a cartel arrangement, requires one to disregard the mechanisms built into it, and into the Board's policies, which are designed precisely to defeat any anti-competitive consequences, by preserving the Company's independence from its members' interests (see below, from paragraph 273). Nonetheless, the Company seeks authorisation in respect of the CCA's cartel provisions out of an abundance of caution as described below.

Any anti-competitive effects often transient

171. From paragraph 205 below, we discuss the fact that the disruptions mentioned in the following pages are predominantly infrequent and of short duration, and hence, to the extent they have any impact on competition at all, the impact is unlikely to be material.

Cartel provisions which might apply

172. The Company seeks authorisation in respect of CCA Part IV Division 1 in its entirety, not limited to the example provisions mentioned below.
173. The conduct described in section 3.1 above and further below is undertaken by the Company in accordance, or in connection, with its functions and obligations under the EI Act and the PNR. That is, the Company's substantial purpose is performance of functions and obligations under the Pilbara regime and not a prohibited purpose under the CCA. However, the Company seeks authorisation in respect of Division 1 in its entirety to account

¹²³ regulation 14, *Electricity Industry (Pilbara Networks) Regulations 2021*

for the fact that there may be some limited circumstances where a cartel contravention may technically be taken to have occurred (for example, where the effect condition is made out).

174. Some of the relevant conduct described above and below involves the entering into of arrangements between an NSP and the Company. As indicated above, authorisation is sought in relation to both the entering into and giving effect to those arrangements.¹²⁴
175. Provisions which might apply (if the competition condition is satisfied in each case) include:
- s 45AD(2)(c) – fixing prices for goods/services supplied by the parties*
176. The ISO, by arguably engaging in **collective procurement of ESS** for the benefit of members and other rules participants, could be seen to be having the effect of controlling the price of ESS to be supplied by the member selected as a supplier of ESS.
177. As outlined above, the ISO will contract with primary providers of FCESS and SRESS, with the contracts establishing the price the ESS provider is to be paid for the service. The PNR requires that, for secondary providers there is no contract entered into, rather the ISO nominates one or more secondary providers who can take over frequency control if the primary provider is not maintaining frequency in part of the power system (or the power system as a whole). The nominated secondary FCESS providers must specify a price for their service. To prevent price gouging or other manipulation by this limited pool of secondary FCESS providers, the ISO may publish a price cap from time to time to reflect the ISO's reasonable estimate of the cost of providing the service.¹²⁵
178. In this situation, the competition condition is likely satisfied because each of Rio Tinto, Horizon and Alinta are both members of the Company and potential ESS suppliers within the NWIS.
179. It is possible that a contract entered into between the Company and the primary providers of FCESS fixes or controls the price of those services supplied by the primary providers, in circumstances where that provider is a Member of the Company (currently Rio Tinto, Horizon or Alinta).
180. It is also possible that the administered price cap imposed by the Company for secondary services could be characterised as an agreement between competitors to fix the price for those services.
181. The ISO could arguably be **controlling the price for balancing energy** because it prescribes an administered price. In normal circumstances rules participants would not be said to be “competing” with each other to supply balancing energy. Rather, imbalances are just something which happens unavoidably in the operation of the power system. But all network users are at least potential competitors – if the administered price was set high or low enough, each of them might be tempted to manipulate its energy flows in order to accumulate (for high prices) a large positive imbalance to ensure it gets paid out at the lucrative price or (for low prices) a large negative imbalance to take advantage of the inexpensive energy. All network users might compete to win this race.

¹²⁴ Arrangements will be entered into, and given effect to, by the Company (as ISO) and the relevant NSP. In some circumstances the NSP may also be the ISO's delegate. In giving effect to those arrangements, the relevant NSP will be acting as “systems operations participant” or “rules participant” and not as the ISO's delegate.

¹²⁵ PNR rule 206

s 45AD(2)(c) – fixing prices for goods/services acquired by the parties

182. By negotiating or setting a price for ESS and passing this through to the relevant payers, the ISO arguably has the effect of **fixing the price for ESS** for each of the members (and others). The competition condition is probably satisfied because even though Rio, Horizon and Alinta (and others) do not have any choice as to whether they acquire ESS, because they are forced by the rules to acquire – or at least to pay for – the services, nonetheless the fact remains that if there was an open market for ESS they could compete to find the lowest-cost way of fulfilling that obligation.
183. For the same reasons, the ISO is arguably **setting the price for the balancing energy** acquired by whichever of the members, or other market participant, has a negative imbalance in a trading interval, and the competition condition is probably satisfied for the reason just discussed in paragraph 181.

s 45AD(3)(a)(i) – limiting production of goods (electricity):¹²⁶

184. Electricity is “goods” under the CCA, and so the act of generating electricity is probably the “production of goods” for the purposes of this section. One of the main ways in which an ISO or NSP maintains control over a power system is by regulating generators’ output from time to time, e.g. to preserve frequency, or avoid network congestion. The occasions when the ISO or an NSP asks a generator to *increase* its output are not relevant here. But for the times when a generator is “constrained off” or otherwise asked to *reduce* its output, then this, although undertaken for the benign purpose of maintaining a secure and reliable supply of energy for all customers and implementing the Pilbara regime, nonetheless on its face arguably has the explicit purpose of **restricting those generators’ production of electricity** for a period.
185. This scenario could be alleged to have arisen in several contexts:
- (a) When system operations participants **consciously reach agreement on such measures to limit generation** as part of a system coordination meeting, a post-incident investigation, or other collaborative conduct.
 - (b) When this **outcome emerges after discussion**, collaboration or information-sharing between system operations participants in circumstances where an arrangement or a “nod and a wink” understanding may be inferred, or a concerted practice has arisen.
 - (c) When the ISO and NSPs collaborate to **implement the constrained access model** for network services under Subchapter 9.1 of the PNR, and agree on what are to become binding network constraints.¹²⁷

(Each of the above three instances will likely involve active discussions and collaboration between competitors or potential competitors, such that it could be arguable that parties could be said to have come to an arrangement or understanding.)

¹²⁶ Electricity is “goods” under the CCA: section 4, definition of “goods”, paragraph (d).

¹²⁷ Under the constrained network access model in the PNR, the ISO control desk may issue constraint directions in circumstances where published constraint rules designed to ensure the power system remains secure are, or are likely in the near future, to be violated. These directions are to be apportioned in a specific order of priority as set out in the PNR rule 251.

- (d) When the ISO control desk¹²⁸ (including Horizon as the ISO's delegate with conflicts of interest as discussed above¹²⁹) issues **system operations directions**, or takes other steps to preserve security and reliability under the PNR, although this is unlikely to involve a "contract, arrangement or understanding" as the ISO (or ISO's delegate) is acting as the sole operator of the control desk in issuing the system operations directions.
- (e) When a new generator wishes to connect to the grid, but the ISO or an NSP as a **condition of connection imposes restrictions on the generator's output** whether for security or reliability reasons, for technical rules compliance, due to network constraints, or otherwise. In the NSP's case, the offending contract, arrangement or understanding could arise from its discussions with the ISO (representing all members) or with other affected NSPs.
- (f) The PNR themselves impose various restrictions on generator's ability to generate electricity, for good technical or policy reasons. Although the PNR are a legislative instrument, not a contract, arrangement or understanding, and so cannot themselves be a cartel provision, **the rule change process involves close consultation** with affected parties, and anyone can propose a rule change. It is therefore possible that some or all members could in discussing, or agreeing to propose, a rule change, come to a common understanding to support, for benign and pro-competitive purposes, a rule change which would impose a further limitation on someone's capacity to generate electricity. Even though the rules are governed by an independent process, such that stakeholders' submissions on rule changes cannot determine the final outcome, it might be argued that such an understanding might be said to have the purpose of *indirectly* limiting generating capacity.¹³⁰

186. The competition condition is likely satisfied for electricity generation because Rio, Alinta and Horizon (through its contracts with TransAlta and ATCO) all generate electricity into the NWIS. At least Alinta and Horizon, and possibly also Rio, compete to generate, because all three members are in a position to generate more or less electricity in response to the right price signals.

s 45AD(3)(a)(ii) – limiting capacity of a party to supply services

- 187. Network operators can¹³¹ provide services to network users, including accepting electricity at an entry point to the grid, transporting electricity through the grid, and delivering electricity at an exit point from the grid.
- 188. Just as the scenarios discussed at paragraph 185 above could result in a direction to a generator to limit its output, so each of them could result in a constraint on the network services an NSP can offer.
- 189. The competition condition is likely satisfied because at least Horizon and Alinta do or could compete to provide network services. This market is unlikely to be a priority for Rio, but it

¹²⁸ For completeness, NSPs can also issue *system operations directions*, and could do so unilaterally rather than as a result of a contract, arrangement or understanding with a competitor or anyone else. See discussion under section 46, from paragraph 213 below.

¹²⁹ Paragraph 162 on, above

¹³⁰ This would only be cartel behaviour if the affected power station operator was part of the discussion.

¹³¹ It is not always a service, because sometimes the network operator is using the network for its own purposes, as when a vertically-integrated business like Horizon or Alinta transports electricity through its own network for sale to consumers.

too has the capacity to be at least a theoretical competitor given sufficient price incentive, for example if there is an opportunity to build and operate a major transmission line linking new areas of renewable generation to its own and other minesites.

s 45AD(3)(a)(iii) – limiting supply by a party of goods or services

190. The limitation references in this sub-paragraph could arise in the course of ISO control desk decisions or directions which **constrain retailers' capacity to supply electricity**, e.g. by limiting network services as discussed from paragraph 187 above, or by limiting generator output as discussed from paragraph 184 above, or by shedding load. Likewise, the PNR and HTR themselves will limit retailers' capacity to supply electricity by imposing technical and operational constraints, and will limit the supply of ESS or balancing energy by requiring it to be done through the PNR mechanisms.
191. By regulating and centralising the **procurement of ESS and balancing energy** into what could be seen as a collective bargaining arrangement, the regime could be argued to limit the supply of these things by the members, because the gentailer-NSPs are the main source of these goods and services.
192. In each of these cases it could be argued that the cartel regime is enlivened:
- (a) directly, by an arrangement or understanding arising or inferred from operational collaboration and consultation; or
 - (b) indirectly, by an arrangement or understanding between members to propose or support with a rule change proposal if the effect of the rule change is to impose such a limitation.
193. As before, the competition condition is probably satisfied because at least Alinta and Horizon compete to supply electricity to consumers. They arguably also compete, or could compete if the price was right, to provide network services to network users, at least around Port Hedland where their networks co-exist and could relatively easily be extended to new loads or generators. As discussed above at paragraph 181, it's at least arguable that all members also compete or could potentially compete to supply ESS and, in at least some senses, balancing energy.

s 45AD(3)(a)(iv) – limiting acquisition by a party of goods or services

194. The regime's arrangements regarding **centralized procurement of ESS and balancing energy** could be argued to amount to collective bargaining by the members, and to impose an implied limitation on the parties' procuring these things individually.
195. As discussed above, for operational and system security reasons the regime necessarily imposes **restrictions on the generation of electricity**, and hence the **wholesale supply of electricity**, and also on the **provision of network services**. At least Horizon and Alinta, and possibly also Rio, are competitors or potential competitors in these markets. All three self-generate, and to that extent do not in fact compete for wholesale electricity, but if the price was right any of the 3 could choose instead to buy their electricity from someone else (rather than making their own) and so would be competitors. Likewise all 3 operate their own networks and thus in effect provide network services to themselves and so to some extent do not compete to acquire these services, but it's also true that depending on where generation and customers are located, at least Horizon and Alinta, at least around Port Hedland, may wish to acquire network services from each other in order to access those customers more easily than by building their own competing network.

196. The PNR, and the ISO's and members' conduct under the PNR, might also be argued to limit **consumers' ability to acquire electricity**, for example by imposing technical or operational constraints on network services or on energy exports from the grid.

s 45AD(3)(b)(i)&(ii) – allocating between the parties persons who are likely to acquire or supply goods or services from the parties

197. Since each of the members is an actual or potential supplier of ESS, the fact that the regime dictates who is to pay whom for ESS could arguably be seen as falling within this limb by **allocating ESS acquirers** to particular ESS providers.
198. Similarly but more so, but subject to paragraph 199, all parties unavoidably supply balancing energy when they have a positive imbalance, and since the EBAS regime and engine allocates who is to pay whom for balancing energy, it could be argued to fall within this limb by **allocating balancing energy acquirers** to particular balancing energy providers.
199. The conclusion in paragraph 198 assumes very conservatively that the after-the-event apportionment of *payment obligations* in respect of supplies which have in fact occurred in an unguided fashion according to the laws of physics, and not necessarily between the same parties, amounts to an allocation of persons who “have acquired” these goods or services for CCA purposes. The Company does not advance this interpretation – simply notes it here as another conceivable risk.
200. If the regime can be seen as establishing collective bargaining in respect of the **acquisition of whole-of-system modelling services**, then it could be argued to involve cartel behaviour of the type described by this subsection.
201. However, it is unlikely that the competition condition would be met for whole-of-system modelling. Although the NSPs still compete with each other to procure modelling services for their own network purposes, the effect of the Pilbara regime is to remove the whole-of-system modelling task from the NSPs and give it to the ISO. The NSPs are thus, by statute, arguably no longer in the market for these services, and hence no longer competing.

The joint venture defence

202. For completeness, the Company observes that the joint venture defence¹³² may be available for some of the potential cartel behaviour described above. However, this defence has not been tested in court, and it would not assist in respect of sections 45 to 48 discussed below, so the Company seeks the certainty of an authorisation.

Section 45 – General prohibition on anti-competitive arrangements or concerted practices

203. If any conduct under or giving effect to the Pilbara regime arises from a contract, arrangement or understanding, or from a concerted practice, and results in a substantial lessening of competition, it could breach section 45.
204. For example, in addition to the conduct listed above, the PNR require the NSPs and the ISO to work collaboratively on an ongoing basis, creating a risk that some aspects of their ongoing activity might be characterised as a concerted practice.

¹³² CCA section 45AO

No likely substantial lessening of competition

205. The Company considers it unlikely that any of the relevant conduct would be likely to substantially lessen competition.¹³³ As described above (from paragraph 35), the Pilbara regime was implemented specifically with a view to promoting competition.
206. It is true that in order to pursue the combined goals of competitive open access and system security and reliability, the Pilbara regime, like every electricity regime, necessarily imposes restrictions on grid connections, generator output, the provision or use of network services and the supply and consumption of electricity. These necessarily hinder the ability of some would-be competitors to compete.
207. In a limited number of cases, this hindrance may be long-term or permanent. For example, if connecting an obsolete generator to the grid could jeopardise grid stability, and the cost of upgrading the machine to make it compliant is too high, then the owner of that machine might be prevented permanently from competing to supply wholesale electricity. Similarly, the reality of constrained network access is that a sub-optimally located generator may not be able to fully access the market without funding prohibitively expensive network upgrades.¹³⁴
208. But this impact on *competitors* is not the same as there being an impact on *competition*. The Company considers that even if some businesses are hampered by the technical requirements for grid connection or by being on the wrong side of a network constraint, there remain ample opportunities for existing and new businesses with compliant plant and better locations to compete, and their ability to do so will be enhanced by the opening of the electricity market as a result of these reforms.
209. The Pilbara electricity market is characterised by large, sophisticated and well-resourced parties on both the supply and demand side of most markets. The large mining consumers, in particular, are well-equipped to drive competition, and have levels of electricity demand which are capable of underwriting new investment where necessary to overcome technical or operational hurdles. This access to potential foundation customers lowers the barriers to market entry for would-be new competitors.
210. Further, there are strong mechanisms built into the regime to ensure that it does not overall stifle competition, including the framework of pro-competitive controls described in section 9.4 below (see from paragraph 272).
211. For the above reasons, even permanent obstacles to individual competitors are unlikely to substantially lessen competition in the Pilbara markets. But in fact, many of the disruptions will be infrequent and of short duration. System contingencies are usually resolved within a few hours. While it's possible for even rare and brief outages to have significant *commercial consequences*, such transient disruptions are not likely to substantially reduce *competition* in the relevant markets. This is especially so to the extent that system events affect more than one would-be competitor simultaneously.
212. Nonetheless, from an abundance of caution the Company requests that the authorisation extend to section 45.

¹³³ As a result, the Company has not undertaken econometric analysis of the Pilbara markets.

¹³⁴ The PNR include an ability to build out constraints: PNR rule 264.

Section 46 – Misuse of market power

213. If any of the rules participants has a substantial degree of power in a market, then if any of the conduct discussed in this application has or is likely to have the purpose or effect of substantially lessening competition, section 46 could be argued to be breached.
214. Under section 46 there need not be a contract, arrangement or understanding. Unilateral actions by a sufficiently powerful market participant may result in a breach, for example the issuing of system operations directions¹³⁵ if they limit supply or acquisition of services or electricity.
215. But for reasons discussed from paragraph 205 above, the Company considers a substantial lessening of competition to be unlikely.
216. As a result, the Company does not consider it necessary to explore whether any of the rules participants may have the requisite degree of power in a relevant market.
217. Nonetheless, from an abundance of caution, the Company requests that the authorisation extend to section 46.

Section 47 – Exclusive dealing

218. It is possible that some elements of the regime could be characterised in a way which could be argued to approach third line forcing, for example:
- (a) the linkage between an NSP providing network services and the requirement that the access seeker acquires ESS, balancing energy and modelling services;
 - (b) any ESS provider must agree to acquire balancing energy as necessary.
219. However, as with sections 45 and 46, the Company does not believe that the relevant conduct will have, or be likely to have, the purpose or effect of substantially lessening competition.
220. Nonetheless, from an abundance of caution the Company requests that the authorisation extend to section 47.

Section 51 authorisation by regulation

221. On 4 November 2022, the Regulations were amended¹³⁶ to add regulation 16A, which is an authorisation under section 120ZF of the *Electricity Industry Act 2004* for the purposes of section 51 of the CCA.
222. In short, the regulation authorises the Company, its directors, members and delegates, and any other person with a function under the PNR or PNAC, to do, enter into, give effect to etc any arrangement, act, matter or thing in performance of, or in relation to, a function under the PNR or PNAC, under instruments made under the PNR and PNAC, or under the Act in relation to the PNR and PNAC.

¹³⁵ PNR rule 188(1)

¹³⁶ *Government Gazette, WA*, 4 November 2022, p. 5240, item EN301, gazetting the *Electricity Industry (Pilbara Networks) Amendment Regulations 2022* SL 2022/183.

223. This regulation is constrained in time by section 51(1C)(c) of the CCA.¹³⁷ Further, the regulation is explicitly intended to operate only as an interim measure to enable the Pilbara regime to operate as required whilst this application is assessed by the ACCC.¹³⁸ Hence, the Company and those for whom protection is sought by this application request the certainty of an authorisation to enable them to undertake the proposed conduct over a longer term as envisaged by the rationale set out in section 3.3 below.

3.3 Rationale for the proposed conduct

The Pilbara regime is consciously pro-competitive

224. As discussed above (see from paragraph 22), the Government introduced the Pilbara reforms to benefit Pilbara electricity consumers in two ways:
- (a) opening networks to access;
 - (b) ensuring the NWIS was operated and maintained efficiently and in a secure and reliable state.
225. Both of these facilitate competition in the Pilbara electricity sector.
226. The link between the first objective and competition is obvious – effective network access under the PNAC is a critical enabler of competition in the Pilbara’s retail or generation sectors. Regulated access is not an end in itself – governments regulate access to promote competition in upstream and downstream markets.¹³⁹ Accordingly, in the Company’s view, the Pilbara regime’s regulation of these matters is consciously pro-competitive. As noted above at paragraph 146, the Company has a role in approving new connections and ensuring effective network access in a secure and reliable manner.
227. But the second objective is also pro-competitive. The PNR create a network with higher reliability and security, with transparent governance overseen by a single independent entity rather than three vertically-integrated entities, and with transparent and accountable administration of technical rules, constraints, ESS, energy balancing, system operation, incident response and post-incident review. This will make market entry and market participation easier, which will be likely to attract new market entrants and make their success more likely. It will go a considerable way to levelling the playing field as between the incumbent gentailer-NSPs and their potential competitors. As a result, the Company considers the PNR to be thus pro-competitive in their own right, in addition to providing support to the PNAC’s access regime.

The conduct is required by, and necessary for, the recent Pilbara reforms

228. The proposed conduct is necessary to give effect to the Pilbara regime as designed by the Western Australian Government.
229. As to the objective in paragraph 224(a), as discussed above (from paragraph 36), many of the matters discussed in this application are essential to create effective third party access, by making available efficient and transparent connection rights, system operation, ESS and balancing energy.

¹³⁷ This is recognized by regulation 16A(2).

¹³⁸ Regulation 16A(4) disapplies the regulation from anything which may be authorized by the ACCC.

¹³⁹ This is one of the standard coverage criteria: ENAC s 3.5(a); NGL s 15(a); CCA s 44CA(1)(a).

230. As to the objective in paragraph 224(b), to properly manage the NWIS, which is an interconnected system made up of separately-owned power systems, there must be coordination and cooperation between the several operators. If the grid is to operate securely, reliably and efficiently that cooperation needs to be relatively continuous, and the grid needs to be placed under a single overarching control. This is what the reforms have done for the NWIS, replacing informal, opaque and imperfect cooperation with transparent, formal and accountable rules-based coordination and collaboration. This necessarily requires rules participants to engage in the discussions, conduct and information-sharing described in section 3.1 above.

The Company offers the optimum way of achieving these benefits

231. As noted above (from paragraph 48), the use of the Company as ISO was selected by the Western Australian government as being a flexible, more cost effective, efficient and fit-for-purpose solution, having regard to the participants of the NWIS, the size and importance of the NWIS, the role of the system operator, the fact that registered network service providers were required to fund it, and the roles performed by other bodies in respect of the NWIS, such as the Economic Regulation Authority, and the WA Government through the Minister for Energy and the Coordinator.
232. The Company was selected and supported for the ISO role following extensive stakeholder engagement as the optimum model in terms of efficiency and a Pilbara focus.

3.4 Term of authorisation sought

Authorisation for 10 years requested

233. The Company seeks an authorisation for 10 years.
234. The Pilbara regime is intended to provide a permanent, if evolving, regulatory framework for NWIS access and operation. Its introduction has involved disruption for NWIS stakeholders, who invested a significant amount of time and resources in the reform process, and are now investing further time and resources in transitioning into the regime. A period of 10 years would provide certainty for the Company and NWIS stakeholders.
235. In particular, a period of 10 years will reduce risk for potential investors in the NWIS, allowing the public benefits described in this application to be realised to a greater degree.
236. The Company notes the ACCC's preference for authorisations to normally be in effect for 5 years. However, the Company believes that a longer period is justified in this instance because:
- (a) the actual anti-competitive impact of the relevant conduct is generally likely to be negligible or nil (from paragraph 205, above), and in fact the regime and much of the proposed behaviour will be pro-competitive;
 - (b) all of the relevant conduct will be occurring within the framework of the PNR and PNAC, which are guided by the pro-competitive Pilbara electricity objective and which include the framework of pro-competitive controls described in section 9.4 below (from paragraph 272).
237. The Company asks that the authorisation start as soon as possible to provide the Company with certainty as it prepares for the end of the Pilbara regime's transitional period.

4. Internal documents regarding the proposed conduct

4. Provide documents submitted to the applicant's board or prepared by or for the applicant's senior management for purposes of assessing or making a decision in relation to the proposed conduct and any minutes or record of the decision made

238. The Company has provided a copy of its Constitution, which is an agreement between the members.
239. Because this is a statutory regime, the Company considers that no other internal documents are relevant.

5. Persons who may be impacted by the proposed conduct

5. Provide the names of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. targets of a proposed collective bargaining arrangement; suppliers or acquirers of the relevant products or services) and detail how or why they might be impacted

240. The following classes of persons may be directly impacted by the proposed conduct:

Proposed conduct	Class of person directly affected	How or why impacted
1. Centralized procurement and allocation of ESS¹⁴⁰	ESS suppliers	<ul style="list-style-type: none"> • Must compete in ISO procurement process if they wish to supply, i.e. cannot contract bilaterally • Cannot self-supply, but can effectively do so if they compete successfully in ISO process • Cannot contract bilaterally (opaquely)
	ESS acquirers	<ul style="list-style-type: none"> • ISO procures on their behalf, i.e. cannot procure bilaterally • Cannot self-supply, but can effectively supply themselves if they compete successfully in ISO process • Benefit from transparent, competitive procurement • Benefit from a rule-based allocation of ESS costs
	Network users and electricity consumers	<ul style="list-style-type: none"> • Benefit from supply competition and increased transparency • Benefit from the fact that the ISO, on their indirect behalf, will seek to negotiate the most efficient price • Benefit (in terms of both system security and cost) from the fact that the independent ISO determines how much ESS to procure, rather

¹⁴⁰ See paragraph 112 onwards, above.

Proposed conduct	Class of person directly affected	How or why impacted
		<p>than leaving it to individual gentailer-NSPs' risk appetites</p> <ul style="list-style-type: none"> • Cannot procure on own behalf or self-supply, but can compete in ISO process
2. Centralized energy balancing regime¹⁴¹	Suppliers of balancing energy (i.e. those with positive imbalance)	<ul style="list-style-type: none"> • Must accept ISO price and PNR payment rules • Cannot contract bilaterally (opaquely) • Benefit from rules-based apportionment and independent (administered) pricing
	Acquirers of balancing energy (i.e. those with negative imbalance)	<ul style="list-style-type: none"> • Must pay ISO price and accept PNR payment rules • Cannot contract bilaterally (opaquely) • Benefit from rules-based apportionment and independent (administered) pricing
	Network users (including retailers) and electricity consumers	<ul style="list-style-type: none"> • Benefit from there being a central balancing mechanism, rather than having to negotiate their own with the NSP in an asymmetric context • Benefit from increased transparency and accountability • Benefit from administered price (likely to approximate SRMC) rather than having to negotiate their own price • Benefit from being able to participate as nominators in ISO EBAS process, but otherwise cannot arrange to settle imbalances themselves
3. Acquire whole-of-system modelling services¹⁴²	Modelling providers	<ul style="list-style-type: none"> • Must compete in ISO procurement process if they wish to supply whole-of-system modelling services • Can still offer services to NSPs and others
	NSPs	<ul style="list-style-type: none"> • No longer control whole-of-system modelling • Must accept the price the ISO negotiates when it procures services (but usually pass this on to network users or consumers) • Still able to procure own services as well, if desired
	Access seekers and network users (including retailers)	<ul style="list-style-type: none"> • Benefit from modelling being conducted by independent party, rather than being controlled by the gentailer-NSP whose network they are trying to access, and who is potentially an upstream or downstream competitor • Benefit from more secure and reliable system due to centralized, higher quality modelling

¹⁴¹ See paragraph 127 onwards, above.

¹⁴² See paragraph 136 onwards, above.

Proposed conduct	Class of person directly affected	How or why impacted
		<ul style="list-style-type: none"> • Must accept the price the ISO negotiates • May be blocked or restricted from access if do not meet technical requirements assessed by the ISO
	Electricity consumers	<ul style="list-style-type: none"> • Benefit from improved third party access to covered networks, opening up retail competition • Benefit from more secure and reliable system • Probably end up bearing indirectly the price the ISO pays to the modelling provider (but would have paid anyway, if NSP did the modelling) • May not be able to contract with preferred supplier if it cannot achieve technical compliance
4. New connection approvals ¹⁴³	Access seekers	<ul style="list-style-type: none"> • May be blocked from accessing the market due to technical restrictions imposed by the ISO or NSP, or may have to bear extra costs to achieve compliance • Once a network user, benefit from a secure system (i.e. reduced exposure to risks arising from the next connecting person)
	Other network users	<ul style="list-style-type: none"> • May be exposed to additional risk and cost, including under the loss-of-grandfathering¹⁴⁴ rules, if ISO or NSP allows the new connection, but this was always the case and hopefully under the regime will benefit from higher-quality decisions in this regard • Benefit from a secure system
	Generators Retailers Consumers	<ul style="list-style-type: none"> • Access to electricity markets or to new sources of electricity supply may be hampered if their preferred access seeker cannot get access • Electricity offtake or supply may be disrupted if the ISO or NSP permit a new connection which causes system impacts, but this was always the case and hopefully under the regime will benefit from higher-quality decisions in this regard • Benefit from a secure system
5. Constrained network access ¹⁴⁵	Access seekers	<ul style="list-style-type: none"> • As in row 4, a decision on network constraints by the ISO or NSP may block or hinder the access seeker from accessing the market, or it may have to bear extra costs to resolve the constraint, but benefit from a secure system

¹⁴³ See paragraph 143 onwards, above.

¹⁴⁴ Under PNR Appendix 3 clause A3.13(b), legacy arrangements can be lost as a result of changes in the power system unrelated to anything done by the grandfathered operator. That is, if the power system could previously safely accommodate a non-compliance, but can no longer do so e.g. due to load growth, the grandfathering protection for that non-compliance can be withdrawn.

¹⁴⁵ See paragraph 147 above.

Proposed conduct	Class of person directly affected	How or why impacted
	Other network users	<ul style="list-style-type: none"> As in row 4, a decision on network constraints by the ISO or NSP may block or hinder an existing network user from accessing the market in the same way as previously, or cause it to bear extra costs to resolve the constraint, but benefit from a secure system
	Generators Retailers Consumers	<ul style="list-style-type: none"> As in row 4, a network constraint may impact on an access seeker or network user can impact on their ability to supply or offtake electricity, but benefit from a secure system
<p>6. Operational actions or directions¹⁴⁶</p> <p>approving new network connections</p> <p>grant or withhold exemptions from the PNR</p> <p>taking operational actions</p> <p>issuing mandatory operational directions</p> <p>establish operational protocols</p> <p>etc</p>	Generators	<ul style="list-style-type: none"> May be required to reduce energy injections on occasion, which affects revenue and contractual commitments Benefit from more secure and reliable system If they are a third-party generator, benefit from more transparent and independent system operation (system no longer operated by competing gentailer-NSP)
	NSPs	<ul style="list-style-type: none"> No longer able completely to control own destiny in respect of overall system Less discretion to direct neighbouring NSPs under connection agreements No longer fully free to make own operational decisions e.g. re network constraints Benefit from having an independent ISO to ensure other NSPs and gentailers operate responsibly Benefit from generally being left alone to operate their own network Benefit from ISO being able to mediate relationships with other NSPs Benefit from more secure and reliable system
	Access seekers	<ul style="list-style-type: none"> Network services (entry, transport, exit) may be constrained on occasion, which affects revenue and contractual commitments Benefit from transparent, predictable technical rules with less gentailer-NSP discretion Benefit from the independent ISO, and not the potentially-conflicted gentailer-NSP, having final oversight of connection issues, subject to a dispute process Benefit from the independent ISO similarly being the final decision maker on exemptions and grandfathering

¹⁴⁶ See paragraph 148 onwards, above.

Proposed conduct	Class of person directly affected	How or why impacted
	Network users (including retailers)	<ul style="list-style-type: none"> • May be required to reduce energy injections or withdrawals, or both, on occasion, which affects revenue and contractual commitments • Will likely indirectly bear the costs of ESS procurement and balancing energy, and so theoretically impacted by the restriction on absolute competition, but benefit from a transparent, independent procurement process in both respects • Benefit from transparent, predictable regime with less gentailer-NSP discretion
	Consumers	<ul style="list-style-type: none"> • May be required to reduce energy withdrawals, on occasion, which affects revenue and contractual commitments • (If contestable) benefit from the introduction of retail competition. • May ultimately bear the costs of ESS procurement and balancing energy, see comments in preceding cell.
7. Other collaboration and coordination ¹⁴⁷ system coordination meetings liaise as necessary post-incident discussions and investigations collaborative management of the power system	Generators NSPs Access seekers Network users (incl. retailers) Consumers	<ul style="list-style-type: none"> • Much the same as rows 4 and 5 above. • Should benefit from a more efficient, secure and reliable system, operating more transparently.
8. Delegation of real-time control desk activities ¹⁴⁸	Generators NSPs other than Horizon Access seekers Network users (incl. retailers) Consumers	<ul style="list-style-type: none"> • The use of Horizon is a pragmatic choice, designed to reduce the regime's costs and thus facilitate access and competition • It comes at the price of a risk, or perceived risk, that Horizon as the ISO control desk may not be as independent or impartial as the ISO might be if it performed the role itself. • These concerns are mitigated by the measures set out from paragraph 296
9. Information sharing ¹⁴⁹	Generators NSPs other than Horizon Access seekers Network users (incl. retailers)	<ul style="list-style-type: none"> • The three main potential adverse impacts from inappropriate sharing of information are: <ul style="list-style-type: none"> ○ reduction in competition if the information allows a competitor to gain an unfair advantage;

¹⁴⁷ See paragraph 151 onwards, above.

¹⁴⁸ See paragraph 159 onwards, above.

¹⁴⁹ See paragraph 164 onwards, above.

Proposed conduct	Class of person directly affected	How or why impacted
	Consumers	<ul style="list-style-type: none"> ○ reduction in competition if the sharing leads to an arrangement or understanding which lessens competition; ○ general harm to a business if the information falls into the wrong hands (e.g. miners' consumption data becoming available to their global competitors). ● These concerns are mitigated by detailed rules regarding confidentiality and ringfencing (paragraph 278).

Section D: Market information and concentration

6. Products, services, geographic areas, vertical relationships

6. Describe the products and/or services, and the geographic areas, supplied by the applicants. Identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have vertical relationship (e.g. supplier-customer).

242. The regime operates in the Pilbara region of Western Australia, with an initial focus on the NWIS.

NWIS's overall scale

243. In 2018, the NWIS operated with:¹⁵⁰
- (a) approximately 21,000 distribution customers;
 - (b) a peak load of approximately 480 MW; and
 - (c) installed capacity of approximately 800 MW.
244. The NWIS may expand during the term of any authorisation granted by the ACCC. New networks and infrastructure could be added. This could mean new NSPs, new rules participants and likely new Company members.¹⁵¹

Goods and services supplied or acquired by the applicants

245. The Company and rules participants are involved in some or all of the following markets:
- (a) **System operator services** – the Company's services consist of the day to day, real-time operation of the power system and responding to contingencies, with the goal of maintaining system security and reliability, supported by planning, administration and coordination before real time, and incident investigation after

¹⁵⁰ AEMO, Review of Independent System Operator Role in the North West Interconnected System, Final Report prepared for the Public Utilities Office (November 2018) (**AEMO Review**), 9 [1.1.3]. Available [here](#).

¹⁵¹ The eligibility of NSP Member is discussed at paragraph 266.

real time. The Company is appointed in respect of the whole of the Pilbara, but its functions presently focus predominantly on the NWIS. The real-time component is delegated to Horizon.

- (b) **Network services** – network services are provided by the NSP of the relevant network and include accepting the injection of electricity into the network, hauling electricity through the network, and allowing withdrawal of electricity from the network, together with related services relating to connection and access. Each NSP has a monopoly on the provision of network services in its own network. Horizon and Alinta have substantial geographical overlap in Port Hedland, and each NSP can at least theoretically compete with other NSPs by building competing lines.
- (c) **Generation and wholesale supply of electricity** – generation involves the production of electricity for sale and transport through the power system. Wholesale supply refers to the sale or supply of electricity by generators to retailers for on-sale to consumers, or by generators directly to large customers. Gentailers are usually considered to be participants in the wholesale market, in the sense that their generation business ‘self-supplies’ to their retail business, for on-sale to consumers. Subject to network constraints, any generator in the NWIS can compete with any other generator. New generators can enter the market, provided they satisfy the technical requirements for connection. Outside the NWIS, competition is possible in the broader Pilbara by building new lines, interconnecting separate networks, seeking access to the covered networks (Alinta and Horizon) or seeking coverage and then access to uncovered networks.
- (d) **Retail sale of electricity** – the on-selling of electricity by retailers (who acquire electricity in the wholesale market) to consumers. This includes the retail businesses of gentailers, selling to consumers. Retailers can compete for customers anywhere they can get network access or build their own network. For Horizon’s NWIS network, access is only available to a competing retailer for the purposes of supplying “contestable” customers,¹⁵² i.e. customers who consume more than 1,200 MWh in any 12-month period.¹⁵³ This threshold applies only in respect of Horizon’s covered network – all other customers are contestable.
- (e) **Essential system services (ESS)** – FCESS and SRESS are described briefly in paragraph 112 above. Every power system needs a formal or informal arrangement for both FCESS and SRESS, and sometimes other ESS as well, so the geographic range for this market is the same as the relevant network. If the power system is to survive islanding events, in which the grid temporarily separates into two or more electrically-unconnected systems, ESS arrangements need to be in place for all islands. An island without FCESS and SRESS in place will be unreliable at best, if it does not shut down immediately.

¹⁵² Section 54(3) of the *Electricity Corporations Act 2005* creates a monopoly franchise for Horizon Power in respect of all customers who are “**prescribed customers**”. It does this by the slightly round-about route of disapplying Horizon’s network licence under the *EI Act*, but the practical effect is the Horizon is prohibited from supplying network services to competing retailers, for such customers. A customer who is not a “prescribed customer” is called a “**contestable customer**”.

¹⁵³ The *Electricity Corporations (Pilbara Prescribed Customers) Order 2021*, made under section 54(4) of the *Electricity Corporations Act 2005*, defines as “**prescribed customers**” (i.e. *non*-contestable or “franchise” customers) each customer at a supply point in a light regulation network who never consumes 1,200 MWh or more of electricity at the supply point in any 12-month period from 1 January 2020, and customers the Pilbara ISO could reasonably expect to never consumer 1,200 MWh in any 12-month period.

- (f) **Balancing energy** – As described above (from paragraph 127), every network user will sometimes supply and sometimes acquire balancing energy. The PNR’s energy balancing and settlement (**EBAS**) regime provides a simple means of apportioning energy imbalances, and payment for them. Balancing energy flows where it chooses, but suppliers and acquirers of balancing energy can all nonetheless be said in some sense to compete, because if the price for balancing energy were set low or high enough, market participants would seek to manipulate their imbalances to take advantage of the prices.
- (g) **Modelling services** – Network owners maintain software models of the power system in order to assess its status and measure the technical feasibility of changes to the system and the impact of new connections. It is essential for network owners to have models of both their individual networks and the whole of system model to make accurate assessments. Modelling services can be provided from anywhere.

Areas of competition

246. To the best of the Company’s knowledge, the areas of competition are set out in the following table:¹⁵⁴

Service	Competitors (present and potential)
Network services	<p>Horizon and Alinta</p> <p><i>Potentially:</i></p> <p><i>The operator of any new network which may connect to the NWIS.</i></p> <p><i>In theory, perhaps, the operators of excluded networks and integrated mining networks.</i>¹⁵⁵</p>
Generation and wholesale sale of electricity	<p>Horizon and Alinta</p> <p><i>Potentially:</i></p> <p><i>Other power station operators, e.g. ATCO and TransAlta, and the operators of any new power stations which may be connected in future (subject to other contractual commitments).</i></p> <p><i>In theory, perhaps, generators located within an integrated mining network.</i>¹⁵⁶</p>
Retail electricity	<p>Horizon and Alinta</p> <p><i>Potentially:</i></p> <p><i>Possible new market entrant retailers.</i></p> <p><i>Potentially the operator of an integrated mining network, but unlikely beyond its embedded customers (townsites, etc)</i></p>

¹⁵⁴ The information in this table reflects the Company’s understanding based upon its reasonable enquiries.

¹⁵⁵ These networks are not “covered” for third party access, and so cannot be compelled to provide network services. The Company believes that for commercial and operational reasons, the operators of these networks are not likely to voluntarily offer network services to anyone.

¹⁵⁶ Once again, the Company believes that for commercial and operational reasons, such power stations will likely focus solely on self-supply.

ESS	<p>Supply:</p> <p>Before the PNR centralized the process, Horizon and Alinta, and to some extent Rio Tinto, could have competed to supply, but generally each just made its own arrangements internally or bilaterally.</p> <p>Now the process is centralized, all 3 can compete to contract with the ISO to be an ESS supplier.</p> <p><i>Potentially:</i></p> <p><i>Other power station operators can compete to supply, e.g. ATCO and TransAlta, and the operators of any new power stations which may be connected in future (subject to other contractual commitments)</i></p> <p>Acquisition:</p> <p>Before the PNR centralized the process, all three competed to acquire.</p> <p>Now, the PNR allocate who is to be a “payer”, and the process can probably no longer be described as competition.</p>
Balancing energy	<p>Any network user supplies balancing energy whenever it has a positive imbalance</p> <p>Any network user acquires balancing energy whenever it has a negative imbalance</p>
Modelling services	<p>All three NSPs plus the Company compete to acquire to some extent, although the Company has a focus on system-wide modelling, and the NSPs have a focus on modelling their own networks</p>

Vertical relationships

247. To the best of the Company’s knowledge, the following vertical relationships exist:¹⁵⁷

Service	Vertical relationships
Network services	<p>Horizon provides network services to Alinta and others to deliver electricity to customers connected to Horizon’s network</p> <p>Horizon has an interconnection agreement¹⁵⁸ with each of Rio Tinto and Alinta, covering the respective interconnections between their networks</p>
Generation and wholesale sale of electricity	<p>The NWIS is dominated by self-supply. Each gentailer-NSP supplies itself (in Horizon’s case through contracts with ATCO and TransAlta) for its own use or for on-sale.</p> <p>No current relationships outside ESS and balancing</p>
Retail electricity	<p>Both Horizon and Alinta are vertically integrated gentailers.</p>

¹⁵⁷ The information in this table reflects the Company’s understanding based upon its reasonable enquiries.

¹⁵⁸ An interconnection agreement is a special class of network services contract, in which each NSP is providing a connection service to the other NSP

ESS	<p>ESS benefit all users of the interconnected network and so in a sense can be said to be acquired by all of them.</p> <p>Before the regime:</p> <ul style="list-style-type: none"> • Rio Tinto was contracted to provide FCESS and SRESS to Horizon, for the benefit of all NWIS users • The Horizon-Alinta contract also provides for Alinta to provide ESS in some circumstances • Horizon, through its contracts with TransAlta and ATCO, on occasion provided ESS <p>Under the Pilbara regime: the ISO will contract with or designate ESS providers in accordance with the PNR, who will supply as required and be paid through the EBAS engine.</p>
Balancing energy	<p>As noted above, balancing flows just happen.</p> <p>Before the regime: The bilateral Horizon-Rio Tinto and Horizon-Alinta arrangements made provision for balancing energy.</p> <p>Under the regime: Balancing energy will be allocated and paid for centrally through the EBAS engine.</p>
Modelling services	<p>Before the regime: On occasions the parties would jointly procure modelling services to address certain system issues, with safeguards in place to protect sensitive information.</p> <p>under the regime: The ISO will procure whole-of-system modelling for the benefit of all.</p> <p>In a sense, an NSP such as Horizon could be said to provide modelling services to a person seeking network services, such as Alinta, because modelling was an important determinant of whether connection could proceed.</p>

7. Industries and supply chains

7. Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.

248. The NWIS is like any other power system, in which generators supply electricity to customers (often called “loads”) through transmission (high voltage) and distribution (lower voltage) networks.
249. Electricity generation in the NWIS is overwhelmingly gas-fired, with small amounts of diesel backup. Over the next decade the Company expects a large influx of intermittent renewable generation as mining companies decarbonise their supply chains. This is desirable, but will bring operational challenges for the NWIS because as the penetration of intermittent generation grows, the task of managing grid stability becomes more challenging. Without Pilbara reforms creating both a single ISO and a framework for formal cooperation, the three NSPs would find this transition difficult to manage, which in turn would be a barrier to decarbonisation.
250. Until recently, and with a small number of important exceptions, the networks have not been subject to open access. Thus, each gentailer-NSP supplied the loads on its own network.

The main exception is that Horizon and Alinta have a legacy arrangement by which Alinta accesses Horizon's network to deliver electricity to Alinta's customers in Port Hedland.

251. Because of this vertical integration and monopoly network control, there has to date been only limited wholesale trading in electricity. Generators have exclusive vertical relationships with loads. That is, except for balancing energy and ESS, Rio Tinto's generators supply Rio Tinto's loads, Alinta's generators supply Alinta's loads, and Horizon's generators (its own small unit, and the contracted TransAlta and ATCO power stations) supply Horizon's loads.
252. Prior to the introduction of third party access under the Pilbara regime, there was very little competition for retail supply.
253. With the advent of open access on Horizon's and Alinta's networks, it is expected that over time a more familiar market structure will emerge in which some or all of the following happen:
- (a) gentailers self-generate, transport the electricity through networks under access contracts (or through their own network), and retail the electricity to large and small consumers;
 - (b) generators and loads are free to contract directly with each other for the wholesale supply of bulk electricity, with one of the parties being responsible for transport through the network;
 - (c) generators supply electricity wholesale to retailers for on-sale.
254. The Government has indicated that it has no plans to require the gentailer-NSPs to vertically disaggregate.

8. Market shares

8. In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.

255. To the best of the Company's knowledge, market shares are as follows.¹⁵⁹
256. **System operation services** – the Company has been appointed by regulation to perform this function for the NWIS. The appointment is exclusive.
257. **Network services** – each NSP has a monopoly in the provision of network services in respect of its own network. Horizon and Alinta are subject to regulated mandatory third party access.
258. **Balancing energy and ESS** – To date this has been managed privately by each NSP on its own network, and through bilateral contracts, and each gentailer-NSP could be said to have a monopoly over providing these services in its own network. Under the Pilbara regime, any generator will be able to compete to provide ESS. As described from paragraph 127 above, although balancing energy flows can be manipulated for commercial

¹⁵⁹ The information in this table reflects the Company's understanding based upon its reasonable enquiries.

advantage, in general they are simply something that happens, rather than being a market in which providers or acquirers compete.

259. **Generation and wholesale supply, retail electricity** – Given the current high degree of vertical integration in the market, the concept of market share has limited utility.
260. Further, the nature of the NWIS market makes it difficult to access public data on customer numbers and consumption. Electricity consumption is commercially sensitive information, especially for mining companies which compete in a global market, because consumption data can be used to reverse-engineer energy costs and energy intensity of production.
261. However, from publicly-available information, the Company knows that the approximate size of each installed generation fleet is:
- (a) Horizon has installed capacity of approximately 256 MW, comprising:
 - (i) ATCO’s Karratha Power Station – 86 MW;
 - (ii) TransAlta’s South Hedland Power Station – 150 MW;
 - (iii) Horizon’s temporary power station at Karratha – approximately 20 MW.

In 2019-2020 Horizon delivered 594 GWh to its customers.¹⁶⁰

- (b) Alinta has installed generation capacity of 388 MW, comprising of:
 - (i) Port Hedland Power Station – 210 MW; and
 - (ii) Newman Power Station – 178 MW.
- (c) Rio Tinto has installed generation capacity in excess of 500 MW.¹⁶¹

9. Competition and competitors

9. In assessing an application for authorisation, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously. For example, describe:

- 9.1. existing competitors*
- 9.2. likely entry by new competitors*
- 9.3. any countervailing power of customers and/or suppliers*
- 9.4. any other relevant factors.*

9.1 Existing competitors

262. Before the current reforms, there was limited opportunity for competition in the NWIS. The introduction of open access to Alinta’s and Horizon’s networks through these reforms paves the way for competition to emerge.

¹⁶⁰ Horizon Power, Overview of Horizon Power’s network and customers in the Pilbara Region (Figure 12, Page 16). Available [here](#).

¹⁶¹ Provided to the Company by Rio Tinto

263. Under the new regime, Horizon and Alinta compete for contestable retail customers. It's possible that either or both of TransAlta and ATCO may also compete in the retail market in due course, subject to their existing contractual commitments.

9.2 Likely entry by new competitors

264. The introduction of open access also creates an opportunity for new generators and retailers to enter the market. This is expected to occur over the next decade as renewable energy projects are installed to meet customers' decarbonisation needs. The ISO's role will help to facilitate new entrants to the market.
265. The market for network services will likely continue to be largely a natural monopoly, mitigated by the open access regime for Horizon's and Alinta's networks. It is also open to a would-be access seeker to apply to have any other Pilbara network 'covered' for open access under ENAC.¹⁶²
266. It is open for any new network to connect to the NWIS. Unless they get exemption as an "excluded network",¹⁶³ the NSP will need to register under the PNR, and in doing so will become eligible to be an NSP Member of the Company.

9.3 Any countervailing power of customers and/or suppliers

267. Although the NWIS electricity market does include residential and small business consumers, it is dominated by very large mining companies' operations, whose countervailing power is substantial.
268. These consumers are sophisticated, well-connected and well-resourced.
269. The financial consequences of a supply disruption can be extremely large, easily running to millions of dollars an hour, and the knock-on operational consequences for train and mine scheduling of even a relatively short outage can take days, and more millions of dollars, to resolve.
270. As a result, the customers are both highly motivated and well-equipped to use not only their normal commercial leverage, but also all of the control mechanisms available to them under the PNAC and PNR (see section 9.4 below), to constrain any anti-competitive or otherwise detrimental behaviour.

9.4 Any other relevant factors

Pro-competitive controls built into the Pilbara regime

271. The Pilbara regime was created to promote and facilitate competition, and to eliminate or mitigate the risk of anti-competitive behaviour. As such, it includes a framework of important controls.

¹⁶² Coverage is a Ministerial decision, and the process is similar to the one in the *National Gas Law* and the declaration process in Part IIIA of the *Competition and Consumer Act 2010*.

¹⁶³ PNR rule 24(1): The ISO may, on application by the *network service provider* of a *non-covered NWIS network*, by notice on published on the *ISO's website*, determine that the *network* is an *excluded network*. The steps the ISO must take before making a determination, the relevant criteria it must be satisfied of and other relevant machinery are contained in PNR rules 24(2) – (5).

Overview

272. In summary, the controls are:

- (a) the Company's constitution and associated policies (from paragraph 273);
- (b) the pro-competitive Pilbara electricity objective, which emphasises the long-term interests of consumers (from paragraph 275);
- (c) detailed confidentiality and ringfencing regimes (from paragraph 278)
- (d) four separate layers of accountability (from paragraph 281);
- (e) the Government can change the PNAC and PNR as necessary on its own initiative or in response to a request by any person (from paragraph 288);
- (f) the Government can unilaterally remove the Company from its ISO role (paragraphs 294 and 295).

The ISO's independence is entrenched, despite it being owned by NSPs

273. As noted at paragraph 37 above, a central tenet of the Pilbara regime is that the ISO both must be in fact, and must be seen to be, independent from its NSP members. This is achieved by the following mechanisms:

- (a) the Company's constitution mandates that the Company has an independent chair (with the independence criteria enshrined in the Company's constitution to ensure independence from its members) and a government-appointed director, and that at least one of them must be present for quorum to be achieved at a directors' meeting;
- (b) the Company has implemented a Conflicts of Interest and Information Protocol to ensure conflicts of interest are lawfully and properly managed and to ensure that the Company and members comply with their obligations under the CCA regarding sharing competitively sensitive information;
- (c) the Company's key functions and powers are specified in the PNR and to a lesser extent the PNAC, instruments the Company does not control.

274. The Company is also subject to the external accountability factors described under the following sub-headings.

The Pilbara electricity objective frames the entire regime and everything done under it

275. The Pilbara regime must seek to achieve the Pilbara electricity objective (set out in paragraph 28 above).¹⁶⁴

276. This objective is explicitly directed to the long-term interests of consumers. Unlike earlier generations of such objectives, it does not directly reference competition, but it is clear that anti-competitive outcomes or the types of public detriment discussed above would be inconsistent with the objective. Further, any detriment which placed at risk the price, quality,

¹⁶⁴ See *EI Act* section 120A(1)(b) for the ENAC, section 120N for the PNR, and section 120ZG(2) for the regime as a whole.

safety, reliability and security of electricity supply and systems would be directly inconsistent with this objective.

277. As noted above, the Company must seek to contribute to the achievement of the Pilbara electricity objective under the PNAC.¹⁶⁵ Many of the Company's functions under the PNR also require it to have regard to the Pilbara electricity objective.¹⁶⁶

The PNR and PNAC include detailed confidentiality regimes and the PNAC includes a ringfencing regime

278. The PNR and PNAC contain detailed rules regarding confidentiality,¹⁶⁷ including a prohibition on misuse of information received when performing a function¹⁶⁸ and a prohibition on non-permitted disclosure.¹⁶⁹
279. The PNAC¹⁷⁰ contains rules regarding ringfencing, which require vertically integrated NSPs to publish ringfencing rules which ensure confidentially sensitive information received by the NSP in performance of a function under the PNR is only used within the network business, that costs of the network business are appropriately attributed and that measures are included to ameliorate the potential for discriminatory treatment in favour of other businesses of the NSP. Ringfencing rules are required to be approved by the Economic Regulation Authority.
280. The PNR¹⁷¹ contains a provision which states that a vertically integrated registered NSP must not unfairly discriminate in favour of itself, its associate or other business as compared to any competing generator or consumer or against any such competing generator or consumer. The PNR also confirms that this does not limit obligations under the PNAC's ringfencing requirements.

Multiple layers of accountability

281. The Company and rules participants can be held to account regarding their rules obligations, including those discussed in the preceding paragraphs, by four separate mechanisms:
282. **First**, the Company will be held accountable **by its own board** which comprises member nominees, a government nominee and an independent chair. This board thus cannot be subject to capture by any one or two members, or even by all three gentailer-NSP members combined. If the Company's Conflict of Interest Policy ever proves insufficient to allow the independent chair to manage a situation, the independent chair and government-appointed director would be able to invoke one of the other controls discussed in this section 9.4.

¹⁶⁵ PNAC section 13(1).

¹⁶⁶ Including but not limited to developing the power system modelling procedure, undertaking system modelling in access applications and arbitrations, performing functions related to system coordination, determining the administered price for balancing energy, conducting reviews of ESS and balancing and settlement arrangements, developing constraint rules and constrained access procedures, assessing notices for new connections, and monitoring and reporting on the Pilbara Regime's effectiveness. Respectively, PNR rules 121(2), 273(b), 170(c), 231(a), 247(1), 256(2)(a), 266, 270(3)(a) and 369(1).

¹⁶⁷ PNR Subchapter 11.2

¹⁶⁸ PNR rule 297(2)

¹⁶⁹ PNR rule 298

¹⁷⁰ PNAC Chapter 8

¹⁷¹ PNR rule 17(3) and (4)

283. **Second**, the PNR include a **flexible and scalable dispute mechanism**,¹⁷² designed to empower any interested person to hold rules participants to account. Any person (including the Company and any rules participant) can commence a rules dispute to challenge a person's performance of its functions under the PNR or to enforce its PNR rights,¹⁷³ and the arbitrator of that dispute has very wide remedial powers.¹⁷⁴ The Company and its members have no ability to control the arbitrator's determinations.
284. The PNAC includes a similarly flexible dispute mechanism for access disputes. In addition, for access, which is a key enabler of competition, the *EI Act* contains an explicit prohibition on conduct hindering access,¹⁷⁵ modelled on similar provisions in the *National Gas Law* and *National Electricity Law*.
285. These dispute mechanisms are intended to give affected parties a direct self-help mechanism, which can be appropriate and efficient given the resources available to some of the larger consumers. It also opens the door to negotiated commercial resolution of grievances.
286. But the regime does not rely solely on self-help. The **third** accountability mechanism is the **ISO's compliance and enforcement** role,¹⁷⁶ backed by a broad power to make remedial directions.¹⁷⁷ This includes self-monitoring by the ISO.¹⁷⁸ The Company's constitution and Board policies will ensure that this role is performed without any inappropriate influence from conflicted nominee directors.
287. Finally, the **fourth** accountability mechanism is the ERA's compliance oversight role, which ensures the ISO is kept fully accountable including in respect of its self-monitoring obligations.¹⁷⁹

The Government controls the rule change process

288. The Pilbara ISOC Co Limited model is adapted from the REMCo model which was authorised in 2009,¹⁸⁰ but contains a significant difference which further decreases the risk of adverse outcomes.
289. Whereas the REMCo rules were a contract between members and REMCo itself was in charge of the rule change process, in the Pilbara regime the rules are delegated legislation under the *EI Act*.¹⁸¹

¹⁷² PNR Chapter 13

¹⁷³ PNR Chapter 13. Any rules participant can commence a dispute (rule 326(1)). A "rules participant" is any person on whom the rules confer a "function" or benefit (definition, rule 10). "Function" includes power (which includes a privilege, authority or discretion), duty, responsibility, authority and jurisdiction (*Interpretation Act 1984* (WA), section 5). The *Electricity Industry Act 2004* section 120V(2) empowers regulations which designate specified rules as civil penalty provisions and conduct provisions. No such regulations have been made at this stage, because the Government preferred the Pilbara regime to rely on self-help through the rules dispute mechanism. It will be open to a future Government to revisit this position, if this enforcement mechanism is proving inadequate.

¹⁷⁴ PNR rule 359(2)

¹⁷⁵ *EI Act* s 120S

¹⁷⁶ Under PNR rule 307(1), the ISO must monitor the behaviour of all rules participants for compliance with the rules and may take enforcement action under Subchapter 12.1.

¹⁷⁷ PNR rule 312(6)(a)(ii)

¹⁷⁸ PNR rule 307(1)

¹⁷⁹ PNR rule 313

¹⁸⁰ Discussed at paragraph 50 above. See footnote 33 for REMCo's authorizations.

¹⁸¹ *EI Act* section 120K(1)

290. The *EI Act* gives the Coordinator of Energy¹⁸² and the Minister very broad rule-making powers for both the PNAC and PNR,¹⁸³ within the broad framework of the pro-competitive Pilbara electricity objective), giving them wide powers to address any detrimental behaviour. The Company is not a rule-making authority.
291. This means that, in addition to all the above controls, the government retains complete control in respect of the Pilbara regime, the role and functions of the Company and all rules participants, and is able to intervene should any of them act in an anticompetitive fashion, or otherwise cause inappropriate public detriment.
292. Any person can propose a rule or procedure/protocol change.¹⁸⁴ The Minister and Coordinator are each able to initiate their own rule changes. Considering the size and importance to the State economy of Pilbara electricity consumers, the Government would have every incentive to exercise these powers to address the misbehaviour.
293. The resulting changed rules would have the force of law under the *EI Act*, and could prevail over any contract, arrangement or understanding.¹⁸⁵

The Government controls the Company's tenure

294. In the final analysis, if all the above measures including a rule change were insufficient to prevent the relevant detriment, the Government can unilaterally remove the Company from the ISO role, simply by changing the regulations.¹⁸⁶
295. Once again, having regard to the policy objectives of the regime, and the constituents affected, the Government would be unlikely to leave the Company in place if it, its members or rules participants more broadly were causing unnecessary public detriment, and none of the above measures had worked.

Protective measures associated with delegating the ISO control desk to Horizon

296. As noted above, although the "Administrative ISO" model is efficient, it does mean that the sensitive day-to-day operational decisions will be made by gentailer-NSP Horizon, acting as the ISO's delegate. In addition to the overall controls on the ISO just described, which will apply also to its delegate, the regime includes measures designed to manage the delegate's behaviour:
- (a) The Company has broad discretion over the instrument of delegation's content,¹⁸⁷ and intends to ensure that it explicitly regulates the conflict of interest, with provisions dealing with ringfencing of personnel, information and decision making, and a prohibition against discrimination. The Company can contractually hold the delegate to account under this instrument.

¹⁸² The Coordinator of Energy is a statutory office created by the *Energy Coordination Act 1994*. Under section 4A, the Coordinator of Energy's functions, among other things, include assisting the Minister in planning and coordinating the provision of energy in Western Australia, advising the Minister on all aspects of energy policy, and performing the functions vested in it by written laws (including the instruments of the Pilbara regime).

¹⁸³ See sections 120C of the *EI Act* for the PNAC, and section 120N for the PNR.

¹⁸⁴ PNR rule A2.5.1

¹⁸⁵ *EI Act* section 120ZI(2)

¹⁸⁶ Regulation 14, made under section 120W(2) of the *EI Act*.

¹⁸⁷ The ISO may choose which function or functions are to be delegated (PNR rules 39(1) and 39(4)), and impose whatever conditions it sees fit (PNR rule 39(2)(c)). Subject to conditions, the ISO may amend the instrument of delegation at any time by notice to the delegate (PNR rule 39(2)(e)).

- (b) The Company is free to cancel the delegation at any time, and to take on the control desk function itself, or to appoint as delegate someone with fewer conflicts.
- (c) The PNR prohibit a vertically-integrated gentailer-NSP such as Horizon from discriminating in favour of itself or against its competitors when performing any function under the rules, which will include the delegated ISO control desk function.¹⁸⁸
- (d) The PNR contain detailed rules regarding confidentiality including a prohibition on misuse of information received when performing a function¹⁸⁹ and a prohibition on non-permitted disclosure.¹⁹⁰
- (e) The ISO control desk's activities and decision-making (and hence Horizon's, when acting as a delegate in that role) are closely regulated by the PNR, which prescribe boundaries on what the control desk can and cannot do,¹⁹¹ and by the operating protocols which will be developed in consultation with (at least) all NSPs and registered facility controllers.¹⁹² These protocols can be updated as necessary to prevent misbehaviour.
- (f) The ISO must monitor the delegate's performance and take steps to prevent recurrence of any unsatisfactory performance.¹⁹³
- (g) The delegate's costs are regulated.¹⁹⁴
- (h) Anyone is free to propose a rule change which removes or qualifies the ISO's ability to delegate to Horizon, or imposes limits on the delegate's behaviour.¹⁹⁵
- (i) The post-incident investigation regime will enable any misbehaviour by the ISO control desk to be identified.
- (j) The delegate remains subject to the PNAC's ringfencing requirements.

¹⁸⁸ PNR rule 17(3)

¹⁸⁹ PNR rule 297(2)

¹⁹⁰ PNR rule 298

¹⁹¹ See for example: rule 188(3) which provides that the control desk's powers of direction are limited to those granted by the relevant protocol; the preference as in rule 83 for matters to be resolved informally, without activating a protocol – in which case the ISO control desk has no powers of direction at all (other than in emergencies); rule 168(1) which requires Horizon to perform the control desk function in accordance with good electricity industry practice; and rule 170(c) which requires the parties to have regard to the Pilbara electricity objective when performing system management functions.

¹⁹² PNR rule 77(1). The protocol framework is contained in Subchapter 3.7.

¹⁹³ PNR rule 42(2)

¹⁹⁴ PNR rule 125

¹⁹⁵ This possibility was explicitly anticipated in para 164 of the Government's "Drafter's Comments" circulated to selected stakeholders on 31 December 2021. There is also an argument, which the Company has not tested, that the ISO may be able to appoint another control desk delegate under rule 39, even if rule 45 remained unchanged. But in practical terms, this would likely not be required. Replacing Horizon at the control desk would be a significant innovation, and so would likely come with other rules changes as well, so rule 45 could be amended in passing.

Section E: Public Benefit

10. Public benefits

10. Describe the benefits to the public that are likely to result from the proposed conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.

297. The Company considers the proposed conduct to be integral to achieving and maximising the public benefits emerging from the Pilbara electricity reforms, as described above (from paragraphs 27).

Context

298. The Pilbara houses a significant portion of the nation's resource industries. The Explanatory Memorandum noted that:¹⁹⁶

The Pilbara's infrastructure and economy are critical contributors to Western Australia's prosperity. Compared with other regulated networks in Australia and elsewhere, network use in the Pilbara is disproportionately focused on the high-value resources sector, large end-users, vertically integrated suppliers, and significant quantities of self-supply.

299. According to the Department of Primary Industries and Regional Development (WA),¹⁹⁷ the Pilbara's iron ore and liquefied natural gas industries are valued at over \$70 billion and make up over 70% of Western Australia's mineral and energy production. 62,841 people live in the Pilbara. However, as many non-residents rely on the Pilbara for employment, the region supports 63,850 jobs (5.48% of the total of Western Australian jobs). The annual economic output of the Pilbara is \$87.773 billion (14.65% of Western Australia's GSP). The mining sector contributes \$69.8 billion (79.48%) to this total.
300. Paragraphs 22 to 58 above discussed the rationale for the Pilbara regime, and the important role the ISO plays in that regime.

Public benefits

301. The public benefits arising from the proposed conduct can be summarised as follows:
302. **Supporting increased competition in the NWIS** – as discussed above, the Pilbara regime has a clearly pro-competitive intent and effect. It enables effective access to covered networks, including a transparent and independent process for new connection approval overseen and supported by an independent system operator. The move to a single independent system operator, in place of three vertically integrated gentailer-NSPs, with transparent and accountable governance, system operations, and procurement and provision of ESS and balancing energy, makes the Pilbara a more attractive place for new market entrants, and makes them more likely to succeed in competing against the incumbent gentailer-NSPs.

¹⁹⁶ 8 [2.3].

¹⁹⁷ Department of Primary Industries and Regional Development (WA) REMPLAN. Pilbara data available [here](#).

303. As described at paragraph 48 on, the ISO model chosen was supported by the broad stakeholder group as the 'least cost', 'least intervention', option to improve transparency and place responsibility on those parties best able to manage the risks.
304. **Increased coordination between NSPs** – the cooperative approach taken by NSPs under the Pilbara regime will facilitate much greater coordination in respect of the NWIS' operation. This has benefits both for power system reliability (discussed below) and avoiding inefficient and unnecessary duplication of assets.¹⁹⁸
305. **Increased power system security and reliability** – the Company's primary function is to serve as the independent system operator of the NWIS.¹⁹⁹ This, coupled with the increased coordination of NSPs, will enhance the security and reliability of the NWIS, and make it more attractive for new market entrants. A more reliable and competitive NWIS will encourage investment in NWIS-connected projects, reduce risk of asset damage, reduce the costs associated with blackouts, and ensure the consistent supply of an essential public good for Pilbara residents and small-businesses. While many miners maintain self-supply in the region, the benefits emerging from reliable NWIS infrastructure is likely to positively impact industry in the region.²⁰⁰
306. **Improved opportunities for decarbonisation projects** – the Company believes that the Pilbara region will play a significant role in decarbonising Western Australia's economy, and facilitating emerging low-carbon export industries. The Pilbara is well-placed to host large, commercial scale green energy projects.²⁰¹ Many projects are currently planned for development and operation in the region. The Company expects investment in renewable energy to increase dramatically, as miners aim to reduce the carbon footprint of their products to meet the demands of Australia's export markets.
307. The power system benefits described above will help improve the viability, cost and coordination of these projects. This will improve Australia's balance of trade by maintaining the merchantability of its existing resource exports and mitigating the decline of petroleum-based exports, by facilitating the development of new export industries in hydrogen and ammonia. Beyond an economic perspective, Australians will benefit from the environmental

¹⁹⁸ At page 7 [2.2] of the Explanatory Memorandum, it was noted that:

...the NSPs collaborate informally and in a relatively ad hoc manner regarding the operation of the system as a whole. As a result, there has been little potential for the shared use of common electricity infrastructure to avoid wasteful duplication. This has meant the cost of electricity supply has been higher, which risks affecting the future economic development of the region.

¹⁹⁹ Specific functions in exercising this role include the (1) performance of real time power system monitoring and operation (or the monitoring of a delegate performing that function), (2) development and running of the software model of the power system, including the overseeing of the process for assessing and testing new connections, (3) the coordination of network planning, (4) the coordination of responses to contingencies and unplanned outages, (5) the mediation of outage scheduling disputes, (6) the investigation of incidents and outages, (6) the procurement and management of essential system services, and (7) monitoring the NSPs' compliance with the statutory regime and enforcing compliance.

²⁰⁰ AEMO has noted the cost of blackouts for Pilbara miners; "the generation and network infrastructure owned and operated by the mining companies... is strongly integrated into their respective mining operations. The cost of establishing and maintaining generation and network infrastructure may represent a small proportion of total operation costs, but issues with electricity supply can significantly affect mining operation productivity and reliability". AEMO, Review of Independent System Operator Role in North West Interconnected System (November 2018), 9 [1.1.3]. Available [here](#).

²⁰¹ The Pilbara has the most sunshine hours a day of any region in Australia, as well as strong wind resources. Its area covers 507 thousand square kilometers, meaning it has ample room for solar and wind projects which are require significant land resources to be viable at a large-scale. The Pilbara presently acts as a gateway to Australia's export markets, meaning lower transportation and associated infrastructure costs for projects intending to sell hydrogen and ammonia products to foreign purchasers.

benefits associated with decarbonisation. The period of the proposed authorisation is a crucial period for the development of these new green energy industries.

Counterfactual – Less efficient or responsive regime, or possible regime failure

308. If the requested authorisation is not granted, the Company and its members will need to consider whether it can continue to perform the ISO role in a manner which does not involve it or its members in breaching the CCA either directly or through the CCA's accessorial liability provisions.
309. The Government would need either to find another entity to fulfil the ISO role, or to materially redesign the Pilbara regime so that there could be no risk of CCA breaches. As discussed below, the Company considers that neither of these is an attractive option.

Possible need to find another ISO

310. If the Company were to be forced to withdraw, the selection of a new ISO would be a matter for Government, but any change could have at least the following deleterious effects:
- (a) One of the primary drivers for adopting the Pilbara ISOCo Limited model was cost-effectiveness (above, from paragraph 48). Although the choice of a participant-owned system operator created a need to manage competition concerns, it gave participants an opportunity to realise real and quantifiable efficiency gains by enabling the ISO to focus exclusively on the Pilbara, and to be staffed only to the level necessary to meet the Pilbara's specific requirements. Instead the NSP members bring their expertise and knowledge of their networks to assist in ISO carrying out its functions. Those savings make the NWIS more efficient, and lower regulatory overheads, thus lowering one barrier to new market entrants. Any alternative model risks being more expensive. This cost would need to be absorbed by the market, hindering competition and undermining support for the regime.
 - (b) Another driver was the benefit of having a dedicated, local ISO whose sole focus was on the Pilbara. This will likely not be possible with any other candidate. The Pilbara has several unusual characteristics compared with most other networks, for which 'local' experience and knowledge would be especially useful.
 - (c) The rules would need to be amended, to deal with a non-member-owned ISO and to address any particular requirements the new ISO brought to the table. This would mean the Government and stakeholders were required to go through another reform process, soon after the recently-completed substantial and expensive process.
 - (d) The current regime was developed through a closely consultative fashion, during which it obtained a considerable degree of support from disparate Pilbara stakeholders beyond those who are NSP members. That support is important for the future, as the regime begins to be tested by the growing push to decarbonise currently carbon-intensive activities in the Pilbara.

Amending the regime to remove CCA risk

311. It may be theoretically possible for the Government to revise the Pilbara regime so that the CCA risks described in this application do not arise, but the Company does not consider this to be a realistic option.

312. This would be a matter for Government, but the Company considers that a regime crafted to eliminate all theoretical CCA risk would be materially less effective at promoting access and competition, maintaining a secure and liable supply of electricity, and promoting the long-term interests of Pilbara electricity consumers. It would require diluting or removing such central elements as:
- (a) central procurement and management of ESS and balancing energy;
 - (b) the emphasis on cooperation and collaboration between NSPs in planning, outage scheduling, system operation and post-incident investigation;
 - (c) centralized independent modelling;
 - (d) centralized independent oversight of the new connection process; and
 - (e) collaborative management of constrained access;
 - (f) greater transparency and information exchange generally.
313. It would also require the Government and stakeholders to embark on a major rework of the new regime, which would be poor regulatory process.

Members or rules participants withdraw

314. Risk determinations for the Company's members or other rules participants are a matter for each business, but it is self-evident that unresolved CCA risk will be a disincentive to members joining or remaining with the Company, and to market participants entering the NWIS or any other market governed by the Pilbara regime.
315. An incentive for new market entrants to 'go it alone' by building and operating their own duplicate networks would be a retrograde step.

Section F: Public Detriment (including likely competitive effects)

11. Public detriment

11. Describe any detriments to the public likely to result from the proposed conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments.

316. The Pilbara reforms, and the Company's role in those reforms, are designed to promote competition and efficiency in the long-term interests of electricity consumers. The detriments discussed in this application are necessary concomitants of the new regime. Further, the Company considers that these detriments are generally either minor, transient or theoretical, and are mitigated by several elements built into the regime.
317. The main detriments for the various classes of market participant are summarised in the table in section 5 above (see paragraph 240 above). In summary these are:

- (a) **Regulation of supply, acquisition and pricing for ESS and balancing energy**, which potentially limits competitive freedom (but also limits the scope for opaque supply arrangements containing inefficient prices).
- (b) **Restrictions on the generation, transportation and consumption of electricity** when necessary for system security or reliability, and including restrictions on new connections, or the imposition of constrained access – this may hamper consumers’ ability to use electricity whenever and wherever they wish, which may hinder their conduct in downstream markets.
- (c) **Centralized procurement of whole-of-system modelling services**, limiting the ability of suppliers and acquirers of such services to compete and innovate. However, each NSP remains free to acquire modelling services in respect of its own network or the whole system.
- (d) **Potential for inappropriate information sharing or use**, from which the three main potential adverse impacts are:
 - (i) reduction in competition if the information is shared or used inappropriately and this allows a competitor to gain an unfair advantage;
 - (ii) reduction in competition if the sharing leads to an arrangement or understanding which lessens competition; or
 - (iii) general harm to a business if the information falls into the wrong hands (e.g. miners’ consumption data becoming available to their global competitors).

However, there are protections against this in both the PNR and the PNAC as noted at paragraphs 278 to 280 above.

- (e) **Increased costs** – The implementation of the Pilbara regime, including the ISO model, is resulting in some increased costs which will likely be passed through to end use consumers by NSPs and network users. However, the model chosen is the least cost, least intervention method to achieve the goals of the Pilbara reforms and was widely supported by end consumer stakeholders throughout consultation

Mitigating factors

318. In addition to the above detriments being modest, or in some cases purely theoretical, the risk of public detriment is mitigated by factors discussed in section 9.4 above (see from paragraph 272).

Net benefit

319. Overall, the Company believes that the public benefits emerging from the Pilbara regime, implemented using the current Pilbara ISOC Co Limited model, significantly outweigh any detriments.

Section G: Contact details of relevant market participants

12. Contact details for interested parties

“12. Identify and/or provide names, and where possible, contact details (phone number and email address) for likely interested parties such as actual or potential competitors, key customers and suppliers, trade or industry associations and regulators.”

320.

COMPANY	ADDRESS
Alinta Energy	PO Box 8348 Perth BC WA 6849
ATCO Australia	2 Mill Street Perth 6000
BHP	125 St Georges Terrace Perth WA 6000
Fortescue Metals Group	Level 2, 87 Adelaide Terrace East Perth WA 6004
Horizon Power	18 Brodie-Hall Drive Bentley WA 6102
Rio Tinto	152-158 St Georges Terrace Perth WA 6000
Roy Hill	5 Whitham Rd Perth Airport WA 6105
TransAlta Energy Australia	Level 2, 191 St Georges Terrace Perth WA 6000
Woodside Energy	GPO Box D188 Perth WA 6840
Economic Regulation Authority	Level 4, Albert Facey House, 469 Wellington St Perth WA 6000
Energy Policy WA	Level 1, 66 St Georges Terrace Perth WA 6000

A confidential list of contact details has been provided separately.

Section H: Additional information

13. Other information

“13. Provide any other information or documents you consider relevant to the ACCC’s assessment of the application.”

Comparing the conduct in this proposed authorisation with previous authorisations in respect of electricity systems and markets

321. There are some parallels between the authorisation sought in this application with that granted in respect of the WEM Rules to the Independent Market Operator and other

registered rules participants and persons on whom market rules or regulations confer functions, powers or responsibilities (**WEM Rules Authorisation**)²⁰² and also that granted to Stanwell Corporation Limited and Diamantina Power Station Pty Ltd in respect of arrangements for participants of the North West Power System to agree rules relating to the coordination of electricity dispatch (**NWSP Authorisation**)²⁰³

322. The purposes of the proposed conduct in the Pilbara have some similarities with the objectives of the wholesale electricity market described in the WEM Rules Authorisation, namely:²⁰⁴
- (a) the safe and reliable operation production and supply of electricity and electricity-related services;
 - (b) encouraging competition, including by facilitating entry of new competitors;
 - (c) minimising the long-term cost of electricity supplied to customers from the NWIS.
323. As noted in paragraph 321, the WEM Rules Authorisation also granted protection to a broader class of persons than the market operator.
324. The purposes of the proposed conduct in the Pilbara also have similarities with that described in the NWSP Authorisation, namely coordination of generators and demand management and load shedding of certain participants within the system²⁰⁵

Regime does not deal with retail matters

325. The Pilbara regime does not deal with retail matters. As such, an authorisation in the form proposed will not extend to any contracts, arrangements or understandings regarding the wholesale or retail price of energy; or sharing confidential information relating to retail pricing matters, cost or profits.

²⁰² ACCC, *Determination, Authorisation number: A91004, A91005 and A91006*

²⁰³ ACCC, *Determination, Authorisation number AA1000454*

²⁰⁴ Adapting paragraph 2.16 from the *WEM Rules Authorisation*.

²⁰⁵ Adapting paragraph 1.5 of the *NWSP Authorisation*

Schedule 1 – Legislative structure of the Pilbara regime

326. The *Electricity Industry Amendment Act 2019* amended the EI Act to include a new Part 8A, which implements the Pilbara Regime.
327. In addition to Part 8A, the Pilbara Regime comprises the following instruments, represented schematically in _____ below:
- the *Electricity Industry (Pilbara Networks) Regulations 2021*;
 - the PNAC;
 - the PNR;
 - the *Harmonised Technical Rules* (a schedule to the PNR);
328. All of these are delegated legislation²⁰⁶ under the EI Act. None of them are contractual in nature.

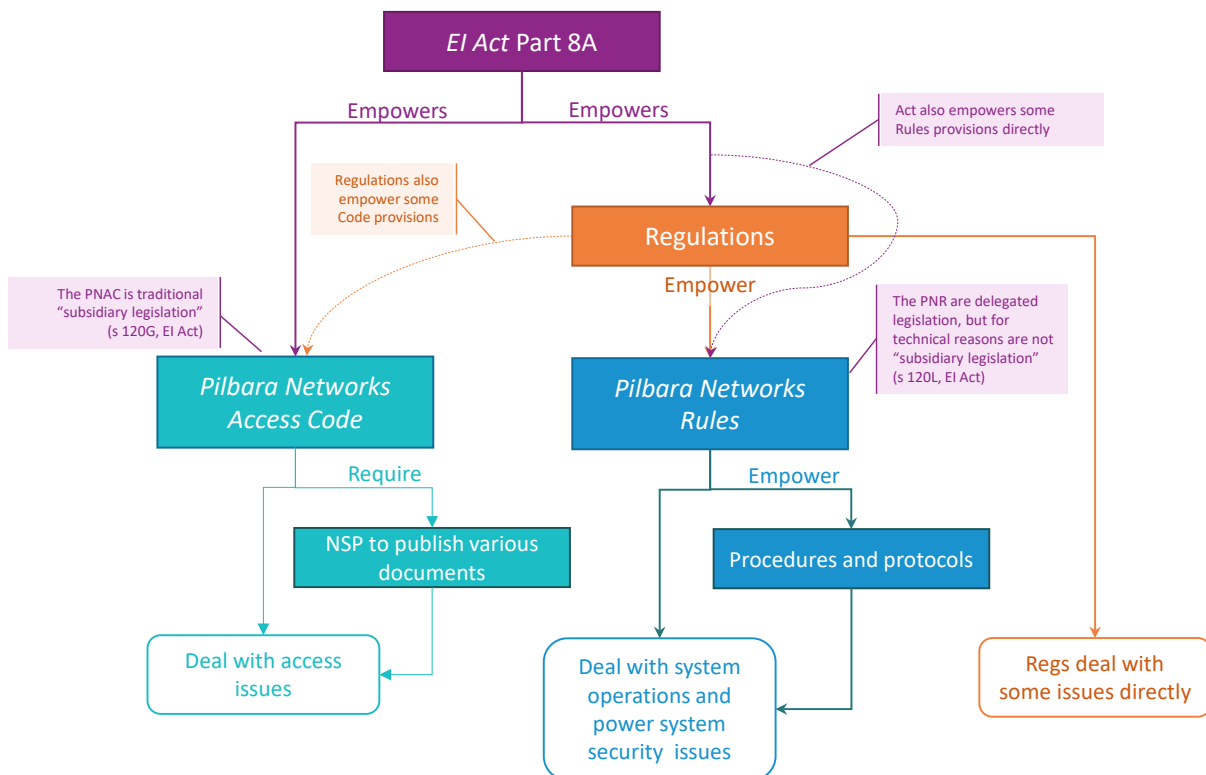


Figure 3 - The Pilbara Regime's legislative structure

²⁰⁶ Under section 120L of the *EI Act*, the PNR are stated to be “not subsidiary legislation” for certain limited purposes. This is a technical distinction relating to whether the rules are required to be tabled in Parliament, and whether the interpretation provisions of the *Interpretation Act 1984* apply. It does not alter the fact that the PNR are legislative instruments made under a delegated statutory power.

Schedule 2

Declaration by Applicant

Declaration

329. The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.
330. The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.
331. The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



Signature of authorised person

Executive Officer Pilbara ISOCO

Office held

James Campbell-Everden

Name of authorised person

This 7th day of November 2022