Federal Court of Australia

Australian Energy Regulator v Hornsdale Power Reserve Pty Ltd [2022] FCA 738

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| File number: |  |
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| Judgment of: | **BESANKO J** |
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| Date of judgment: | 28 June 2022 |
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| Catchwords: | **CONSUMER LAW** — application for declarations of contraventions of National Electricity Rules (NER) pursuant to s 44AAG(1) of *Competition and Consumer Act 2010* (Cth) (CC Act) and order for payment of civil penalty pursuant to s 44AAG(2)(a) of CC Act — where respondent “Registered Participant” in National Electricity Market (NEM) and registered with Australian Energy Market Operator (AEMO) as “Market Generator” and “Market Customer” with respect to Hornsdale Power Reserve (HPR) — where during relevant period, respondent made market ancillary service offers to AEMO for contingency frequency control ancillary services (FCAS), being services procured by AEMO to ensure that when frequency of NEM goes outside of “normal operating frequency band”, frequency recovers — where to qualify for registration to participate in trading markets for contingency FCAS, respondent required to have generating unit or load approved by AEMO, including by providing parameters about generating unit — where “droop”, being amount or proportionality of response to variation in frequency, agreed to with AEMO at time of registration was 1.7% — where on 23 July 2019, update on firmware for HPR performed by respondent’s contractor assisting in operation and maintenance of HPR, with effect of altering settings such that droop was 3.7% and reducing maximum response capacity of generating unit and load compared to classification by AEMO — where on 9 October 2019, unplanned outage event in response to which power system frequency fell and respondent required to deliver particular contingency FCAS — where respondent’s FCAS response less than expected, caused by change in settings as a result of firmware update on 23 July 2019 — where respondent not aware of change until informed by AEMO on 12 November 2019 and on 14 November 2019, relevant settings effecting droop for HPR corrected to 1.7% — where respondent did not comply with cl 4.9.8(a) of NER in respect of 185,738 dispatch instructions given by AEMO for respondent to be ready and capable of providing service stated at nominated range — where respondent did not comply with cl 4.9.8(d) of NER in respect of latest market ancillary service offer during 32,602 trading intervals, because offers for response capability exceeding maximum dispatch capability of HPR — where respondent did not comply with cl 3.8.7A(l) of NER in respect of 690 market ancillary service offers, because response capability did not reflect technical characteristics of generating units — where respondent agrees orders sought by applicant should be made — whether appropriate to make declarations sought — consideration of matters in s 64 of National Electricity Lawfor which there must be regard in determining civil penalty and other relevant matters — consideration of relevance of statutory maximum in fixing civil penalty in accordance with *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 — where among other things, parties submit serious breaches of NER given importance of FCAS to power system security and need to promote proactive compliance because of difficulty for market operator and regulator to detect non-compliance until services actually deployed during frequency deviation — whether appropriate to impose pecuniary penalty sought — orders made  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 44AAG, 44AE*Evidence Act 1995* (Cth) s 191*Federal Court of Australia Act 1976* (Cth) ss 21, 43National Electricity Lawss  2AA, 15, 38, 49, 64, 66, 67National Electricity Rules (Version 126) rr 2.2.6, 2.3.5, 3.8.7A, 4.2.3, 4.9.3A, 4.9.8*National Electricity (South Australia) Act 1996* (SA)*National Electricity (South Australia) Regulations* |
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| Cases cited: | *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599*Australian Energy Regulator v AGL HP 1 Pty Ltd* [2022] FCA 737*Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482  |
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| Date of hearing: | 24 February 2022  |
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| Counsel for the Applicant: | Mr J Arnott SC with Ms M Bennett |
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| Solicitor for the Applicant: | DLA Piper Australia |
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| Solicitor for the Respondent: | White & Case |

ORDERS

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|  | SAD 176 of 2021 |
|   |
| BETWEEN: | AUSTRALIAN ENERGY REGULATORApplicant |
| AND: | HORNSDALE POWER RESERVE PTY LTDRespondent |

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| order made by: | BESANKO J |
| DATE OF ORDER: | 28 June 2022 |

THE COURT DECLARES THAT:

1. The respondent contravened clause 3.8.7A(l) of the *National Electricity Rules* (the NER) in the period between 10.05 am on 23 July 2019 until 5.10 pm on 14 November 2019 (the relevant period) by making 690 *market ancillary service offers* to the Australian Energy Market Operator (AEMO) that did not reflect the technical characteristics of the HPRG1 *ancillary service generating unit* or the HPRL1 *ancillary service load*.
2. The respondent contravened clause 4.9.8(a) of the NER in relation to 185,738 *dispatch instructions* given by AEMO during the relevant period, because the respondent did not provide frequency control ancillary services (FCAS) which complied with *dispatch instructions* received from AEMO (in circumstances where the respondent did not hold the reasonable opinion that to comply would be a hazard to public safety or materially risk damaging equipment).
3. The respondent contravened clause 4.9.8(d) of the NER in relation to 32,602 trading intervals during the relevant period, in which the respondent was not able to provide FCAS which complied with the latest *market ancillary service offer* that it had made to AEMO for the relevant trading interval.

THE COURT ORDERS THAT:

1. Pursuant to s 44AAG(2)(a) of the *Competition and Consumer Act 2010* (Cth), within 28 days of the making of this order, the respondent pay to the Commonwealth of Australia a pecuniary penalty of $900,000 in respect of the contraventions of NER clauses 3.8.7A(l), 4.9.8(a) and 4.9.8(d) referred to in the Declarations.
2. Pursuant to s 43 of the *Federal Court of Australia Act 1976* (Cth), within 28 days of the making of this order, the respondent pay the applicant’s costs of and incidental to this proceeding, agreed in the amount of $30,000.
3. All of the remaining claims in the Originating Application are dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BESANKO J:

# Introduction

1. The applicant in this proceeding is the Australian Energy Regulator and it seeks orders against the respondent, Hornsdale Power Reserve Pty Ltd, under s 44AAG(1) and (2) of the *Competition and Consumer Act 2010* (Cth) (the CC Act). The orders sought are declarations of breaches of the National Electricity Rules (the NER) and an order for the payment of a civil penalty determined under the CC Act and in accordance with the National Electricity Law (the NEL), which is a schedule to the *National Electricity (South Australia) Act 1996* (SA). The applicant also seeks an order for costs against the respondent.
2. The applicant filed a Concise Statement with its Originating application. The parties have agreed to a resolution of the proceeding. A statement of agreed facts and joint submissions have been filed by the parties. The statement of agreed facts is signed by the parties and contains facts agreed between the parties for the purposes of the proceeding. They are “agreed facts” in the proceeding within the meaning of s 191 of the *Evidence Act 1995* (Cth).
3. The declarations which the applicant seeks are as follows:
4. The Respondent contravened clause 3.8.7A(l) of the *National Electricity Rules* (NER) in the period between 10:05 am on 23 July 2019 until 5:10 pm on 14 November 2019 (the Relevant Period) by making 690 *market ancillary service offers* to the Australian Energy Market Operator (AEMO) that did not reflect the technical characteristics of the HPRG1 *ancillary service generating unit* or the HPRL1 *ancillary service load*.
5. The Respondent contravened clause 4.9.8(a) of the NER in relation to 185,738 *dispatch instructions* given by AEMO during the Relevant Period, because the Respondent did not provide frequency control ancillary services (FCAS) which complied with *dispatch instructions* received from AEMO (in circumstances where the Respondent did not hold the reasonable opinion that to comply would be a hazard to public safety or materially risk damaging equipment).
6. The Respondent contravened clause 4.9.8(d) of the NER in relation to 32,602 trading intervals during the Relevant Period, in which the Respondent was not able to provide FCAS which complied with the *latest market ancillary service offer* that it had made to AEMO for the relevant trading interval.
7. The other orders which the applicant seeks are as follows:
8. Pursuant to s 44AAG(2)(a) of the *Competition and Consumer Act 2010* (Cth), within 28 days of the making of this order, the Respondent pay to the Commonwealth of Australia a pecuniary penalty of $900,000 in respect of the contraventions of NER clauses 3.8.7A(l), 4.9.8(a) and 4.9.8(d) referred to in the Declarations.
9. Pursuant to s 43 of the *Federal Court of Australia Act 1976* (Cth), within 28 days of the making of this order, the Respondent pay the Applicant’s costs of and incidental to this proceeding, agreed in the amount of $30,000.
10. In addition to these orders, the parties seek an order that all of the remaining claims in the Originating application be dismissed.

# The Facts

1. The following facts are taken from the statement of agreed facts. A Glossary, insofar as it relates to expressions in the NER, is included in these reasons as Appendix A.
2. The “relevant period” for the purposes of the alleged breaches is the period from 10.05 am on 23 July 2019 (AEST) until 5.10 pm on 14 November 2019 (AEST).
3. The applicant is a body corporate established pursuant to s 44AE of the CC Act and has the functions and powers referred to in s 15 of the NEL.
4. The respondent is and was at all material times a company registered under the *Corporations Act 2001* (Cth) and the owner and operator of the Hornsdale Power Reserve (the HPR). The respondent has been, since 14 November 2017, a *Registered Participant* in the National Electricity Market (the NEM) and was registered with the Australian Energy Market Operator (AEMO) as a *Market Generator* and *Market Customer* in relation to the HPR.
5. At all times, including during the relevant period, AEMO was the independent market and system operator for the NEM. The NEM is an interconnected *power system* across eastern and south-eastern Australia. AEMO’s statutory functions are identified in s 49 of the NEL and they include to operate and administer the wholesale exchange where electricity and services are traded and to maintain and improve *power system* *security* (s 49(1)(a) and (e)). AEMO’s obligations include using reasonable endeavours to control the frequency of the NEM within the *normal operating frequency band*, which was within a range of 49.85Hz to 50.15Hz 99% of the time, and 49.75Hz to 50.25Hz 1% of the time. It is agreed between the parties that while the *normal operating frequency* *band* specified in the NER is the range 49.9Hz to 50.1Hz, this range has been altered by specification in the *power system* *security standards* approved by the *Reliability Panel* (a panel established under s 38 of the NEL) on the advice of AEMO (which, during the relevant period, were the Frequency Operating Standards set out in the *Reliability Panel*’s final report dated 15 April 2009) to the range of 49.85Hz to 50.15Hz 99% of the time and 49.75Hz to 50.25Hz 1% of the time.
6. Maintaining the frequency within the *normal operating frequency band* is necessary for the security of the *power system*. As a general proposition, if power generation increases, the frequency will rise and if demand for electricity increases, the frequency will fall. Therefore, maintaining equilibrium between demand and supply is necessary to keep the *power system* frequency within the *normal operating frequency bands*. If the frequency goes outside of this range, the NEM can face significant issues.
7. AEMO procures frequency control ancillary services (FCAS) to ensure that when frequency does go outside of the *normal operating frequency band*, the frequency recovers.
8. Under the Frequency Operating Standards that applied during the relevant period, AEMO was required to use reasonable endeavours to ensure that following most events, the system frequency should not exceed the *normal operating frequency band* for more than five minutes.
9. To meet its obligation to use reasonable endeavours to control the frequency of the *power system*, at any point in time, within the *normal operating frequency band*, AEMO procured during the relevant period a category of *market* *ancillary services* known as frequency FCAS. All FCAS procured by AEMO are *market* *ancillary services* under the NER and are regulated as such.
10. FCAS fall into two categories:
11. regulation FCAS, which are used continually to correct minor frequency deviations; and
12. contingency FCAS, which while always *enabled* are generally (but not only) used when a *contingency event* occurs which triggers a significant frequency deviation. This makes it difficult to detect when an FCAS provider is not complying with its offers or *dispatch instructions*.
13. Regulation FCAS are controlled centrally by AEMO’s automatic generation control system, while contingency FCAS are controlled locally and are triggered by the frequency deviation that follows a *contingency event.*
14. A *contingency event* is defined in cl 4.2.3 of the NER and involves the failure or removal from service of a *generating unit* or part of the *transmission network*, such as a major generating unit suddenly going offline or the loss of transmission lines. A *contingency event*, by its nature, can occur without warning and may result in stress being placed on the NEM.
15. A provider of contingency FCAS is paid by AEMO to be on standby to provide the service of changing its power output to stabilise the frequency of the *power system* in the event of a material frequency deviation. A provider of contingency FCAS whose services have been *enabled* by AEMO is required to automatically alter their electricity supply so as to assist in stabilising the frequency for the relevant *dispatch interval*.
16. It is critical for *power system* *security* that providers of contingency FCAS whose services have been *enabled* by AEMO can and do respond according to dispatch when frequency deviations occur. *Enabled* FCAS units are required to monitor the local *power system* frequency and respond automatically to deviations of frequency by either injecting or absorbing electricity to assist AEMO by correcting frequency to the *normal operating frequency band*. Providers of FCAS are required to install and maintain monitoring equipment that monitors and records the response of the *ancillary service generating unit* or *ancillary service load* to changes in the frequency of the *power system*, so as to be capable to verify the response that they provide when *enabled* by AEMO.
17. There are six trading markets for different types of contingency FCAS, each for particular services that provide a particular type of response of a particular duration in the event of a frequency deviation. They are as follows: (1) the *fast raise service* market, where the FCAS provider bids to provide a six second response to arrest a major drop in frequency following a *contingency event*; (2) the *fast lower service* market, where the FCAS provider bids to provide a six second response to arrest a major rise in frequency following a *contingency event*; (3) the *slow raise service* market, where the FCAS provider bids to provide a 60 second response to stabilise frequency following a major drop in frequency; (4) the *slow lower service* market, where the FCAS provider bids to provide a 60 second response to stabilise frequency following a major rise in frequency; (5) the *delayed raise service* market, where the FCAS provider bids to provide a five minute response to recover frequency to the *normal operating frequency band* following a major drop in frequency; and (6) the *delayed lower service* market, where the FCAS provider bids to provide a five minute response to recover frequency to the *normal operating frequency band* following a major rise in frequency.
18. A *Registered Participant* must register with AEMO before they can make bids or offers in these markets. Once registered, a *Registered Participant* may submit bids or offers for the particular service.
19. To qualify for registration to participate in the markets mentioned above, a *Market Participant* must have had a *generating unit* approved by AEMO for classification as an *ancillary service generating unit* or a *load* classified as an *ancillary service load*.
20. To apply for the approvals referred to, AEMO requires the *Market Participant* to provide a number of parameters about the *Market Participant*’s *generating unit* or *load* for each FCAS market in which it seeks to be registered. These parameters include the maximum *market ancillary service* capacity in MW. This is calculated according to a formula specified and published by AEMO.
21. One of the variables in the formula for calculating the maximum *market ancillary service* capacity is the percentage of droop. The droop defines the amount or proportionality of response to a variation in frequency: for example, the larger the variation in frequency away from the *normal operating frequency band*, the larger the response, in MW, that is required.
22. The droop (and the associated maximum response of the facility to a 0.5Hz frequency deviation) and the speed of that response then determines the maximum amount of FCAS that AEMO will register for a facility for the fast, slow and delayed contingency services. Clauses 3.3, 3.4, 4.3, 4.4, 5.3 and 5.4 of the *market ancillary service* *specification* (the MASS) govern, for the respective FCAS, how the amount of FCAS response is calculated for the purposes of *market ancillary service* *offers*.
23. The droop that was agreed to with AEMO at the time of registration for the HPR was 1.7%.
24. For each five-minute *dispatch interval*, amongst other things, the NEM dispatch engine accepts bids and offers to ensure that sufficient contingency FCAS is *enabled* to respond if required. AEMO enables FCAS by providing *dispatch instructions* to a *Market Participant* pursuant to cl 4.9.3A of the NER. Under cl 4.9.3A, each *dispatch instruction*: (1) states the relevant *generating unit* or *load* that has been selected to provide the FCAS; (2) states the service concerned; and (3) nominates the range to be *enabled*.
25. The NEM dispatch engine also determines a clearing price for each market for each *dispatch interval*. This price is used to calculate payments to the *Market Participants* who were *enabled* for that *dispatch interval*. Payments for contingency FCAS are recovered from *Generators* (for the raise services) or *Market Customers* (for the lower services).
26. The HPR is an electricity storage facility located near Jamestown in South Australia. During the relevant period, it used a lithium-ion battery with a capacity of 100MW. The respondent was the *Registered Participant* for the HPR. Tesla Motors Australia Pty Ltd (Tesla) was contracted to assist with the operation and maintenance of the HPR. The HPR is connected to South Australia’s electricity *transmission network*, which forms part of the NEM.
27. During the relevant period, the HPR comprised a *generating unit* designated as “HPRG1”, which AEMO classified as an *ancillary service generating unit* under cl 2.2.6 of the NER and a *load* designated “HPRL1”, which AEMO classified as an *ancillary service load* under cl 2.3.5 of the NER.
28. During the relevant period, the respondent made *market ancillary service offers* to AEMO for each of the *fast raise service*, the *slow raise service* and the *delayed raise service* (using the HPRG1) and each of the *fast lower service*, the *slow lower service* and the *delayed lower service* (using the HPRL1).
29. In accordance with the requirements of the MASS, the maximum response (in MW) included in the *dispatch instruction* (as the upper limit of the “range enabled”) was enabled to be provided if and when the frequency deviated by +/- 0.5Hz from 50Hz.
30. The HPR’s registered FCAS capacity during the relevant period was for 41 MW to be delivered at the lower limit of this 49.5Hz containment band.
31. At 10.05 am on 23 July 2019, an update was performed by Tesla on the firmware for the HPR, which affected both HPRG1 and HPRL1. This update had the effect of altering settings such that the droop of the HPR (both HPRG1 and HPRL1) was 3.7%. The change in the droop reduced the maximum response capacity of HPRG1 and HPRL1 compared to what AEMO had classified as shown in the following table:

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| **MW** | **Maximum Dispatchable capacity outside of the Relevant Period (droop at 1.7%)** | **Maximum Dispatchable capacity during the Relevant Period (droop at 3.7%)** |
|  | **Fast (6 sec)** | **Slow (60 sec)** | **Delayed (5 min)** | **Fast (6 sec)** | **Slow (60 sec)** | **Delayed (5 min)** |
| **HPRG1 (Raise)** | 63 | 19 | 41 | 29 | 9 | 19 |
| **HPRL1 (Lower)** | 63 | 19 | 41 | 29 | 9 | 19 |

1. As a consequence, during the relevant period, the HPR was not capable of providing 41MW of FCAS at the frequency of 49.50Hz, which was required in order for it to comply with the applicable *dispatch instruction* or *market ancillary service offer* (as explained at [25] and [32] above).
2. On 9 October 2019, there was an unplanned outage at Kogan Creek Power Station in Queensland (the Kogan Creek event). The respondent did not cause or contribute to the Kogan Creek event. In response to the Kogan Creek event, the *power system* frequency fell and the respondent was required to deliver *fast raise services* in accordance with the amount it was *enabled* to provide. The FCAS response that the respondent provided by using HPRG1 following the Kogan Creek event was less than expected and could not exceed 46% of the amount of FCAS that the respondent offered and was *enabled* for in the *dispatch instructions* in accordance with the MASS. This was caused by the change in settings which altered the droop as a consequence of the firmware update on 23 July 2019.
3. Although the FCAS response that the respondent provided (using HPRG1) following the Kogan Creek event response was less than the amount for which it had been *enabled*, the response assisted to bring system frequency within the *normal operating frequency* *band* as set by the Frequency Operating Standards.
4. On 12 November 2019, AEMO informed the respondent that the response of the HPR was less than the *enabled* contingency FCAS and not in line with the agreed droop of 1.7% when delivering FCAS.
5. The respondent was not aware until it was informed by AEMO that the contingency FCAS response from the HPR was less than what it had offered in its *ancillary market services offers* and been *enabled* to provide in *dispatch instructions*.
6. On 13 November 2019, Tesla investigated the under-delivery of the FCAS response from the HPR. On 14 November 2019 at 5.10 pm, the relevant settings on the firmware effecting the droop for the HPR were corrected to 1.7%. On 20 November 2019, Tesla completed its investigation and identified that the firmware update of 23 July 2019 was the cause of the under-delivery of FCAS by the HPR during the Kogan Creek event.
7. During the relevant period, AEMO gave and the respondent received 197,508 *dispatch instructions* pursuant to cl 4.9.3A(a) of the NER for *market* *ancillary services* that required the respondent to be ready and capable of providing, at the specified time if required, the service stated, at the nominated range, in the *dispatch instruction* and in which the “range” was a range of the amounts of the nominated service, up to the maximum amount specified as being *enabled* in the *dispatch instruction*, expressed in MW.
8. Of these 197,508 *dispatch instructions*, there were 185,738 *dispatch instructions* (being 97,588 *dispatch instructions* for HPRG1 *ancillary services* *generating unit* and 88,150 *dispatch instructions* for HPRL1 *ancillary services load*) which required the respondent to be ready and capable of providing, at the specified time if required, the range *enabled* in the *dispatch instruction*, and the respondent did not provide the capacity for which it was *enabled*.
9. As a result of these two matters, the respondent did not comply with 185,738 of the *dispatch instructions* given by AEMO as required by cl 4.9.8(a) of the NER (Version 126), which is as follows:

A *Registered Participant* must comply with the *dispatch instruction* given to it by *AEMO* unless to do so would, in the *Registered Participant’s* reasonable opinion, be a hazard to public safety or materially risk damaging equipment.

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

1. The respondent’s failure to provide the capability to deliver the required proportionate response relative to the size of the frequency excursion in accordance with the MASS represented a failure to provide the relevant *market ancillary service* specified in the *dispatch instruction*, in circumstances where the HPR was, during the relevant period, *enabled* to deliver its full FCAS capacity.
2. During the relevant period, there were 32,602 *trading intervals* during which the respondent was not able to comply with its latest *market ancillary service offer* for the *trading interval* because those offers were for a response capability exceeding the maximum dispatch capacity of the HPR during the corresponding *trading interval*.
3. As a result of these matters, the respondent was not able to comply with *the market ancillary service offers* made by it for 32,602 *trading intervals* as required by cl 4.9.8(d) of the NER, which is as follows:

A *Market Participant* which has classified a *generating unit* or *load* as an *ancillary service generating unit* or an *ancillary service load*, as the case may be, must ensure that the *ancillary service generating unit* or *ancillary service load* is at all times able to comply with the latest *market ancillary service offer* for the relevant *trading interval*.

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

1. The response capability set out in each of the 345 *market ancillary service* *offers* made during the relevant period for the *fast raise service*, the *slow raise service* and the *delayed raise service* did not reflect the technical characteristics at the relevant time of HPRG1. The response capability set out in each of the 345 *market ancillary service offers* made during the relevant period for the *fast lower service*, the *slow lower service* and the *delayed lower service* did not reflect the technical characteristics at the relevant time of HPRL1. As a result of these matters, the values associated with the 690 *market ancillary service offers* made by the respondent did not represent the technical characteristics of HPRG1 and HPRL1, respectively, as required by cl 3.8.7A(l) of the NER, which is as follows:

The following requirements apply to all *market ancillary service offers* for each type of *market ancillary service*:

…

(l) the values associated with the *market ancillary service offer* referred to in clause 3.8.7A(j) must represent technical characteristics of the *ancillary service generating unit* or *ancillary service load* …

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

1. The contraventions previously identified were caused by the update to the firmware performed by Tesla on 23 July 2019, which was corrected on 14 November 2019. A provider of contingency FCAS must ensure that the provider’s *generating unit* or *load* is able to respond when required in accordance with amounts for which it has been *enabled*.
2. During the relevant period, the respondent had in place a *Generator* compliance program to promote its compliance, as required under the NER. This compliance program was developed such that retrospective analysis of the HPR was to be triggered by the occurrence of significant *contingency events*. This involved an assessment of the response of the HPR to the frequency deviation (meaning the active power fluctuation when the frequency is outside of the normal operating bands set out in the Frequency Operating Standards). However, the respondent did not identify a risk to changes in the frequency settings and therefore did not test the technical characteristics, compliance or performance of the HPR following the firmware upgrade in July 2019. As a result, the respondent did not know whether or not it could satisfy the offers that it was making.
3. The respondent did not conduct sufficient ongoing performance monitoring of the HPR’s contingency FCAS performance using real-time high-speed frequency data after a major frequency deviation. During the relevant period, the respondent’s systems did not detect and correct its non-compliance before being notified by AEMO on 12 November 2019, following AEMO’s analysis of the Kogan Creek event.
4. Following the relevant period, the respondent immediately reviewed its compliance program and the compliance program was updated to: (1) improve its change management process, to ensure the potential impacts of firmware updates are appropriately addressed including with post-implementation controls; (2) increase real-time monitoring of the system’s capability to provide frequency response; (3) include automatic frequency event response check with real-time alarming system provided by Telsa; and (4) include systematic frequency response checks post *contingency event* and perform at least one check per week of the system’s frequency response to any deviation from the normal operating band within the last seven days if no *contingency event* occurred.
5. AEMO relies upon the providers of contingency FCAS such as the respondent to do what they have bid or offered to do and been *enabled* to provide. The HPR’s inability to respond in accordance with the respondent’s *market ancillary service offers* over a period of nearly four months impacted AEMO’s ability to plan and prepare for frequency deviations.
6. While the HPR was not capable of providing 41MW of FCAS at the frequency of 49.50Hz, which was required in order for it to comply with the applicable *dispatch instruction* or *market ancillary service offer*, the HPR was capable of providing 41MW of FCAS at the frequency of 49.09Hz. The lower limit of the containment band is 49Hz for a network event or separation event, and 47Hz for a multiple *contingency event*. If one of these events had occurred and was sufficiently large, the HPR would have been capable of providing 41MW of FCAS at a frequency of 49.09Hz and up to the registered FCAS capacity of 100MW at a frequency of 48.00Hz (while not in compliance with the applicable instruction or offer). The frequency of 49Hz is a point at which customers are likely to be interrupted and the frequency of 48Hz is a rare and extreme frequency deviation.
7. The respondent generated revenue of $32,310,557 and delivered a profit of $10,741,006 for the year ended 31 December 2019. The majority of this revenue was produced through the supply of *market* *ancillary services*. During the relevant period, the respondent was paid $6,431,237.63 to provide contingency FCAS at the HPR. In response to a request from AEMO, in March 2021 the respondent repaid $3,383,631.51 for contingency FCAS for the relevant period by AEMO deducting that amount from amounts otherwise payable to the respondent.
8. The respondent has not been previously found to have engaged in similar conduct.
9. I turn now to the relief sought by the applicant.

# The declarations

1. The applicant seeks three declarations, each relating to a contravention of a particular clause of the NER.
2. The source of the Court’s power to make the declarations in this case is contained in s 44AAG(1) of the CC Act and s 21 of the *Federal Court of Australia Act 1976* (Cth). The respondent consents to the making of the declarations. Nevertheless, the Court must be satisfied that the making of the declarations is appropriate.
3. I discussed the principles which are relevant to the making of declarations for contraventions of the NER in my recent decision in *Australian Energy Regulator v AGL HP 1 Pty Ltd* [2022] FCA 737 (*AER v AGL*) (at [35]–[39]). The circumstances of this case are such that it is an appropriate case for declarations because: (1) the declarations coupled with the pecuniary penalty will act as a deterrent, both to the respondent and other *Registered Participant*s in the NEM and, therefore, there is utility in granting the declarations; (2) there is a public interest in the declarations as all members of the community have an interest in a properly functioning electricity market; (3) Parliament has indicated the extent of its disapproval of the conduct by the size of the maximum penalties. This is serious conduct and the Court should indicate its disapproval of it, not only by imposing a pecuniary penalty, but also by making declarations; and (4) the proposed declarations clearly identify the contraventions and are appropriate in their terms.

# The pecuniary penalty

1. The applicant seeks an order that the respondent pay a pecuniary penalty of $900,000 in respect of the contraventions. The Court’s power to order that a person pay a pecuniary penalty is contained in s 44AAG(2)(a) of the CC Act. The penalty to be imposed is to be determined “in accordance with the law”.
2. Each of the clauses contravened as identified in the declarations carries a civil penalty. The NEL is the schedule to the National Electricity (South Australia) Act and s 2AA of the NEL provides that a provision of the NEL or the NER is a civil penalty provision if prescribed to be such by the Regulations. The *National Electricity (South Australia) Regulations* identify the three clauses referred to in the declarations as civil penalty provisions.
3. Section 64 of the NEL identifies the matters for which there must be regard in determining the amount of a civil penalty. The section provides:

Every civil penalty ordered to be paid by a person declared to be in breach of a provision of this Law, the Regulations or the Rules must be determined having regard to all relevant matters, including—

(a) the nature and extent of the breach; and

(b) the nature and extent of any loss or damage suffered as a result of the breach; and

(c) the circumstances in which the breach took place; and

(d) whether the person has engaged in any similar conduct and been found to be in breach of a provision of this Law, the Rules or the Regulations in respect of that conduct; and

(e) whether the service provider had in place a compliance program approved by the AER or required under the Rules, and if so, whether the service provider has been complying with that program.

1. Section 66 provides that if a breach of a civil penalty provision consists of a failure to do something that is required to be done, the breach is to be regarded as continuing until the act is done. It is not suggested that this section is not relevant in the circumstances of this case.
2. Section 67 addresses cases of conduct which is in breach of more than one civil penalty provision. It provides:

(1) If the conduct of a person constitutes a breach of 2 or more civil penalty provisions, proceedings may be instituted under this Law against the person in relation to the breach of any one or more of those provisions.

(2) However, the person is not liable to more than one civil penalty under this Law in respect of the same conduct.

**Note—**

Clause 39 of Schedule 2 to this Law sets out further provisions in relation to double jeopardy.

1. Before turning to the pecuniary penalty in this case, there are three matters which I can address by reference to my recent decision in *AER v AGL.*

## The significance of the fact that the parties have agreed an amount for the pecuniary penalty

1. In *AER v AGL*, I said (at [52]–[54]):

52 The significance of the fact that the parties have agreed an amount for the pecuniary penalty was considered in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*DFWBII*). The plurality (French CJ, Kiefel J (as her Honour then was), Bell, Nettle and Gordon JJ) referred to the existence of an “important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers” (at [46]).

53 The plurality said that the Court is not bound by the figure suggested by the parties. Their Honours said (at [48]):

… The court asks “whether their proposal can be accepted as fixing an *appropriate* amount” and for that purpose the court must satisfy itself that the submitted penalty is appropriate.

(Emphasis in original; footnote omitted.)

The plurality also said (at [58]).

… Subject to the court being sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and, for the reasons identiﬁed in *Allied Mills*, highly desirable in practice for the court to accept the parties’ proposal and therefore impose the proposed penalty. …

(Emphasis in original; footnote omitted.)

54 Finally (for present purposes), the plurality referred to the assistance the Court may obtain as to the appropriate penalty from the regulator which is, it is to be expected, in a position to offer “informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance” (at [60]).

## The importance of deterrence

1. In *AER v AGL*, I said (at [55]–[56]):

55 The purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance (*Trade Practices Commission v CSR Limited* [1990]FCA 762; (1991) ATPR 41-076 (*CSR Limited*) at 52,151–52,152 per French J (as his Honour then was); *DFWBII* at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; *Pattinson* at [14]–[19] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

56 In the context of the civil penalty regime under the *Fair Work Act 2009* (Cth), the plurality in *Pattinson* said (at [43]) that the primary objective of the regime was deterrence and at [40], their Honours referred with approval to the observations of Burchett and Kiefel JJ in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 (*NW Frozen Foods*) (at 293) as follows:

… [I]nsistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”. Plainly, if deterrence is the object, the penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression.

The plurality in *Pattinson* went on to say that it is necessary for a civil penalty to be fixed in a way which strikes a reasonable balance between deterrence and oppressive severity (at [41]).

## The relevance of the maximum penalty

1. *In AER v AGL*, I said (at [49]–[51]):

49 The High Court recently considered the role of the maximum penalty in fixing a civil penalty in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 (*Pattinson*). The plurality of Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ said that it was an error to treat the statutory maximum as implicitly requiring that contraventions be graded on a scale of increasing seriousness, with the maximum to be reserved exclusively for the worst category of contravening conduct (at [49]) or as controlling, as distinct from being balanced with all other relevant factors (at [52]).

50 The plurality then (at [53]) referred to the following passage from the decision of the Full Court of this Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 (at [155]–[156]):

“The reasoning in *Markarian* about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal. As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.

Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.” (citations omitted)

51 The plurality in *Pattinson* then went on to say (at [54]–[55]):

54 Two aspects of the Full Court’s reasoning in this passage from *Reckitt Benckiser* deserve particular emphasis here. The first is their Honours’ recognition that the maximum penalty is “but one yardstick that ordinarily must be applied” and must be treated “as one of a number of relevant factors”. As has already been seen, other factors relevant for the purposes of the civil penalty regime include those identified by French J in *CSR*.

55 The second point is that the maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring “some reasonable relationship between the theoretical maximum and the final penalty imposed”. This relationship of “reasonableness” may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.

1. There are a large number of separate contraventions in this case. The applicant accepted that because of the large number of contraventions in this case, and the fact that they all resulted from the act performed by Tesla at 10.05 am on 23 July 2019 to update the firmware for the HPR such that the settings were altered, including the droop of the HPR and the failure to detect this thereafter, reference to the maximum penalty is not “a particularly informative task” and would result in a maximum penalty which is “outside the bounds of what would be appropriate”. The parties were agreed that the respondent’s conduct should be viewed, for the purposes of fixing the pecuniary penalty, as a single course of conduct. I accept this submission and will proceed on that basis. I note the observations of Beach J in *Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58 (at [107] and [118]) as to what is and is not the same conduct for the purposes of s 67 of the NEL and the “course of conduct” principle.

## Relevant considerations

1. I have already identified the matters which are set out in s 64 of the NEL. In addition, the cases indicate a range of other matters which may be relevant in the determination of a civil penalty depending on the circumstances of the case. It is sufficient for me to set out the following passage in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599(at [18] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ):

In *CSR*, French J listed several factors which informed the assessment under the *Trade Practices Act 1974* (Cth) of a penalty of appropriate deterrent value:

“The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:

1. The nature and extent of the contravening conduct.

2. The amount of loss or damage caused.

3. The circumstances in which the conduct took place.

4. The size of the contravening company.

5. The degree of power it has, as evidenced by its market share and ease of entry into the market.

6. The deliberateness of the contravention and the period over which it extended.

7. Whether the contravention arose out of the conduct of senior management or at a lower level.

8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.

9. Whether the company has shown a disposition to co‑operate with the authorities responsible for the enforcement of the Act in relation to the contravention.”

(Citation omitted.)

## This case

1. In the end, both parties focused on matters indicating the seriousness of the breaches on the one hand, and matters of mitigation on the other. In performing the Court’s task and bearing in mind the High Court’s observations in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (relevantly extracted above at [66]), it is sufficient for me to focus on those matters.
2. The applicant identified six matters which in its submission lead to the conclusion that the contraventions are serious and of significance.
3. The first matter identified by the applicant is the critical importance of FCAS to *power system* *security* and the harm that can potentially flow to end-users of electricity if *power system* *security* is compromised. The applicant pointed out that the *power system* depends for its reliability and safety on the maintenance of the equilibrium between power generation, that is, the supply of electricity, and *load*, that is, the demand for electricity. If the frequency of the *power system* varies outside the specified band, then that can cause significant issues for the NEM. For example, it can lead to generation or *load* shedding. AEMO uses as one of the tools to maintain the frequency of the *power system*, FCAS and it procures FCAS to ensure that when the frequency does go outside the *normal operating frequency* *band*, the frequency recovers.
4. The second matter identified by the applicant is the number of contraventions. There are a large number of contraventions; the total number is nearly 220,000.
5. The third matter identified by the applicant is the period of time over which the contraventions occurred; the period is in the order of four months.
6. The fourth matter identified by the applicant is the failure of the respondent’s compliance system to detect and correct the non-compliance during the relevant period. As I have said, during the relevant period, the respondent had in place a *Generator* compliance program to promote its compliance as required under the NER. This compliance program was developed such that retrospective analysis of the HPR was to be triggered by the occurrence of sufficient *contingency events*. This involved an assessment of the response of the HPR to the frequency deviation. However, the respondent did not identify a risk to changes in the frequency settings and, therefore, did not test the technical characteristics, compliance or performance of the HPR following the firmware upgrade in July 2019. As a result, the respondent did not know whether or not it could satisfy the offers that it was making. The respondent did not conduct sufficient ongoing performance monitoring of the HPR’s contingency FCAS performance using real-time high-speed frequency data after a major frequency deviation. Furthermore, during the relevant period, the respondent’s systems did not detect and correct its non-compliance before being notified by AEMO on 12 November 2019 following AEMO’s analysis of the Kogan Creek event.
7. The fifth matter identified by the applicant is the amount of the financial benefit that the respondent derived while it was in contravention of the NER. It is relevant to note in this context that following a request from AEMO, in March 2021 the respondent repaid $3,383,631.51 for contingency FCAS for the relevant period.
8. The sixth matter identified by the applicant is the difficulty in detecting contraventions of a capability to provide FCAS until the service is in fact required to be actively delivered during a network event, by which time it is too late for AEMO or the *Market Participant* to take pre-emptive action to prevent the non-compliance arising. This is an important matter and it was emphasised by the applicant in its oral submissions. As the applicant’s counsel submitted, the type of contraventions in this case only become apparent following the necessity of the services being drawn upon and being found not to be there. I accept the submission made by the applicant that because it is difficult for the market operator and the regulator to detect non-compliance before the services are actually deployed during a frequency deviation, it is important in determining the size of the pecuniary penalty to take into account the need to promote proactive compliance by providers given the difficulty of detection otherwise.
9. The respondent asked me to take into account the following matters, all of which are present as is clear from the agreed facts:
10. the contraventions were inadvertent, not deliberate;
11. the senior management of the respondent were not involved in the contraventions;
12. as soon as the respondent became aware of the deficient contingency response, it took immediate steps to rectify it in combination with Tesla;
13. as soon as the respondent became aware of the deficient contingency response, it expeditiously took steps to improve and review its compliance program;
14. the respondent has not previously been found by a Court to be in breach of the NER or the NEL in respect of conduct of a similar kind;
15. no actual loss or damage was caused by the contraventions, although the respondent made it clear that it accepts the submissions made by the applicant about the structural importance of the services being properly provided;
16. the respondent did not profit through the contraventions. It repaid the relevant sum to AEMO upon request; and
17. the respondent has fully cooperated with the applicant and AEMO throughout the process of ascertaining and admitting liability for the contraventions.
18. Taking these matters into account, I consider that the proposed pecuniary penalty of $900,000 is just and appropriate and a penalty determined in accordance with the law.

# Costs

1. I will make the costs order as sought by the parties.

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| I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated: 28 June 2022

**Appendix A**

**Glossary**

|  |  |
| --- | --- |
| ***ancillary service generating unit*** | A *generating unit* which has been classified in accordance with Chapter 2 as an *ancillary service generating unit.* |
| ***ancillary service load*** | A *market load* or *load* which has been classified in accordance with Chapter 2 as an *ancillary service load*. |
| ***contingency event*** | An event described in clause 4.2.3(a). |
| ***delayed lower service*** | The service of providing, in accordance with the *market ancillary service specification*, the capability of controlling the level of *generation* or *load* associated with a particular *facility* in response to a change in the *frequency* of the *power system* beyond a threshold or in accordance with electronic signals from *AEMO* in order to lower that *frequency* to within the *normal operating frequency band.* |
| ***delayed raise service*** | The service of providing, in accordance with the *market ancillary service specification*, the capability of controlling the level of *generation* or *load* associated with a particular *facility* in response to a change in the *frequency* of the *power system* beyond a threshold or in accordance with electronic signals from *AEMO* in order to raise that *frequency* to within the *normal operating frequency band*. |
| ***dispatch instruction*** | An instruction given to a *Registered Participant* under clauses 4.9.2, 4.9.2A, 4.9.3, 4.9.3A, or to an *NMAS provider* under clause 4.9.3A. |
| ***dispatch interval*** | A period defined in clause 3.8.2.2(a1) in which the *dispatch algorithm* is run in accordance with clause 3.8.21(b). |
| ***enabled***  | A *market ancillary service* is enabled when *AEMO* has selected the relevant *generating unit* or *load* for the provision of the *market ancillary service* and has notified the relevant *Market Participant* accordingly.An *inertia network service* is enabled when *AEMO* has selected the relevant *inertia network service* and the service is providing *inertia* to an *inertia sub-network*.An activity approved by *AEMO* under clause 5.20B.5(a) is enabled when *AEMO* has selected the relevant activity and the activity is performing and available in accordance with any conditions of that approval.A *system strength service* is enabled when *AEMO* has selected the relevant *system strength service* and the service is contributing to the *three phase fault level* at the relevant *fault level node*. |
| ***fast lower service*** | The service of providing, in accordance with the requirements of the *market ancillary service specification*, the capability of rapidly controlling the level of *generation* or *load* associated with a particular *facility* in response to the locally sensed *frequency* of the *power system* in order to arrest a rise in that *frequency*. |
| ***fast raise service*** | The service of providing, in accordance with the requirements of the *market ancillary service specification*, the capability of rapidly controlling the level of *generation* or *load* associated with a particular *facility* in response to the locally sensed *frequency* of the *power system* in order to arrest a fall in that *frequency*. |
| ***generating unit*** | The plant used in the production of electricity and all related equipment essential to its functioning as a single entity. |
| ***Generator*** | A person who engages in the activity of owning, controlling or operating a *generating system* that is *connected* to, or who otherwise *supplies* electricity to, a *transmission* or *distribution system* and who is registered by *AEMO* as a *Generator* under Chapter 2.For the purposes of Chapter 5, the term includes a person who is required or intends to register in that capacity or is a non-registered embedded generator (as defined in clause 5A.A.1) who has made an election under clause 5A.A.2(c). |
| ***load***  | A *connection point* or defined set of *connection points* at which electrical power is delivered to a person or to another *network* or the amount of electrical power delivered at a defined instant at a *connection point*, or aggregated over a defined set of *connection points*. |
| ***market ancillary service*** | A service identified in clause 3.11.2(a). |
| ***market ancillary service offer*** | A notice submitted by an *Ancillary Service Provider* to *AEMO* in respect of a *market ancillary service* in accordance with clause 3.8.7A. |
| ***Market Customer*** | A *Customer* who has classified any of its *loads* as a *market load* and who is also registered by *AEMO* as a *Market Customer* under Chapter 2. |
| ***Market Generator*** | A *Generator* who has classified at least one *generating unit* as a *market generating unit* in accordance with Chapter 2 and who is also registered by *AEMO* as a *Market Generator* under Chapter 2. |
| ***Market Participant*** | A person who is registered by *AEMO* as a *Market Generator*, *Market Customer, Market Small Generation Aggregator, Market Ancillary Service Provider* or *Market Network Service Provider* under Chapter 2. |
| ***normal operating frequency band*** | In relation to the *frequency* of the *power system*, means the range 49.9Hz to 50.1Hz or such other range so specified in the *power system security standards*. |
| ***power system*** | The electricity power system of the *national grid* including associated *generation* and *transmission* and *distribution networks* for the *supply* of electricity, operated as an integrated arrangement. |
| ***Registered Participant*** | A person who is registered by *AEMO* in any one or more of the categories listed in rules 2.2 to 2.7. However:(a) in the case of a person who is registered by *AEMO* as a *Trader*, such a person is only a *Registered Participant* for the purposes referred to in rule 2.5A;(b) in the case of a person who is registered by *AEMO* as a *Metering Coordinator*, such a person is only a *Registered Participant* for the purposes referred to in clause 2.4A.1(d);(c) as set out in rule 2.11.1A, for the purposes of rule 2.11 only, *Third Party B2B Participants* (other than *Third Party B2B Participants* who are also *Embedded Network Managers*) are also deemed to be *Registered Participants*;(d) as set out in clause 8.2.1(a1) and 8.2A.2(b), for the purposes of some provisions of rule 8.2 only, *AEMO, Connection Applicants, Metering Providers, Metering Data Providers, Third Party B2B Participants* and *B2B Change Parties* who are not otherwise *Registered Participants* are also deemed to be *Registered Participants*;(e) as set out in clause 8.6.1A, for the purposes of Part C of Chapter 8 only, *Metering Providers, Metering Data Providers* and *Third Party B2B Participants* who are not otherwise *Registered* *Participants* are also deemed to be *Registered* *Participants*; and(f) as set out in clause 4.8.12(a3), for the purposes of Part C of Chapter 8 only, *Jurisdictional System Security Coordinators* are also deemed to be *Registered Participants.* |
| ***transmission network*** | A *network* within any *participating jurisdiction* operating at nominal *voltages* of 220kV and above plus:(a) any part of a *network* operating at nominal *voltages* between 66 kV and 220 kV that operates in parallel to and provides support to the higher voltage *transmission* *network*;(b) any part of a *network* operating at nominal *voltages* between 66kV and 220 kV that is not referred to in paragraph (a) but is deemed by the *AER* to be part of the *transmission network*.For a *participating jurisdiction* other than the State of Victoria, an *identified shared user asset* owned, controlled or operated by a *Primary Transmission Network Service Provider* (including a *third party IUSA* that is the subject of a *network operating agreement*) forms part of that *Primary Transmission Network Service Provider’s transmission network*. |