Australian Energy Regulator v Pacific Hydro Clements Gap Pty Ltd [2021] FCA 733

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| File number: | SAD 169 of 2019 |
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| Judgment of: | **WHITE J** |
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| Date of judgment: | 1 July 2021 |
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| Catchwords: | **CONSUMER LAW** – contravention by a wind farm of the *National Electricity Rules* (NER) – pecuniary penalties pursuant to s 44AAG of the *Competition and Consumer Act 2010* (Cth) – declaration of a contravention of the NER – order for implementation of a compliance program.  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 4, 44AAG, 44AE*Federal Court of Australia Act 1976* (Cth) s 21*National Electricity Law* ss 2, 2AA, 15, 64*National Energy Rules* (Version 82) cll 4.15, 4.2.5, 4.3.1, 4.4.3, 5.1.3, 5.3.4, 5.3.4A, 5.3.7; cll S5.2.2, S5.2.5, S5.2.5.1, S5.2.5.4, S5.2.5.5, S5.2.5.8*National Electricity (South Australia) Act 1996* (SA) s 9*National Electricity (South Australia) Regulations* reg 6(1)  |
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| Cases cited: | *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18; (1999) 161 ALR 79*Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1*Australian Energy Regulator v HWF 1 Pty Ltd* [2021] FCA 732*Australian Energy Regulator v Snowtown Wind Farm Stage 2 Pty Ltd* [2020] FCA 1845*Australian Energy Regulator v Snowy Hydro Ltd (No 2)* [2015] FCA 58*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482*Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non‑Indemnification Personal Payment Case)* [2018] FCAFC 97; (2018) 264 FCR 155*Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421*Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357*National Electricity Code Administrator v NRG Flinders Operating Services Pty Ltd* No 1 of 2005*National Electricity Code Administrator v Pelican Power Point Ltd* No 2 of 2005*Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 299 IR 404*Singtel Optus Pty Ltd v Australian Competition and Consumer Commissioner* [2012] FCAFC 20: (2012) 287 ALR 249*Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41‑076*Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49  |
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| Division: | General Division |
|  |  |
| Registry: | South Australia |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Economic Regulator, Competition and Access |
|  |  |
| Number of paragraphs: | 88 |
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| Date of hearing: | 25 May 2021  |
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| Counsel for the Applicant: | Dr R Higgins SC with Mr T Clarke |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Mr P Solomon QC with Mr J Kirkwood |
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| Solicitor for the Respondent: | Allens |

ORDERS

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|  | SAD 169 of 2019 |
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| BETWEEN: | AUSTRALIAN ENERY REGULATORApplicant |
| AND: | PACIFIC HYDRO CLEMENTS GAP PTY LTD (ACN 109 911 097)Respondent |

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| order made by: | WHITE J |
| DATE OF ORDER: | 1 July 2021 |

THE COURT DECLARES THAT:

1. The Respondent contravened r 4.4.3 and cl S5.2.2 of the *National Electricity Rules* (NER) between 6 August 2013 and 3 October 2016 by operating the generating units of the Clements Gap wind farm and allowing those generating units to supply electricity to the power system when the settings for the repeat low voltage ride-through protection system applied to them had not been approved in writing by the network service provider or the Australian Energy Market Operator.

THE COURT ORDERS THAT:

1. Pursuant to s 44AAG(2) of the *Competition and Consumer Act 2010* (Cth) (the CC Act), the Respondent:
	1. within 15 days of the making of this Order, engage a suitably independent compliance professional with expertise in compliance with Generator Performance Standards (theCompliance Expert), with the identity of the Compliance Expert to be agreed between the AER and the Respondent, or failing agreement, as proposed by counsel and determined by the Court.
	2. within 15 days of the making of this Order, instruct the Compliance Expert to:
		1. review the Respondent’s compliance program under NER 4.15(b) in respect of the Clements Gap wind farm and assess whether it conforms with the requirements of NER 4.15(c),
		2. identify any aspect of the compliance program that does not conform, or that may be at risk of not conforming, with the requirements of NER 4.15(c),
		3. identify any gaps in the Respondent’s existing procedures under the compliance program, and
		4. provide recommendations to the Respondent to remedy any such gaps or non-conformities identified in the course of the Compliance Expert’s assessment.
	3. within six months from the date of this Order, provide a written report, signed by the Compliance Expert and the Chief Executive Officer of the Respondent, to the AER that:
		1. describes the expertise of the Compliance Expert and confirms his or her independence,
		2. states precisely how each of the steps described in Order 2(b) were completed,
		3. annexes a copy of the Compliance Expert’s recommendations to the Respondent,
		4. states precisely what steps the Respondent has taken to give effect to the Compliance Expert’s recommendations,
		5. annexes a copy of all internal documents that were amended as a consequence of the Compliance Expert’s recommendations, and
		6. states any of the Compliance Expert’s recommendations that were not implemented by the Respondent.
2. Pursuant to s 44AAG(2)(a) of the CC Act, within 28 days of the making of this Order, the Respondent pay to the Commonwealth of Australia a pecuniary penalty of $1,100,000 in respect of the contravention of NER 4.4.3 referred to in the Declaration.
3. 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 $200,000.
4. All of the remaining claims in the Amended Originating Application are dismissed.
5. There be liberty to the parties to apply with respect to the identification of the Compliance Expert referred to in Order 2(a).

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

REASONS FOR JUDGMENT

WHITE J:

1. This is the third judgment of the Court on proceedings commenced by the Australian Energy Regulator (the AER) on 6 August 2019 against the operators of wind farms in South Australia.
2. The first judgment (*Australian Energy Regulator v Snowtown Wind Farm Stage 2 Pty Ltd* [2020] FCA 1845 (*Snowtown Stage 2*)) was delivered on 22 December 2020 and resolved Action SAD171/2019. Those proceedings concerned the Snowtown South and Snowtown Stage 2 North Wind Farms (together the Snowtown 2 Wind Farm) which comprised 90 wind turbines. The second judgment (*Australian Energy Regulator v HWF 1 Pty Ltd* [2021] FCA 732 (*AER v HWF1*)) was delivered immediately before this judgment and it resolved Action SAD172/2019. HWF1 operated the Hornsdale Wind Farm near Jamestown which, at relevant time, comprised 32 wind turbines.
3. In each of those proceedings, the parties agreed terms which they submitted were appropriate for the resolution of the proceedings commenced by the AER, being the terms of a declaration, the terms of a compliance program, the amount of a pecuniary penalty and an order for costs.
4. This judgment concerns Action SAD169/2019, being the proceedings commenced by the AER against Pacific Hydro Clements Gap Pty Ltd (Pacific Hydro). It is the operator of the wind farm at Clements Gap in the Barunga Range south of Port Pirie (the Clements Gap Wind Farm).
5. As was the case in the *Snowtown Stage 2* and *AER v HWF1* proceedings, the AER and Pacific Hydro have reached agreement as to the resolution of the matter, and join in submitting to the Court that it should make orders in the terms they have agreed. Those terms include an admission by Pacific Hydro that it contravened r 4.4.3 and cl S5.2.2 of the *National Energy Rules* (the NER) in the period between 6 August 2013 and 3 October 2016 (the Relevant Period) and agreement on the orders which should be made in consequence of that admission. In particular they are agreed that the Court should make a declaration pursuant to s 44AAG(1) of the *Competition and Consumer Act 2010* (Cth) the (the CC Act) with respect to the contravention, impose a civil penalty of $1,100,000 pursuant to s 44AAG(2)(a) of the CC Act, require, pursuant to s 44AAG(2)(d) of the CC Act, Pacific Hydro to implement a compliance program, and require Pacific Hydro to pay the AER’s costs of the proceedings, fixed in the sum of $200,000.
6. The parties have filed a Statement of Agreed Facts (SOAF), agreed minutes of order, and Joint Submissions. In addition, the parties made oral submissions on 25 May 2021.
7. The Amended Concise Statement filed by the AER on 6 October 2020 together with the SOAF and Joint Submissions indicate that the circumstances of the admitted contravention of Pacific Hydro are very similar to those which were the subject of the *Snowtown Stage 2* and *AER v HWF1* judgments. The matters agreed in the SOAF are substantially similar to those agreed by the parties in the earlier proceedings. Furthermore, the Joint Submissions of the parties have much in common with the submissions made in the earlier proceedings.
8. In these circumstances, I consider it appropriate to repeat in these reasons much of my reasons in *Snowtown Stage 2* and in *AER v HWF1* in explaining why I consider it appropriate to give effect to the parties’ agreement. I do so, however, with some adaptions so as, amongst other things, to take account of the differences in the facts and circumstances disclosed by the parties’ SOAF and Joint Submissions.

## Factual setting and overview

1. The National Electricity Market (NEM) is the inter‑connected power system in Eastern and South‑Eastern Australia. The network containing the infrastructure for the power system is known as the “National Grid”.
2. The Australian Energy Market Operator (AEMO) is the independent market and system operator for the NEM. It has the primary (but not sole) responsibility for maintaining power system security.
3. The AER is established by s 44AE of the CC Act. It has the functions conferred by s 15 of the *National Electricity Law* (the NEL) contained in the Schedule to the *National Electricity (South Australia) Act 1996* (SA) (the NE (SA) Act). Those functions include the monitoring of compliance by registered participants with the NEL, the regulations made under the NE(SA) Act and the NER, as well as the institution and conduct of proceedings against persons under s 44AAG of the CC Act.
4. ElectraNet is the “Network Service Provider” of the transmission network within South Australia. The electricity generated by the Clements Gap Wind Farm is supplied, via ElectraNet’s transmission network, to the NEM.
5. Rules, known as the NER, have been made under the NE (SA) Act – see Pt 7 of the NEL. They have the force of law in South Australia – see s 9 of the NE (SA) Act. It was Version 82 of the NER which was in force during the Relevant Period. Some of the Rules in the NER have their own Schedules, the clauses in which have the prefix “S”. There have been changes to the NER since Version 82, but in these reasons I will refer to the content of Version 82 in the present tense.
6. Pacific Hydro operated the Clements Gap Wind Farm throughout the Relevant Period. It is a “registered participant” in the NEM.
7. During the Relevant Period, the Clements Gap Wind Farm comprised 27 Suzlon S88 wind turbine generating units, each with a name plate generating capacity of 2.1 MW, together with associated electrical equipment. The Clements Gap Wind Farm is, and was during the Relevant Period, connected to the power system at the Redhill substation at the connection of the Bungama‑Redhill and Redhill‑Brinkworth 132 kV transmission lines. Suzlon Energy Australia Pty Ltd (Suzlon) designed, supplied and installed the wind turbines at the Clements Gap Wind Farm.
8. The ability of wind farm turbines to continue operating (“to ride through”) periods of voltage fluctuations (within particular depths and of particular durations) is an important requirement for their connection to the power system in the NEM. That feature reduces the ability of voltage disturbances arising from faults and other occurrences to cause cascading failures in the system and is accordingly important to the ability of AEMO to maintain “power system security” and, in particular, to avoid blackouts.
9. For this reason, each wind turbine at the Clements Gap Wind Farm has “low voltage ride‑through capability” (LVRT Capability). The LVRT Capability is a control system which, at the Clements Gap Wind Farm, is activated when the voltage at the generating unit terminals dips below 80% of the normal voltage level. This Capability enables a wind turbine to ride through transient voltage dips of specified depths for specified durations.
10. Each wind turbine at the Clements Gap Wind Farm includes a number of protection systems, including a “repeat low voltage ride‑through protection system” (the Repeat LVRT Protection System). During the Relevant Period, the Repeat LVRT Protection Systems were set to be triggered if the LVRT Capability was activated three times within a 120 second period.
11. The purpose of the Repeat LVRT Protection Systems is to avoid the potential for damage to, and failure of, the generating units and plant at the Clements Gap Wind Farm which could be caused by multiple voltage disturbances in a short period of time on the external network. Unexpected failure of the Clements Gap generating units could, in turn, potentially jeopardise power system security.
12. When the Repeat LVRT Protection System is triggered, it causes the rotational speed of the wind turbine to slow and the wind turbine to cease generating active power.
13. In that way, during the Relevant Period the Repeat LVRT Protection System prevented the generating unit’s LVRT Capability from operating in the event that the voltage on any of the three phases at the generating unit terminal fell below 80% of nominal voltage three times within a 120 second period.
14. In the Relevant Period, none of the settings in the Repeat LVRT Protection Systems on the generating units had been approved by ElectraNet or by AEMO. By operating the turbines with the non‑approved settings, and supplying the electricity which they generated, to the national grid Pacific Hydro contravened r 4.4.3 and cl S5.2.2 of the NER. Its contravention continued throughout the Relevant Period. It is this contravention which the parties have agreed should be the subject of the declaration and the other proposed orders.
15. AER no longer presses the balance of the allegations contained in its Amended Concise Statement, including allegations that:
16. by ceasing to supply active power as a result of the activation of the Repeat LVRT Protection Systems, the generating units did not meet or exceed, and were not operated to comply with, the NER or relevant performance standards; and
17. the activation of the Repeat LVRT Protection Systems which caused the generating units to cease generating active power was a contributing cause of the widespread electricity blackout which occurred in South Australia on 28 September 2016.

## Connection to the National Grid

1. NER 5.1.3(a) provides that all registered participants should have the opportunity to form a connection to a network and have access to the network services provided by the networks forming part of the national grid. However, the NER contain detailed prescriptions concerning the manner in which a Generator of electricity may connect, and supply electricity, to the national grid.
2. In order to make such a connection, a Generator of electricity must enter into a connection agreement with the relevant Network Service Provider, (NER 5.3.7(a)). Connection agreements must include performance standards with respect to each of the technical requirements identified in Schs 5.2, 5.3 and 5.3a and each performance standard must have been established in accordance with the relevant technical requirement (NER 5.3.7(b)).
3. The evident purpose of these provisions in the NER is to have the standards of performance in connection agreements established at levels at or above the minimum access standards set out in Schs 5.1, 5.2, 5.3 and 5.3a, with the object of ensuring that the power system operates securely and reliably and in accordance with the system standards set out in Sch 5.1a.
4. Each performance standard required by a connection agreement will be either “an automatic access standard”, as specified in the provisions of Sch 5.2, or “a negotiated access standard”. The latter must be no less onerous than the minimum access standard specified in the relevant provision of Sch 5.2 and must be at a level which will not affect adversely power system security (NER 5.1.3(c)‑(d)).
5. When an intending Generator submits an application to the relevant Network Service Provider to connect to the national grid, it must provide a proposal for a “negotiated access standard” for any technical requirements which will not be met by the “automatic access standards” (NER 5.3.4(e)). If a proposed negotiated access standard relates to a technical requirement which is designated as an “AEMO advisory matter”, the Network Service Provider must consult with AEMO in relation to that proposed standard (NER 5.3.4A(a), (c)). NER 5.3.4A(f) obliges Network Service Providers to reject a proposed “negotiated access standard” if it would:
6. on AEMO’s reasonable advice, adversely affect power system security; or
7. in AEMO’s or the Service Provider’s reasonable opinion:
	1. be lower than the minimum access standard for a technical requirement which is an AEMO advisory matter; or
	2. not meet the requirements applicable to a negotiated access standard in cl S5.2.5.
8. Each automatic access standard and each negotiated access standard in a connection agreement is taken to be the performance standard applicable to the connected plant for the relevant technical requirement (NER 5.3.4A(i)).
9. As already noted, AEMO has the primary responsibility for maintaining power system security. That responsibility requires AEMO to ensure that the power system is operated within the limits of the “technical envelope” (NER 4.3.1(f)) and to ensure that all plant and equipment under its control or co‑ordination is operated within the appropriate operational or emergency limits which are advised to AEMO by the respective Network Service Providers or registered participants (NER 4.3.1(g)).
10. The term “technical envelope” is defined in NER 4.2.5 to mean “the technical boundary limits of the power system for achieving and maintaining the secure operating state of the power system for a given demand and power system scenario”.
11. AEMO is to be informed promptly after the execution of a connection agreement and must be provided with all the relevant technical details of the proposed plant and connection, including details of all performance standards forming part of the terms and conditions of the connection agreement (NER 5.3.7(g)).
12. Once the performance standards have been established, a Generator must ensure that its facilities are planned, designed and operated to comply with the applicable performance standards (NER 4.15(a)(1) and cl S5.2.5.1(c)(1)).
13. NER 4.15(f) requires registered participants owning, controlling or operating a plant to which a performance standard applies to notify AEMO immediately if it becomes aware that the plant is breaching a performance standard applicable to it or if the registered participant reasonably believes that the plant is likely to breach a performance standard applicable to it.
14. The importance of compliance with these obligations is indicated by the fact that AEMO is required to assume, when determining the secure operating limits of the power system, that the applicable performance standards are being met, unless a registered participant has informed it that the performance standard is not being met or it otherwise becomes aware that that is the case (NER 4.2.5(d)).

## Low voltage protection

1. NER 4.4.3 imposes an obligation on Generators of electricity to have protective systems in place to deal with episodes of abnormal voltage in the power system. Their purpose is to ensure that the generating units remain in continuous operation during specified disturbances and thereby to assist AEMO in maintaining power system security. NER 4.4.3 provides:

Generators must, in accordance with Schedule 5.2 and Chapter 5, provide any necessary automatically initiated protective device or systems to protect their plant and associated facilities against abnormal voltage and extreme frequency excursions of the power system.

1. Schedule 5.2 of the NER contains the requirements and conditions to which NER 4.4.3 refers. These requirements include:

S5.2.1

…

(d) the equipment associated with each generating system must be designed to withstand without damage the range of operating conditions which may arise consistent with the system standards.

(e) Generators must comply with the performance standards and any attached terms or conditions of agreement agreed with the Network Service Provider or AEMO in accordance with a relevant provision of Schedules 5.1a or 5.1.

1. Clause S5.2.2 commences with the following condition concerning the application of settings in protection systems:

A generator must only apply settings to a control system or a protection system that are necessary to comply with performance requirements of this Schedule 5.2 **if the settings have been approved** in writing by the relevant Network Service Provider and, if the requirement is one that would involve AEMO under clause 5.3.4A(c) of the Rules, also by AEMO. **A generator must not allow its generating unit to supply electricity to the power system without such prior approval**.

…

(Emphasis added)

1. The Schedules to Ch 5 of the NER contain a number of technical requirements concerning the ability of generating units to “ride through” sudden episodes of reduced voltage in the transmission network. These include:
2. clause S5.2.5.4(c) specifies that a negotiated access standard be as close as practicable to the automatic access standard while respecting the need to protect the plant from damage, have no material adverse impact on power system security and that the generating system be capable of continuous uninterrupted operation for under voltage disturbances;
3. clause S5.2.5.5(c) requires that the generating system and each of its generating units remain in continuous uninterrupted operation for a disturbance caused by a network fault (cleared within specified maximum fault clearance times); and
4. clause S5.2.5.8 requires that, if the generating system or any of its generating units are to be disconnected automatically from the power system in response to abnormal conditions arising from the power system, the protection system in place will not disconnect the generating system for conditions for which it must remain in continuous uninterrupted operation, or which it must withstand under the NER.
5. Each of these technical requirements is an “AEMO advisory matter”, within the meaning of NER 5.3.4A(a), to which reference was made earlier.
6. Pacific Hydro and ElectraNet, in consultation with AEMO, negotiated performance standards for the Clements Gap Wind Farm.
7. In relation to cl S5.2.5.4, the negotiated performance standard required that the generating system, and each of its generating units, be capable of continuous uninterrupted operation within the following ranges of voltages at the connection point:

(i) voltages over 110% for the durations shown in a chart in the Clements Gap performance standard (the higher the voltage, the shorter the period);

(ii) 90% to 110% of normal voltage, continuously;

(iii) 80% to 90% of normal voltage, for a period of at least 2.5 seconds; and

(iv) 70% to 80% of normal voltage, for a period of at least 2 seconds.

1. In relation to cl S5.2.5.5, the negotiated performance standard required each of Pacific Hydro’s generating units to remain in continuous uninterrupted operation for disturbances caused by specified events, as well as other actions which it is not necessary to mention for present purposes.

## Pacific Hydro’s contravention

1. As a Generator of electricity supplied to the national grid, Pacific Hydro was obliged to ensure that:
2. its plant and equipment met the performance standards in the NER and complied with its technical requirements, (NER 4.15(a)(1));
3. it operated the Clements Gap Wind Farm in accordance with the performance standards contained in its connection agreement;
4. the wind turbines did not shut down in response to abnormal conditions arising from the power system in those conditions in which it was required to remain in continuous uninterrupted operation, or in conditions which it was required under the NER to withstand (cl S5.2.5.8(a)(1)); and
5. it had protection and voltage control systems which would ensure that it met the agreed performance standards even under abnormal network conditions (cl S5.2.5.5).
6. The effect of NER 4.4.3 was that Pacific Hydro had to provide a protective device or system of the specified kind and had to do so in accordance with Sch 5.2 and Ch 5.
7. The NER and the applicable performance standards did not contain an explicit threshold for the number of disturbances which the Clements Gap Wind Farm would be required to ride through. However, cl S5.2.2 had the effect that Pacific Hydro was only permitted to apply settings to a control or protection system that were necessary to comply with the performance requirements of Sch 5.2 and, further, only if those settings had been approved in writing by ElectraNet and by AEMO. That is to say, if there were to be settings applied to the Repeat LVRT Protection Systems which limited the generating units’ ability to ride through a number of low-voltage disturbances in a specified period of time, cl S5.2.2 required Pacific Hydro to obtain approval in writing for the application of those settings. Clause S5.2.2 also precluded Pacific Hydro from supplying electricity generated by the Clements Gap Wind Farm to the power system if the protection system settings had not been approved by ElectraNet and AEMO.
8. As noted at the commencement of these reasons, the turbines at the Clements Gap Wind Farm did have LVRT Capability. However, the settings of the Repeat LVRT Protection Systems fixed the maximum number of low‑voltage disturbances that the LVRT Capability would enable the generating units to ride through within a specified time interval before the turbine blades slowed and the turbines ceased generating active power. In particular, they prevented the LVRT Capability from operating in the event that it was activated six times within a 120 second period. This was so despite the agreed performance standards not containing any reference to the Repeat LVRT Protection Systems or to their settings. More particularly, the settings in the Repeat LVRT Protection Systems during the Relevant Period had not been approved by ElectraNet or by AEMO, as required by cl S5.2.2.
9. This was a contravention of NER 4.4.3 which meant that Pacific Hydro failed to provide automatically initiated protective systems to protect its plant and associated facilities against abnormal voltage excursions of the power system in accordance with Sch 5.2 and Ch 5. Pacific Hydro supplied the electricity generated by the Clements Gap Wind Farm to the power system despite not having the requisite approval. This non‑compliance occurred throughout the relevant period.
10. On 28 September 2016, five transmission line faults occurred on the power system, resulting in six under voltage disturbances within a period of approximately 90 seconds. The Repeat LVRT Protection Systems for the Clements Gap generating units did not detect the first under voltage disturbance, but did detect the second, third and fourth. In response to the fourth, the Repeat LVRT Protection Systems on the seven Clements Gap Wind Farm generating units then in operation (the remaining 20 generating units not being in operation at that time) were triggered. Those seven generating units ceased supplying active power to the power system. Shortly afterwards, the widespread electricity blackout which occurred in South Australia on 28 September 2016 commenced. As previously noted, the AER has not pressed its pleaded allegation that the activation of the Repeat LVRT Protection Systems at the Clements Gap Wind Farm was a contributing cause of that blackout.

## The proposed declaration

1. In addition to s 21 of the *Federal Court of Australia Act 1976* (Cth), s 44AAG(1) of the CC Act specifically authorises the Court to issue a declaration that a person has breached a “uniform energy law that is applied as a law of the Commonwealth”. By s 4(1) of the CC Act, the provisions of the NEL, including the Rules, are “uniform energy laws”.
2. The parties propose a declaration in the following terms:

The Respondent contravened NER 4.4.3 and cl S5.2.2 of the [NER] between 6 August 2013 and 3 October 2016 by operating the generating units of the Clements Gap Wind Farm and allowing those generating units to supply electricity to the power system when the settings for the repeat low voltage ride‑through protection system applied to them had not been approved in writing by the Network Service Provider or by [the AEMO].

1. Although the parties have reached agreement on the terms of the proposed declaration, it is for the Court to determine whether it is appropriate for it to be made: *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18; (1999) 161 ALR 79 at [17]. It is established that the Court should be satisfied of three matters before issuing a declaration by consent: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437‑8:
2. the question must be a real and not hypothetical or theoretical;
3. the applicant must have a real interest in raising it; and
4. there must be a proper contradictor.
5. Each of those matters is established in the present case. The proceedings have been brought by the relevant regulator; there is a contradictor; and the subject matter of the litigation involves a matter of public importance.
6. In *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1 at [67]‑[68], Gordon J said that the matters bearing upon the exercise of the discretion to grant or refuse a declaration include consideration of whether the declaration would have any utility, whether the proceedings involve a matter of public interest, whether the circumstances call for the Court’s disapproval of the contravening conduct; and whether the declaration contains appropriate and adequate particulars of how and why the conduct in question is a contravention of the relevant legislation. Those considerations are pertinent in this case.
7. The declaration proposed by the parties is expressed appropriately; will serve as formal record of the contravention found established by the Court; and will accordingly form part of the community’s censure of the conduct. Further, the declaration may serve an educative purpose in indicating to others involved in the generation of electricity how and why the contravention occurred.
8. Accordingly, I am satisfied that it is appropriate for the Court to issue the declaration in the terms upon which the parties have agreed.

## The proposed penalty

1. By s 44AAG(2)(a) of the CC Act, the Court may impose a civil penalty on a person who is declared to be in breach of a civil penalty provision of a uniform energy law or a State/Territory energy law.
2. Section 2AA(1)(c) of the NEL specifies that a civil penalty provision is a provision of the NER prescribed by the *National Electricity (South Australia) Regulations* (the Regulations) to be a civil penalty provision. Regulation 6(1) of the Regulations provides that, for the purposes of s 2AA(1)(c), a provision of the NER listed in Schedule 1 of the Regulations is a civil penalty provision. Schedule 1 lists NER 4.4.3 as a civil penalty provision.
3. By s 2 of the NEL, the maximum penalty applicable throughout the whole of the relevant period for a contravention of NER 4.4.3 was an amount not exceeding $100,000 in addition to an amount not exceeding $10,000 for each day that the contravention continued. This means that the maximum penalty which may be imposed for Pacific Hydro’s continuing contravention of NER 4.4.3 in the period from 6 August 2013 to 3 October 2016 is $11,650,000 (being $100,000 plus $10,000 for each of the 1,155 days during which the contravention continued).
4. The parties have agreed that a civil penalty of $1,100,000 is appropriate for Pacific Hydro’s contravention.
5. The Court may act on the parties’ agreement in determining an appropriate civil penalty: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*Cth v FWBII*). In that case, the plurality said:

[46] [T]here is an important public policy involved in promoting predictability of outcome in civil penalty proceedings and … the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers…

1. Later, the plurality said:

[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 … highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty. To do so is no different in principle or practice from approving an infant's compromise, a custody or property compromise, a group proceeding settlement or a scheme of arrangement.

(Emphasis in the original and citation omitted)

1. However, as was noted by the Full Court (Wigney, Beach and O’Bryan JJ) in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 at [126], the public interest in predictability of outcomes cannot override the statutory directive for the Court to impose a penalty which it considers to be appropriate.
2. A number of matters of principle bearing upon the fixation of an appropriate civil penalty are settled. The principal (and perhaps only) object of the imposition of a civil penalty is to achieve deterrence, both general and specific: *Cth v FWBII* at [55]. Thus it has been said that a civil penalty should put a price on contraventions which is sufficiently high to deter repetition by the contravenor and by others who may be tempted to contravene the Act in a similar way: *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41‑076 at 52,152 in a passage approved in *Cth v FWBII* at [55]. A civil penalty should not be so high as to be oppressive, but should be such as to deter participants in the relevant industry “from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contraventions”: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commissioner* [2012] FCAFC 20: (2012) 287 ALR 249 at [63].
3. Section 64 of the NEL requires the Court when fixing a civil penalty to have 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 [the NEL], 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. As is apparent, the listed matters are not an exhaustive statement of the matters which may be relevant. Matters which may, depending on the circumstances of the given case, be relevant include those discussed by French J in *CSR* at 52,152‑3. In addition to those to which s 64 directs attention, these include the size and resources of the contravenor; the degree of power of the contravenor; the deliberateness of the conduct; the length of time over which the conduct occurred; the degree of involvement of senior management; the culture of the organisation as to compliance or contravention; any cooperation; and any evidence of contrition – see *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non‑Indemnification Personal Payment Case)* [2018] FCAFC 97; (2018) 264 FCR 155 at [20].
2. It is also established that the Court is to determine an appropriate penalty by a process of instinctive synthesis after taking into account all relevant factors, similar to the manner discussed in *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [37], [39] – see *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 299 IR 404 at [90], [112].
3. The nature and circumstances of Pacific Hydro’s contravention have been set out above and need not be repeated.
4. As previously noted, Suzlon (an international wind turbine supplier) had designed, supplied and installed the Clements Gap Wind Farm. Pacific Hydro was not aware until after 28 September 2016 that Repeat LVRT Protection Systems had been applied on the wind turbines and, accordingly, that non‑approved settings had been applied. The circumstance that its contravention was not intentional or reckless is an important matter of context bearing upon the fixation of penalty.
5. The blackout on 28 September 2016 caused a review of the situation. On 3 October 2016, Pacific Hydro informed AEMO that:
6. Suzlon had indicated that it was possible to raise the settings on the Repeat LVRT Protection Systems so that the Systems would be triggered only if the LVRT Capability was activated *more than* three times within a 120 second period; and
7. it had requested Suzlon to modify the settings so that the Repeat LVRT Protection Systems on the generating units would be triggered if the LVRT Capability was activated between 15 and 20 times in a 120 second period.
8. On or about 4 October 2016, Suzlon did raise the Repeat LVRT Protection System settings on each of the Clements Gap Wind Farm generating units so that the Systems would activate only if the LVRT Capability was activated 15, 17 or 20 times (the settings varied across the generating units) within a 120 second period.
9. I infer that this was done with the approval of AEMO. It can therefore be concluded that Pacific Hydro’s contravention was not only not deliberate, but it took prompt action to rectify the position once it became aware of the situation.
10. Pacific Hydro’s contravention must be characterised as serious. When negotiating its performance standards, Pacific Hydro did not identify to either ElectraNet or AEMO that the LVRT Capability on the turbines was subject to the settings in the Repeat LVRT Protection Systems, or that the turbines would shut down in the event that the voltage of any of the three phases at the generating units’ terminals fell below 80% of nominal voltage three times within a 120 second period. Moreover, for the period of just on three years and two months which ensued after 6 August 2013, Pacific Hydro did not notify either ElectraNet or AEMO of this circumstance. Further, during the Relevant Period, Pacific Hydro did not make any assessment of the wind turbines which may have led to the presence of the Repeat LVRT Protection Systems installed by Suzlon being identified.
11. The seriousness of Pacific Hydro’s contravention in applying non‑approved settings is underlined by its potential consequences. As noted earlier in these reasons, AEMO’s ability to achieve and maintain security in the power system depended, amongst other things, on Generators such as Pacific Hydro providing, both at the time of the connection and subsequently, accurate and complete information concerning their ability to operate in accordance with the agreed performance standards. The rigorous regime summarised earlier and in particular cl S5.2.2, is directed, amongst other things, to the achievement and maintenance of power system security, this being an important public purpose. Pacific Hydro’s use of non‑approved settings in the present case compromised AEMO’s ability to discharge its responsibility because it meant that it was making important decisions concerning the secure operating limits of the power system on the basis of incomplete information. As the events of 28 September 2016 indicate, a compromise of the security of the power system can have extensive and serious consequences.
12. It is, however, appropriate to note the absence of some aggravating features as well as matters which mitigate the seriousness of the contravention. Apart from the fact that Pacific Hydro’s contravention was not deliberate, it has not previously been found by a court to be in breach of a provision in the NEL or in the NER; it had during the Relevant Period sought to ensure that it complied with its obligations under the NEL by implementing its own compliance program, as required by NER 4.15(b); and it did not obtain any financial benefit by reason of its contravention. The AER does not allege that the involvement of Pacific Hydro’s senior management made the contravention more serious.
13. Pacific Hydro is part of a substantial corporate group. It is a wholly owned subsidiary of Pacific Hydro Pty Ltd (PHPL) which is, and was during the Relevant Period, the holding company for the Pacific Hydro corporate group’s operations in Australia. PHPL was also the relevant reporting entity for revenue and profit during the Relevant Period. PHPL reported total revenue and profit after tax for the period 2013 to 2016 as follows:

|  |  |  |
| --- | --- | --- |
| **Period** | **$Total Revenue** | **$Profit/loss after tax** |
| 12 months ending 30 June 2014 | 205.576 million | 12.011 million |
| 6 months ending 31 December 2014 | 104.236 million | 56.897 million |
| 12 months ending 31 December 2015 | 247.457 million | 19.910 million |
| 12 months ending 31 December 2016 | 256.548 million | 34.525 million |

1. The AER accepts that it is appropriate for there to be some reduction in the penalty which would otherwise be imposed on Pacific Hydro by reason of its cooperation in the proceedings and acknowledgement of its contravention. However, Pacific Hydro did not initiate settlement negotiations with the AER until after the AER had resolved the *Snowtown Stage 2* proceeding and until after the AER had filed its lay evidence. Further, Pacific Hydro did not act with the same promptness as did HWF1 in seeking the resolution of the proceedings. Nevertheless, it is pertinent that Pacific Hydro did reach the agreement with AER while the proceedings commenced by AER against a fourth wind farm operator remain “live” and did so before AER had filed its expert evidence. Its willingness to do so has had substantial utilitarian value in saving work and the incurring of expense by the AER and in saving the use of the Court’s resources. As indicated, a reduction in penalty on this account is appropriate.
2. In their joint submissions, the parties referred to four authorities in which penalties have been imposed under the NER, or under their predecessor, the *National Electricity Code*:
3. in *National Electricity Code Administrator v NRG Flinders Operating Services Pty Ltd* No 1 of 2005, the National Electricity Tribunal imposed, in accordance with the parties’ agreement, the maximum pecuniary penalty of $300,000 for three contraventions by a Generator of its obligation to comply with its performance standards relating to voltage disturbance ride‑through, of which $150,000 was suspended for a period of 12 months;
4. in *National Electricity Code Administrator v Pelican Power Point Ltd* No 2 of 2005, the National Electricity Tribunal on 8 September 2005 imposed, in accordance with the parties’ agreement, the maximum pecuniary penalty of $100,000 for a single contravention by a Generator of its obligation to comply with its performance standards relating to frequency disturbance ride‑through, of which $80,000 was suspended for a period of 12 months;
5. in *Australian Energy Regulator v Snowy Hydro Ltd (No 2)* [2015] FCA 58, Beach J imposed, in accordance with the parties’ agreement, total pecuniary penalties of $400,000 (out of a potential maximum of $900,000) for nine contraventions committed by a Generator in failing to comply with dispatch instructions given by AEMO as to the required level of generation output; and
6. in *Snowtown Stage 2*, the Court imposed, in accordance with the parties’ agreement, a pecuniary penalty of $1 million (out of an available maximum of $11,360,000) for a contravention of NER 4.4.3 which had continued for a period of approximately three years.
7. To this list can now be added the penalty of $550,000 imposed on HWF1 in *AER v HWF1*.
8. The parties accepted that, in accordance with the parity principle, it is appropriate for the Court to have regard to the penalties imposed in *Snowtown Stage 2* and *AER v HWF1*, as those cases concerned contraventions of the same kind as that of Pacific Hydro and in circumstances which were very similar. In *Snowtown Stage 2*, the contravention had continued for 1,126 days whereas in the present case, it continued for 1,155 days. It can be said that the contravention at the Clements Gap Wind Farm involved fewer wind turbines than was the case in *Snowtown Stage 2*. On the other hand, the respondent in *Snowtown Stage 2* was entitled to a larger reduction in the penalty otherwise appropriate because of its early action in acknowledging its contravention and in negotiating the resolution with the AER.
9. In summary, I am satisfied that the Court should view Pacific Hydro’s contravention seriously. The contravention continued for a very long period and had the potential to result in drastic consequences, even if those consequences were not in fact realised on 28 September 2016.
10. Nevertheless, there are matters of mitigation which are appropriate to be taken into account. I attach particular significance to Pacific Hydro’s acknowledgment of its contravention and its willingness to negotiate a resolution with the AER.
11. Taking all these matters into account in the manner contemplated by the authorities, I consider that the agreed penalty of $1.1 million is *an* appropriate penalty and that it is appropriate for the Court to give effect to the parties’ agreement that it is the penalty which should be imposed.

## Compliance program

1. The Court may make an order requiring implementation of a compliance program if there has been a breach of the NER (s 44AAG(2)(d)).
2. The compliance program on which the parties have agreed will require Pacific Hydro to engage a suitably independent and qualified compliance professional to review its compliance program under NER 14.15(b), with a view to identifying any aspect of the compliance program which does not conform, or which may be at risk of not conforming, with the requirements of NER 4.15(c). The expert will provide a report which will then be reviewed by the AER.
3. An order to this effect is appropriate because it will enhance the compliance by Pacific Hydro with the performance standards applicable to it and assist in avoiding further contraventions.

## Costs

1. Pacific Hydro has agreed to pay the AER’s costs in the sum of $200,000. It is appropriate in the circumstances that Pacific Hydro do pay the AER’s costs and there is no reason to doubt that the figure upon which the parties have agreed is appropriate. There will be an order to that effect.

## Conclusion

1. In summary, for the reasons given above, there will be orders in the terms proposed by the parties.

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| I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice White. |

Associate:

Dated: 1 July 2021