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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

Utilities Legislation Amendment Bill 2017

EXPLANATORY STATEMENT

**Presented by
Shane Rattenbury MLA
Minister for Climate Change and Sustainability**

EXPLANATORY STATEMENT

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

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

Background

The *Utilities Act 2000* (Utilities Act) and *Utilities (Technical Regulation) Act 2014* (UTR Act) regulate the distribution and supply of utility services in the ACT, including electricity, gas and water. The Utilities Act is aimed at the regulation of energy utility services through a licensing regime, while the UTR Act was introduced in 2014 to regulate the technical and infrastructure aspects of licensed utility service provision and unlicensed utility service provision through an operating certificate regime.

The Utilities Act and the UTR Act are drafted in such a way that they have broad application and capture most utility services under the regulatory schemes in each Act. This has led to a level of regulation that is not commensurate with the risk ratings of some small-scale utility services.

In a number of instances, the interaction of the Utilities Act, the UTR Act and the *Electricity Safety Act 1971* produces unnecessary regulatory duplication and imposes regulatory barriers that deter new and innovative utility services and small-scale utility services from being established.

As a result of developments in the utilities sector there are now technologies and service delivery models that did not exist when the utilities legislation was enacted. There are ongoing advancements in the renewables sector as well as other innovations. This includes the national *Power of Choice* reforms, which establish contestability for electricity metering services and are driving changes across a range of other areas of utility service provision. An example is embedded networks, which are discussed in more detail below.

To facilitate these developments it is important that there is not inappropriate or unnecessary regulation acting as a barrier to innovation. Utilities regulation must remain sufficiently flexible to accommodate developments in the sector, while ensuring that regulation is targeted towards ensuring safe, reliable and efficient delivery of utility services.

Overview

Recent experience with both the Utilities Act and the UTR Act has shown that these Acts are not always appropriate for regulating some innovative service delivery models emerging within the utilities sector.

There are services that, despite falling within the broad definitions in the Acts, are of a scale and nature that make it unnecessary for them to be regulated by the schemes within the utilities legislation. These can be adequately regulated under other Territory or Commonwealth laws, or may not pose a significant risk to require a regulatory response. This means that some projects are less viable because there is a regulatory burden on them which is not commensurate with the risks of the project in the particular circumstances.

The Bill proposes to address this issue by inserting a provision into both the Utilities Act and the UTR Act that allows a regulation to be made excluding classes of utilities from falling under the regulatory framework of the particular Act. This will enable the regulatory effort to be better targeted towards those utility services that present a significant risk if they fail.

The Bill creates a power to make a regulation that exempts a utility service from the application of the respective Act. It is more appropriate to insert a power to exclude classes of services from the definition, rather than to change the definition so that certain classes are excluded, because this approach is more flexible into the future. The energy sector is rapidly changing and it is difficult to anticipate all possible future developments that will occur and for definitions to be sufficiently flexible to ensure that they are appropriately targeting the application of each Act.

It is likely that new innovations will emerge in the future that are not currently anticipated. If the definition of utility service is simply altered to exclude certain current service delivery models then it is likely that the same problem will reoccur in the future, with some utility services captured by the definitions but not warranting a regulatory response due to their risk ratings.

It is also considered preferable to insert a mechanism that will allow classes of services to be excluded based on their general characteristics, rather than for individual exemptions to be issued. This will ensure a consistent approach across the utility services sector and allow for exemption decision-making to be made on the basis of the type of service and not on individual projects.

It is also important that, while being flexible, this mechanism is subject to appropriate safeguards to ensure that it is only used in circumstances that will not undermine the effective regulation of utilities. The power inserted into each Act will be subject to a number of important conditions to ensure that it will not compromise the effective regulation of utility services in the territory.

To this end, before the Executive can make the regulation, the Minister is required to consult with the relevant regulator, the ICRC (in relation to the Utilities Act) or the Technical Regulator (in relation to the UTR Act) and have regard to a number of matters, as detailed below.

Before the Executive can make the regulation, the Minister must be reasonably satisfied that the class of utility service is either adequately regulated by another territory or Commonwealth law, or that regulation is not required, and, that exempting the class of utility service will not significantly impede the achievement of the objects of the Act.

When considering whether these circumstances apply, the Minister must have regard to the nature and kind of utility service, the level of risk of the utility service failing or the utility failing to provide the service in a safe, reliable and effective manner, and the consequences for consumers, public safety and the environment if a failure were to happen.

The matters to be considered by the Minister and the requirement to consult with the relevant regulator act as safeguards against any potential improper exercise of the exemption power.

These safeguards ensure that the power can only be exercised to remove unnecessary duplication imposed by the utilities regime and ensures that utility services attract the appropriate regulatory response. It is also a requirement that the exemption will not significantly impede the ICRC or the technical regulator achieving the objects of each Act. This ensures that any exemption must also be consistent with the overall regulatory framework.

These amendments have been designed to ensure that regulatory effort is targeted towards those utility services posing significant risks and warranting a regulatory response. Where a service is captured by the definition of utility service but does not pose a significant risk, it is considered that a lesser regulatory response can be implemented. In these circumstances, the application of the Utilities Act and the UTR Act will be removed, and it will be subject to the appropriate regulatory response.

Embedded Networks

The bill also provides a use of the regulation-making power in the first instance by including provisions to exempt 'embedded networks' from the regulatory schemes under the Utilities Act and the UTR Act.

An embedded electricity network is a distribution system involving multiple customers who are aggregated together through a single connection point to the electricity network. Embedded networks are most commonly implemented in apartment buildings, shopping centres, retirement villages and caravan parks.

The bill creates regulations under both the Utilities Act and the UTR Act so that embedded networks are an exempt class of utility service. These regulations are deemed to be made under the new powers inserted by the Bill.

An embedded network satisfies the criteria in the new regulation making provision because the retail component of an embedded network is appropriately regulated through the Utilities Act, (by operation of s 75B and 75C of the Utilities Act), and the infrastructure component is appropriately regulated by the Electricity Safety Act.

It is appropriate that embedded networks are exempted because they are installations that amount to little more than a meter box and some additional wiring. As such, they are more appropriately regulated under the Electricity Safety Act, even though they currently fall within the definition of utility service. As a result of this amendment those seeking to install embedded networks will not need to obtain an operating certificate under the UTR Act, or be licensed under the Utilities Act. Embedded networks will, however, be regulated under the Electricity Safety Act and national electricity laws.

The interests of consumers in an embedded network system are protected through the regulation of the person or company selling the electricity. Under national electricity laws, National Energy Retail Law (NERL) retailers or NERL exempt sellers (as defined in s 75 and 75A of the Utilities Act) must meet certain obligations and have a number of customer responsibilities. Further, under ACT legislation, NERL retailers or NERL exempt sellers are deemed to be utilities for certain sections of the Utilities Act. Section 75B and 75C of the Utilities Act state that the Act applies to NERL retailers or NERL exempt sellers as if they were utilities under the Act. Importantly, this means that basic customer rights and protections under Part 12 of the Utilities Act (Complaints to ACAT about utilities) apply. This provides a right for a customer to apply to ACAT to prevent substantial hardship that would be caused by withdrawing or denying the supply of electricity services.

Further to this, customers in embedded networks also have protections under national electricity laws. Specifically, the Australian Energy Market Commission (AEMC) has made a final rule determination that provides new rules for embedded networks at the national level. Part of this final rule determination is due to commence on 1 December 2017 and makes a number of changes to the National Electricity Rules, including:

- Setting out the detailed functions, responsibilities and governance arrangements for embedded network managers; and
- Specifying which embedded network operators are required to appoint an embedded network manager, which is an accredited provider role.

This new rule is part of the Power of Choice reform program and will reduce barriers to embedded network customers choosing the products, services and retail providers that best suit them. Further reviews are currently underway at the national level to determine whether the current national regulation of embedded networks is appropriate and fit for purpose.

Human Rights

The bill does not materially impact on human rights. The bill has a generally positive impact on rights and obligations as it is a deregulation initiative that reduces limitations on rights and liberties.

The bill interacts with the right to life in s 9 of the *Human Rights Act 2004* as the amendments allow for exemptions from regulatory regimes that are in place to protect the rights of consumers and public safety through the safe operation and delivery of utility services.

However, the provisions in the bill have been designed in such a way as to not undermine public safety, or deny basic consumer protections, thereby not infringing on the right to life.

Section 9 of the Human Rights Act sets out the right to life, particularly the right not to be arbitrarily deprived of life. The amendments in the bill have been designed to ensure the continued protection of public safety and consumer interests. The power to exempt a class of service from the regulatory requirements can only be exercised in the circumstance that it will not undermine the objects of the Acts, which are aimed at promoting public safety and consumer protections. In any circumstance where exempting a class of service will result in a significant increase in the risk to public safety or reduce customer protections, it will not satisfy the preconditions for the exemption to be made and will not be able to be exempted under this power.

Part 12 of the Utilities Act contains fundamental consumer protections against utilities withdrawing or failing to provide utility services where that would cause substantial hardship on the customer. The customer is given the right to apply to ACAT and ACAT can order the utility to maintain the provision of service to the customer. This is an important protection that positively contributes to the right to life in s 9 of the Human Rights Act.

Sections 75B and 75C of the Utilities Act deem NERL retailers and NERL exempt sellers to be utilities for the purposes of certain parts of the Utilities Act. Importantly, these sections ensure that NERL retailers and NERL exempt sellers are bound by the customer protections in Part 12 of the Utilities Act, with NERL retailers also being subject to the Consumer Protection Code provisions.

The embedded network exemption applies to the owner of the physical embedded network infrastructure and exempts it from the Act. The retail relationship between the customer and seller is unaffected by this exemption, and the seller is bound by the important protections in Part 12.

The provision of electricity is defined in the Human Rights Act as a function of a public nature (Section 40A (3)). Therefore, to the extent an embedded network operator is performing a function of a public nature for the Territory or a Public Authority; exempt utility services are also bound by the public authority obligations under the Human Rights Act.

Scrutiny of Bills Committee Principles

(a) unduly trespass on personal rights and liberties

The general exemption power inserted by the bill does not unduly trespass on personal rights and liberties. Rather, as a deregulation initiative, the power has a positive impact on personal rights and liberties by removing unnecessary regulation. The reduction of restrictions will lead to increased innovation and better customer outcomes as new service delivery models and utility infrastructure are developed that increase competition in the utilities sector. The safeguards that are built-in to the exemption provision, including consultation with the relevant regulator and consideration of the achievement of the objects of each Act, will ensure that rights and liberties cannot be infringed upon. For example, it is noted that the objects of ICRC under the Utilities Act include the protection of the interests of consumers. While it is acknowledged that an unfettered exemption power could have a negative impact on rights, such as consumer protections, the power in this bill is appropriately limited by safeguards to ensure that personal rights are maintained. In this way, the general exemption power is able to be used to remove unnecessary regulation when appropriate, but will not be able to be used to remove necessary regulation that is considered to be an inconvenience. The integrity of the utilities legislative framework is maintained, thereby continuing the protection of consumers and public safety.

The specific use of the regulation power for embedded networks satisfies the safeguards imposed on the general power and does not unduly trespass on personal rights and liberties. As discussed above in the human rights section, important customer rights are maintained through the application of the national electricity laws and the consumer protection code and Part 12 of the Utilities Act. This ensures that fundamental consumer protections still apply, despite the embedded network being exempt from the utilities regulatory framework. The right to life and public safety outcomes are also appropriately achieved through the application of the Electricity Safety Act to the electrical infrastructure of the embedded network.

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

The Bill does not insert administrative decision-making powers. While it is considered that rights, liberties and obligations are unlikely to be negatively impacted as outlined above, any potential impact will occur using a clearly defined legislative regulation making power. The regulation making power is subject to a number of safeguards to ensure that basis rights and liberties are not infringed upon and that the integrity of the utilities regulatory framework is maintained.

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

The Bill inserts a legislative regulation-making power that will have the effect of removing classes of utility services from the regulatory schemes in utilities legislation. This power is appropriately given to the Executive to exclude a small category of utility services from being captured by the schemes of each Act when a regulatory response for that particular class of utility services is not justified.

The decision-making power is clearly defined and subject to appropriate safeguards, that have been subject to Assembly scrutiny and approval. While the decision on whether to make an exemption regulation is not reviewable, it is appropriately given to the Executive to make the regulation and to determine the scope and application of the regulatory scheme in specified and limited circumstances. In passing these amendments, the Assembly has determined that this is an appropriate power for the Executive to hold.

The making of an exemption regulation has the effect of removing limitations on rights and liberties, and is unlikely to negatively impact on rights, liberties and obligations due to the safeguards built in to the provisions.

(d) inappropriately delegate legislative powers:

Allowing the scope of the Act to be altered by regulation is a delegation of legislative powers to the Executive. However, there is a sound reason for allowing this aspect of the legislation to be altered by regulation. Making changes by regulation is a quicker and easier process than amending Acts. This means the legislation will be more flexible and able to respond quicker to the rapidly changing utilities sector. This will allow utilities legislation to remain appropriately targeted and fit-for-purpose.

Additionally, the exemption regulation-making power can only be exercised in specified circumstances, after satisfying criteria outlined in the legislation. The safeguards built-in to the provisions include consulting with the relevant regulator, the ICRC (for the Utilities Act) or the technical regulator (for the UTR Act), having the Minister required to be satisfied that the exemption will not compromise the achievement of the objects of the Act, and assessing whether the utility service is appropriately regulated by other legislation, or the risk if the service fails is low enough that a regulatory response under the utilities legislation is not considered necessary.

The fact that it is not an absolute power to determine the application of the Acts, but is a power to exempt classes of utilities that meet defined criteria, makes the delegation of powers appropriate.

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

The Bill enables a legislative function to be exercised by the Executive. For this reason, the power also contains a mechanism to ensure that it is only exercised in circumstances that the Assembly has deemed to be appropriate, and is subject to safeguards approved by the Assembly.

The power is conditional and can only be exercised if criteria approved by the Assembly are met. In this way, the Assembly has determined the appropriate parameters in which the power may be exercised and has required the Minister to be satisfied of a number of legislative criteria before the Executive can make an exemption regulation. The drafting of the provisions strikes an appropriate balance between providing appropriate limitations on the exercise of the power and allowing flexibility to consider the changing circumstances in the utilities sector.

Outline of Provisions

Part 1 Preliminary

Clause 1 Name of Act

This clause names the Act as the *Utilities Legislation Amendment Act 2017*.

Clause 2 Commencement

This clause provides that the Act, other than sections 5 and 6 and part 4, commences on the day after its notification day.

This section also provides that sections 5, 6 and part 4 commence on 1 December 2017. These provisions commence on this day to align with the commencement of changes to the national electricity rules, as approved in an AEMC final rule determination on embedded networks (outlined in further detail above).

Clause 3 Legislation Amended

This clause states that the amending Act amends the *Utilities Act 2000*, the *Utilities (Technical Regulation) Act 2014* and the *Utilities (Technical Regulation) Regulation 2017*.

Part 2 Utilities Act 2000

Clause 4 New section 15A

This clause inserts new section 15A into the Utilities Act. This clause contains a power for the Executive to make a regulation exempting a class of utility services from the Act.

Before the Executive can make the regulation the Minister must first consult with the ICRC, and then be reasonably satisfied that the class of regulated utility service is adequately regulated under another law applying in the ACT (i.e. a Territory or Commonwealth law), or is not required to be regulated. The Minister must also be satisfied that exempting the class of utility service will not significantly impede the ICRC achieving its objects under section 6 of the Utilities Act.

When considering whether these circumstances are met, the Minister must have regard to a number of matters set out in subsection (2). These matters are the nature and kind of the regulated utility service; level of risk of the regulated utility service failing, or failing to provide the service in a safe, reliable and effective way; and the consequences for consumers, public safety and the environment if such as failure occurred.

Clause 5 New section 262

This clause inserts a new section 262 into the Utilities Act. This section is the mechanism through which a new regulation under the Act is created. It gives effect to the regulation which is inserted by clause 6 below. This enables a regulation to be made by an Act and still function as a normal regulation. This section provides that schedule 2 (inserted by clause 6) is taken to be a regulation made under the Act.

The regulation can be treated as if it were a normal Regulation made through the regular process. The section is self repealing and provides for the expiry of the schedule. It will not appear in the Utilities Act after the amendment is made, but will exist as an ongoing and separate regulation under the Act.

Clause 6 New schedule 2

This clause inserts a new schedule 2 into the Utilities Act. The new schedule 2 is the Utilities (General) Regulation 2017. Schedule 2 is a regulation prescribing an embedded network as an exempt class of utility service, using the regulation-making power under section 15A of the Act, as inserted by clause 4 above.

The Regulation contains the following clauses:

Clause 1 Name of regulation

This clause names the regulation as the *Utilities (General) Regulation 2017*.

Clause 2 Notes

This clause is an information provision and provides that a note include in this regulation is explanatory and is not part of this regulation.

Clause 3 Exempt class of utility service—Act, s 15A

This clause provides that an embedded network is an exempt class of utility service.

The term embedded network is defined within the provision as meaning an embedded network under the national electricity rules, chapter 10 (Glossary). This definition is used to ensure consistency in the regulation of embedded networks at the national level and within the ACT.

An embedded network satisfies the criteria in the new regulation making provision because the retail component of an embedded network is appropriately regulated through the Utilities Act, s 75B and 75C, and the infrastructure component is appropriately regulated by the *Electricity Safety Act 1971*.

In addition, the making of this regulation will not compromise the effective regulation of embedded networks as the national electricity laws also apply to embedded network owners, with increased obligations commencing from 1 December 2017 as outlined above.

The risk of an embedded network failing is low, given it has to comply with the requirements of the Electricity Safety Act, such as AS/NZS 3000 and the consequences of the failure will not leave customers worse off than if consumer mains failed in a standard apartment building. Further, customers are protected in a number of ways as outlined above.

Part 3 Utilities (Technical Regulation) Act 2014

Clause 7 New section 10A

This clause inserts new section 10A into the Utilities (Technical Regulation) Act. This clause contains a power for the Executive to make a regulation exempting a class of utility services from the Act.

Before the Executive can make the regulation, the Minister must first consult with the technical regulator, and then be reasonably satisfied that the class of regulated utility service is adequately regulated under another law applying in the ACT (i.e. a Territory or Commonwealth law), or is not required to be regulated. The Minister must also be satisfied that exempting the class of utility service will not significantly impede the objects under section 6 of the UTR Act being achieved.

When considering whether these circumstances are met, the Minister must have regard to a number of matters set out in subsection (2). These matters are the nature and kind of the regulated utility service; level of risk of the regulated utility service failing, or failing to provide the service in a safe, reliable and effective way; and the consequences for consumers, public safety and the environment if such as failure occurred.

Part 4 Utilities (Technical Regulation) Regulation 2017

Clause 8 New section 2A

This clause inserts a new section 2A into the Utilities (Technical Regulation) Regulation. This clause provides that an embedded network is an exempt class of utility service.

The term embedded network is defined within the provision as meaning an embedded network under the national electricity rules, chapter 10 (Glossary). This definition is used to ensure consistency in the regulation of embedded networks at the national level and within the ACT.

An embedded network satisfies the criteria in the new regulation making provision because the retail component of an embedded network is appropriately regulated through the Utilities Act, s 75B and 75C, and the infrastructure component is appropriately regulated by the *Electricity Safety Act 1971*.

In addition, the making of this regulation will not compromise the effective regulation of embedded networks as the national electricity laws also apply to embedded network owners, with increased obligations commencing from 1 December 2017 as outlined above.

The risk of an embedded network failing is low, given it has to comply with the requirements of the Electricity Safety Act, such as AS/NZS 3000 and the consequences of the failure will not leave customers worse off than if consumer mains failed in a standard apartment building. Further, customers are protected in a number of ways as outlined above.