



Property regulatory obligations and requirements

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Regulatory proposal 2021–2026

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1.1 Introduction

The capital expenditure criteria require that our capital expenditure allowance for the next regulatory period to reasonably reflect the efficient and prudent costs of achieving the capital expenditure objectives.¹ The capital expenditure objectives relevantly include to 'comply with all applicable regulatory obligations or requirements associated with the provision of standard control services'.²

Below we outline our legal obligations of relevance to our forecast property expenditure, and explain why those legal obligations constitute regulatory obligations or requirements.

1.2 Occupational Health and Safety and Equal Opportunity

We have obligations under the Victorian Occupational Health and Safety Act 2004 (**OHS Act**) and the Victorian Equal Opportunity Act 2010 (**EO Act**) that govern how we must treat our employees.

At a high level, these obligations include:

- under the OHS Act, to provide, so far as is reasonably practicable, adequate facilities for the welfare of employees;³ and
- under the EO Act:
 - not discriminating against an employee on the ground of the employee's sex:
 - in the terms or conditions of employment that we afford an employee;
 - by denying or limiting an employee's access to benefits associated with employment; or
 - by subjecting an employee to any other detriment; and
 - taking reasonable and proportionate measures to eliminate discrimination or sexual harassment as far as possible.⁴

Similar obligations apply under the Commonwealth Sex Discrimination Act 1984 (**Sex Discrimination Act**).⁵

Where there are female applicants for advertised positions, we are therefore under an obligation not to discriminate on the basis of sex. It is reasonable to expect that the female workforce will continue to increase in size due to historic underrepresentation and current trends towards increasing gender diversification in traditionally male dominated roles. We expect this to be the case even were there to be no net increase in our total number of employees.

Our obligations under EO and OHS legislation extend to providing toilet and change room facilities of a certain number and standard for our workforce as part of our duty to provide and maintain a working environment that is safe and without risks to health for our employees. There is a high risk that our facilities are either not currently compliant, or will not be compliant with these obligations as our workforce diversifies.

¹ NER, clause 6.5.7(c).

² NER, clause 6.5.7(a)(2)).

³ Occupational Health and Safety Act 2004 (Vic), s 21(2)(d).

⁴ Equal Opportunity Act 2010 (Vic), s 6(o), 15(2) and 18.

⁵ Sex Discrimination Act 1984 (Cth), s 14.

In respect of our OHS obligations, the WorkSafe Compliance Code: Workplace amenities and work environment⁶ (**WorkSafe Code**) sets out that all employees are to have access to clean and hygienic toilet facilities at all times and employees who are required to change in and out of clothing or other apparel need to have access to private, convenient changing areas with secure storage for personal belongings. In particular, the WorkSafe Code sets out numbers of toilet facilities required based on the workforce size and the requirement to provide separate male and female changing rooms.

While the WorkSafe Code is not mandatory in a formal, legal sense, compliance with the Code is required in practice to ensure that we comply with our OHS obligations. Where we comply with the Code, we will be taken to have met our obligations under OHS legislation. At the same time, failure to comply with the Code will be taken into account in assessing compliance with our OHS obligations set out above. That is, compliance with the Code will ensure compliance with our OHS obligations, while failure to comply with the Code will put us at material risk of non-compliance with those obligations.

In relation to our obligations under EO legislation, Australian tribunals have found that the failure to provide separate gender toilet facilities at a workplace amounts to discrimination based on sex, as it creates a situation in which workers of one gender are treated less favourably compared with workers of another gender. Failure to provide adequate female toilets or separate female change room facilities, as is currently the case for at least one of our depots and it is reasonable to expect will become the case for the remaining two depots during the next regulatory period if no changes to current facilities at those depots are made, raises a compelling proposition that we are not taking reasonable and proportionate measures to protect our female workforce from discrimination or sexual harassment.

Breaches of OHS legislation in Victoria are serious matters and are subject to prosecution and enforcement by WorkSafe Victoria. Penalties for non-compliance are currently up to a maximum of \$297,396 for individuals and \$1,486,980 for a corporation depending on the nature, severity and consequences of the breach. Reputational damage for failure to address diversity obligations and initiatives, particularly at such a basic level, can be significant. In the case of EO legislation, orders for compensation for breaches of the legislation can be made by the tribunal or court.

1.3 Building Standards & Planning Law

We have obligations under the Victorian Building Act 1993 (**Building Act**) to ensure that all building work, including alterations, is carried out in accordance with a building permit.⁷ The Building Act adopts the National Construction Code, including the Building Code of Australia (**BCA**) and requires, among other things, classification of buildings and assessment of building permits by building surveyors in accordance with the BCA.⁸

As a result, we are required to ensure that alterations to our existing depots comply with the latest requirements of the BCA.⁹ Where we make alterations to our existing depots that relate to more than half the original volume of the depot, we are required to bring the entire depot into conformity with the BCA.¹⁰ Where alterations affect exits and paths to exits, or access for persons with disabilities, we are also required to bring all

⁶ (accessed 20 October 2019), <https://content.api.worksafe.vic.gov.au/sites/default/files/2018-07/ISBN-Workplace-amenities-and-work-environment-compliance-code-2008-09.pdf>

⁷ Building Act 1993 (Vic), s 16(3).

⁸ Building Regulations 2018 (Vic), r 10, 12 and 13.

⁹ Building Regulations 2018 (Vic), r 233(1).

¹⁰ Building Regulations 2018 (Vic), r 233(2).

exits and paths to exits, or accessible paths of travel, into conformity with the BCA.¹¹ Addressing any identified instances of current non-compliance by our depots with the Building Act and BCA can give rise to an obligation under the Building Act to undertake a more far-reaching program of works.

We also have obligations under the Victorian Planning and Environment Act 1987 (**Planning and Environment Act**) to ensure that building work, including any alterations, is carried out in accordance with a planning permit where required by the planning scheme.¹² This applies even though our existing depots rely largely on existing use rights, arising from the lawful use of the land prior to the commencement of contemporary planning schemes.¹³ While planning permits are required to be consistent with the Building Act, and therefore the BCA, they can impose additional requirements in relation to building work.¹⁴

Carrying out building work without a building permit attracts corporate penalties of up to \$413,050 (FY19-20 penalty units), with personal liability for any person concerned in or taking part in the management of a corporate entity in any way knowingly taking part in the offence.¹⁵ Other notices and orders may also be made, including orders to stop work.¹⁶

Similarly, carrying out building work without a planning permit attracts corporate penalties of up to \$198,264 (FY19-20 penalty units), with personal liability for any corporate officers failing to exercise due diligence to prevent the offence.¹⁷ Enforcement orders may also be made, including requiring development to cease and for the land to be restored as nearly as practicable to the condition before the development started.¹⁸

1.4 Our relevant obligations are 'regulatory obligations or requirements'

Each of our legal obligations discussed above constitutes a 'regulatory obligation or requirement' for the purposes of the definition of that term in section 2D of the NEL and thus the capital expenditure objectives.

Section 2D of the NEL defines a 'regulatory obligation or requirement' to relevantly include:

- a 'distribution system safety duty', being a duty of requirement under an Act of a participating jurisdiction, or any instrument made or issued under or for the purposes of that Act, relating to:
 - the safe distribution of electricity in that jurisdiction; or
 - the safe operation of a distribution system in that jurisdiction;
- an Act of a participating jurisdiction, or any instrument made or issued under or for the purposes of that Act, that regulates the use of land in a participating jurisdiction by a regulated network service provider;
- an Act of a participating jurisdiction or any instrument made or issued under or for the purposes of that Act that relates to the protection of the environment; or

¹¹ Building Regulations 2018 (Vic) r 234(1), 236(1).

¹² Planning and Environment Act 1987 (Vic), s 47(1).

¹³ See clause 63.05 of the Victoria Planning Provisions and corresponding clauses of local planning schemes.

¹⁴ See, in relation to consistency with building legislation, Planning and Environment Act 1987 (Vic), s 62(4)(a) and (b).

¹⁵ Building Act 1993 (Vic), s 16(3) and 243.

¹⁶ Building Act 1993 (Vic), s 112(1)

¹⁷ Planning and Environment Act 1987 (Vic), s 126(1) and 128(1).

¹⁸ Planning and Environment Act 1987 (Vic), s 119.

- an Act of a participating jurisdiction, or any instrument made or issued under or for the purposes of that Act that materially affects the provision, by a regulated network service provider, of electricity network services that are the subject of a distribution determination.

Each of the OHS Act, the EO Act, the Building Act and the Planning and Environment Act are Acts of Victoria, being a participating jurisdiction. Likewise, the Sex Discrimination Act is an Act of the Commonwealth, which is also a participating jurisdiction. The BCA is an instrument made or issued for the purposes of (among other Acts) the Building Act, being an Act of a participating jurisdiction.

Each of these instruments relates to the safe operation of United Energy's Victorian distribution system, and the protection of the environment. The Building Act, the Planning and Environment Act and the BCA also regulate the use of land in Victoria. This is evident from a consideration of the objects of each of the Acts:

- the objects of the OHS Act include securing the health, safety and welfare of employees and other persons at work, eliminating risks to their health, safety and welfare and ensuring that the health, safety and welfare of members of the public are not placed at risk by the conduct of undertakings by employers;¹⁹
- the objects of the EO Act include the elimination of discrimination, sexual harassment and victimisation and, consistent with this objective, the EO Act imposes a general duty to take positive steps to eliminate discrimination, sexual harassment and victimisation, evidencing that a substantive, if not the primary, purpose of the Act relates to the safety and welfare of people;²⁰
- the objects of the Sex Discrimination Act include the elimination of sexual harassment in the workplace and the Act makes sexual harassment unlawful and victimisation an offence, evidencing that a substantive purpose of the Act relates to the safety and welfare of people;²¹
- the objects of the Building Act include protecting the safety and health of people who use buildings, promoting plumbing practices which protect the safety and health of people, to enhance the amenity of buildings constructed on land and to facilitate the construction of environmentally and energy efficient buildings;²²
- the objects of planning in accordance with, and the establishment of the planning framework by, the Planning and Environment Act include, for example:²³
 - providing for the fair, ordering, economic and sustainable use;
 - providing for the development of land, and the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
 - securing a safe work, living and recreational environment for all Victorians and visitors to Victoria;
 - establishing a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;

¹⁹ Occupational Health and Safety Act 2004 (Vic), s 2(1).

²⁰ Equal Opportunity Act 2010 (Vic), ss 3(a), 14 and 15.

²¹ Sex Discrimination Act 1984 (Cth), s 3(c), Division 3 of Part II and s 94.

²² Building Act 1993 (Vic), s 4.

²³ Planning and Environment Act 1987 (Vic), s 4.

- enabling land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;
- ensuring that the effects on the environment are considered and providing for consideration of social and economic effects when decisions are made about the use and development of land; and
- ensuring those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice.

The obligations imposed by each of these instruments are therefore regulatory obligations or requirements of the kind described in one or more of paragraphs (1)(a)(i), (2)(b)(iii) and/or (2)(b)(iv) of the section 2D definition of 'regulatory obligation or requirement'. In the alternative, if the AER is not satisfied that any of its relevant obligations are regulatory obligations or requirements of this kind, United Energy contends that those obligations constitute regulatory obligations or requirements of the kind described in paragraph (2)(b)(v).