

Level 35, The Tower
360 Elizabeth Street
Melbourne Central
Melbourne Vic 3000

GPO Box 520
Melbourne Vic 3001

tel: (03) 9290 1444
fax: (03) 9290 1457

Our Ref: 52152-D16/64647
Contact Officer: Peter Adams
Contact Phone: (03) 9290 1465

9 June 2016

www.aer.gov.au

COAG Energy Council Secretariat
GPO Box 9839
CANBERRA ACT 2601

via email: energycouncil@industry.gov.au

Dear Sir/Madam

Re: Review of Enforcement Regimes under the National Energy Laws

The Australian Energy Regulator (AER) welcomes this opportunity to comment on the further consultation paper regarding recommendations arising from the Review of Enforcement Regimes under the National Energy Laws Final Report. As we have highlighted previously, we consider the implementation of these proposed amendments to the enforcement regime are in the long term interests of consumers and will help to ensure that the integrity of the energy market is maintained.

We consider the policy positions outlined in the current consultation paper are positive steps in providing the courts with additional powers; they would also provide the AER with more robust enforcement powers to support our role. We encourage the continued work on all of the recommendations from the Final Report. The attached paper addresses the specific questions raised in the consultation paper and reflects our earlier submissions.

We would be pleased to provide further assistance on this important area of work. If you would like to discuss any aspect of this submission, please contact Peter Adams, General Manager Wholesale Markets on (03) 9290 1465, or Sarah Proudfoot, General Manager Retail Markets on (03) 9290 6965.

Yours sincerely



Paula W Conboy
AER Chair
Sent by email on: 09.06.2016

Submission on Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation

The AER welcomes this opportunity to comment on the proposed policy positions in relation to recommendations 1, 7, 8 and 9 of the Allens NERA report, "*The Review of Enforcement Regimes under the National Energy Laws*" (the Report). The comments reflect our earlier submissions during this consultation process.

Expansion of Court Orders

The AER supports expanding the types of remedies that a court may order where a breach of national energy laws, rules or regulations has been proven. We consider this provides greater flexibility to the courts, and will assist in ensuring that the most appropriate remedies for breaches can be imposed. It will also assist in aligning the remedies available for breaches with other comparable regulatory regimes. We consider that the provisions and the definitions proposed are appropriate and do not require amendment.

Maximum Civil Penalty and Infringement Notice Levels and the value of money

The AER supports a uniform increase in civil penalties and infringement notice penalty rates to reflect the changes in the value of money since the current penalty rates were set. We consider that this increase will assist in ensuring that they act as effective deterrents for non-compliance, and that penalties better reflect the seriousness of certain breaches. We also support the Energy Working Group's continued work on progressing recommendations 5 and 6 of the Review. We agree that certain aspects of the review into the Australian Consumer Law relating to penalty levels are relevant to the implementation of these recommendations of the Report.

We agree with the Office of Best Practice Regulation's determination that increasing penalty levels will not increase the regulatory burden on participants. A single initial increase in penalties is a more simple, efficient and predictable approach than undertaking a phased introduction. We note that there has been no indication that the penalty increase is intended to have retrospective effect, so that any conduct that occurred prior to the date that an increase in penalty took effect will attract the penalty rate that applied at the time of the conduct (whether the maximum civil penalty or infringement notice penalty) rather than the new penalty rate. In the interests of certainty, it would be useful if the relevant clauses explicitly state that the revised penalty levels are not retrospective.

The AER also agrees that it is important to maintain the value of penalty levels and support the implementation of a mechanism to manage future increases in line with CPI. We consider a similar process to the AEMC's adjustments of the market price cap would be appropriate, which provides for rounding to the nearest \$100 and maintains a steady nominal value in the event of deflation. We consider that a three yearly process would be the most appropriate from a resource and ease of administration perspective and it would provide a higher level of transparency and certainty for market participants than yearly changes.

Development of Ministerial Principles for the designation of Civil Penalties

The AER supports the development of Ministerial Principles to be applied when designating civil penalties. We agree that these principles should be aligned with the objectives of National Energy Laws and consider that the proposed form of the Ministerial Principles set out in consultation paper largely do so. We consider that the Principles could be enhanced in the following ways:

- i. The current wording requires consideration of whether a breach **will** cause material harm in the manner stated. We consider that this could be interpreted to mean that a provision should only attract a civil penalty where an individual breach of the provision would, in any circumstances, cause material harm. This threshold is higher than that generally applied by regulators when assessing conduct, and also by the Courts when determining penalty. We consider it is preferable to consider whether a breach **could** cause harm and remove the materiality consideration. This would provide policymakers and the regulator with greater flexibility in capturing the types of conduct which warrant the application of penalties despite that conduct not always causing actual material harm. We consider these changes are in line with the approach a Court is likely to take when considering the application of appropriate penalties; and
- ii. The wording of principle three requires policy makers to consider a breach in terms of the long term interests of consumers **and** their ability to reasonably access electricity and gas services. While these concepts are closely related, we do not consider both elements need to be satisfied in order for a provision to be a civil penalty provision. Also, we query whether the inclusion of the word "foreseeable" in principle three is intended to refer to foreseeability on the part of the contravening person or not. In our view, the principle should not contain any reference to foreseeability; removal of this concept may have the effect of both removing doubt and possibly capturing wider conduct.

We consider that maintaining the Ministerial Principles in a policy document provides an appropriate level of flexibility and transparency.