

# AER Compliance and enforcement policy

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# 1 About this policy

The AER exists so that energy consumers are better off, now and in the future. This purpose, along with our vision and objectives as the regulator of Australia's national energy markets, are set out in our Strategic Plan 2020-25.<sup>1</sup>

Consumers are at the heart of our work, and we focus on delivering our objectives of affordable energy and satisfied consumers; a secure electricity and gas system; a reliable and low emissions electricity and gas supply; effective development of open and competitive markets; and efficient and timely investment in networks.

This Policy sets out how we approach our roles and functions in monitoring, investigating and enforcing compliance with national energy laws – the National Electricity Law and Rules, National Gas Law and Rules and National Energy Retail Law and Rules, and their associated Regulations and Guidelines – and how this contributes to the purpose, vision and objectives set out in our Strategic Plan.

Our compliance and enforcement work ensures that important protections are delivered and rights are respected. It gives consumers and energy market participants confidence that the energy markets are working effectively and in their long term interests, so that they can participate in market opportunities as fully as possible and are protected when they cannot do so.

In support of the objectives set out in our Strategic Plan 2020-25, our compliance and enforcement work focusses on conduct that – if not compliant – poses significant harm to:

- consumers, in particular those who are vulnerable or disadvantaged, as well as conduct that inhibits consumers' participation in energy markets
- the operation and transparency of competitive energy markets
- the efficient operation of monopoly gas and electricity networks, and that inhibits access to those networks.

We may also take action where the operation of important laws or rules is unclear or contested. We draw on our experience in monitoring and enforcing compliance with national energy laws to inform debate about Australia's energy future and support the energy transition.

This Policy should be read in conjunction with the Compliance and Enforcement Priorities published on our website, which help guide our enforcement work and proactive compliance efforts, and also signal areas where we consider behavioural change in the market is required.<sup>2</sup> Our priorities align with the objectives in our Strategic Plan 2020-25, and are informed by consultation with our stakeholders and the risk based decision making framework set out in this Policy.

In addition to our work in priority areas, we will also act where there are serious issues impacting vulnerable consumers, or to help shape new or emerging markets. We will assess matters having regard to the compliance and enforcement factors in this Policy and take action where justified.

<sup>1</sup> For more information on the AER's Strategic Plan follow this link: <https://www.aer.gov.au/publications/corporate-documents/aer-strategic-plan-2020-2025>.

<sup>2</sup> For more information on the AER's annual compliance and enforcement priorities follow this link: <https://www.aer.gov.au/about-us/our-role/compliance-enforcement>.

## 2 Our role in compliance and enforcement

The AER monitors, investigates and enforces compliance with obligations under national energy laws.<sup>3</sup>

Our jurisdiction covers a number of sectors of the national energy market, including:

- The relationships energy retailers and distributors have with their customers in competitive retail markets, and those of alternative energy providers operating under retail and network exemptions.
- The provision of monopoly transmission and distribution network services to customers and other market participants, and network planning requirements on service providers and the Australian Energy Market Operator (AEMO).
- Participation in competitive wholesale markets for electricity and gas, including obligations on AEMO in handling the day-to-day operations of those markets.

Our functions relate mostly to energy markets in eastern and southern Australia: our jurisdiction covers Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia and Tasmania.

An exception to this is the energy retail market in Victoria, which is regulated under local legislation by the Essential Services Commission of Victoria. We also only regulate monopoly networks in the Northern Territory, with other responsibilities managed by the Utilities Commission of the Northern Territory.

### 2.1 Dispute resolution and individual courses of action

The AER cannot act for or on behalf of complainants in their engagement with energy businesses or AEMO, or on behalf of businesses or AEMO in their engagement with each other.

Direct assistance in resolution of individual disputes is available:

- To residential and small business customers, from their state or territory energy ombudsman if they are unable to resolve a matter with their energy provider.
- To market participants and AEMO, from the Wholesale energy market dispute resolution adviser the AER appoints under chapter 8 of the National Electricity Rules (Electricity Rules) and Part 15C of the National Gas Rules (Gas Rules).

For certain provisions designated by the regulations ('conduct provisions'), persons other than the AER can also institute proceedings against a regulated business for failure to comply with national energy laws, and seek orders including corrective action and compensation for loss or damage.<sup>4</sup>

A person aggrieved by a decision, act or omission by AEMO can also apply to the Court for judicial review of that decision.<sup>5</sup>

<sup>3</sup> Including the National Electricity Rules (Northern Territory) published by the AEMC and the relevant parts of the National Electricity (Victoria) Act 2005.

<sup>4</sup> National Electricity Law, ss. 61A, 61B; National Energy Retail Law, s. 292; National Gas Law, s. 232.

<sup>5</sup> National Electricity Law, s. 70.

## 2.2 Working with other agencies

Responsibility for energy markets is shared between a number of regulators and government agencies. We work closely with our counterparts to make sure that we can deliver the best results in our areas of responsibility.

- Each of our participating jurisdictions maintains a State/Territory energy regulator, with responsibilities for matters including network and generation licensing, service standards and local protections specific to a State or Territory.
- Technical regulators also operate in each State and Territory, and are responsible for the technical capability and safety of energy infrastructure.
- The ACCC is the economy wide, consumer protection and competition agency. The *Competition and Consumer Act 2010* provides the ACCC with powers to protect energy consumers from misleading or deceptive conduct, unconscionable conduct and unfair or anti-competitive practices.<sup>6</sup> The *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019* also gives the ACCC responsibility for compliance with price caps set by the AER for standing offers for retail electricity supply in certain distribution zones in Australia.

We share information and experience across related agencies. We may collaborate on joint solutions to compliance concerns in energy markets, or engage on which agency is best placed to respond. The ACCC and AER Information Policy<sup>7</sup> expands on how information and data held by the AER can be used to support this cooperation.

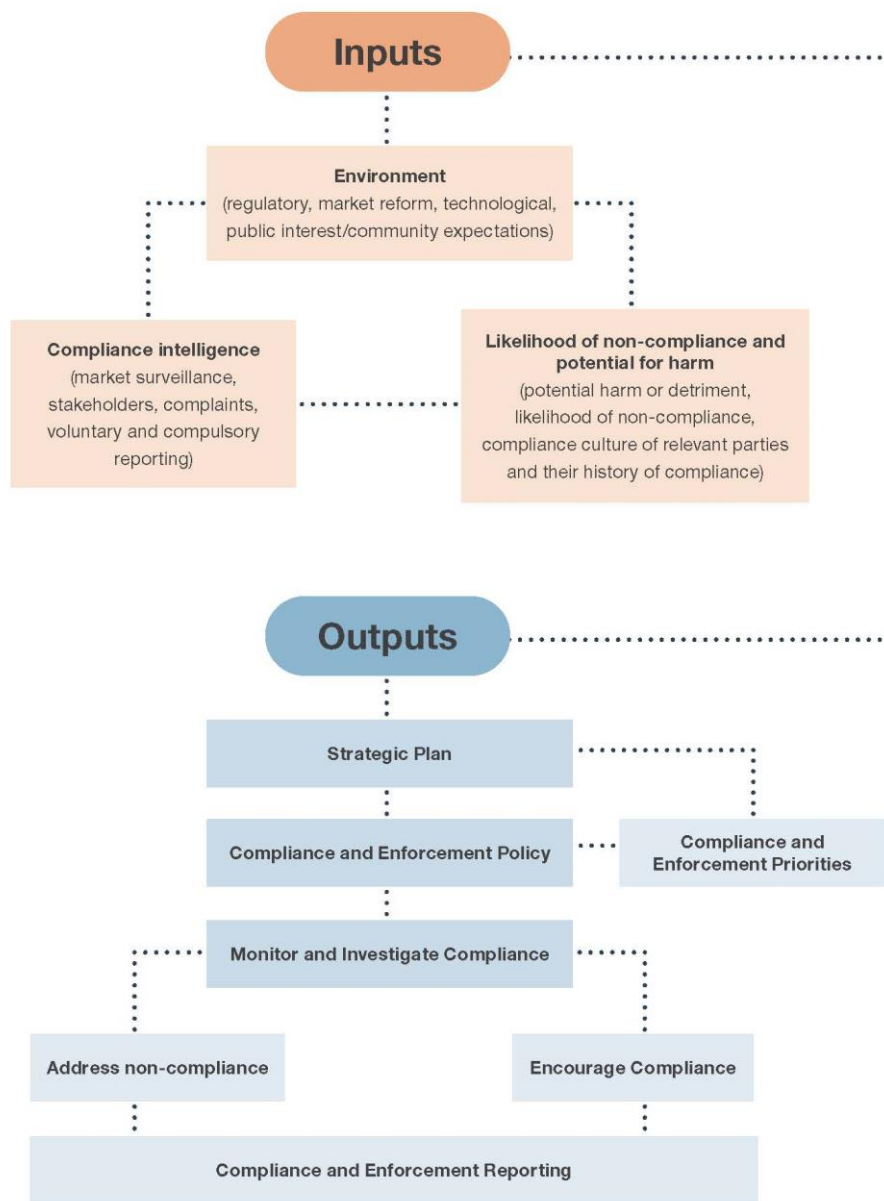
<sup>6</sup> The ACCC also has a role in wholesale price monitoring as directed by the Commonwealth Treasurer.

<sup>7</sup> You can find the ACCC and AER Information Policy: collection and disclosure of information on our website, here: [https://www.aer.gov.au/publications/corporate-documents?f%5B0%5D=field\\_accc\\_aer\\_report\\_type%3A1418](https://www.aer.gov.au/publications/corporate-documents?f%5B0%5D=field_accc_aer_report_type%3A1418).

### 3 Our approach to compliance and enforcement

Our approach to compliance and enforcement aims both to encourage compliance and to address and deter non-compliance. It allows us to hold specific parties that fail to comply with their obligations under the national energy laws to account. It also allows us to leverage outcomes across the market and achieve the strategic benefits of general deterrence.

#### Compliance and enforcement decision making framework



We have discretion in how we monitor compliance, when and how we investigate potential breaches, whether we take compliance action or enforcement action, and the appropriate nature of that action. We will choose the combination of compliance and enforcement tools that we consider will deliver the best outcome for consumers and the market.

We take a risk based approach to prioritising compliance and enforcement work and for assessing non-compliance that is informed by:

- The environment in which we operate (including regulatory and technological change, energy market reform, and public interest in/community expectations of energy markets).
- Concerns emerging from, or identified through, our monitoring of compliance and performance under national energy laws and from our investigative activities.
- The nature of the obligation(s) in question, including the potential harm or detriment that can result from non-compliance and the likelihood (and likely extent) of non-compliance.
- The party or parties subject to the obligation(s) in question, their compliance culture and history of compliance.

In this way, we ensure that our compliance and enforcement work is focussed on the issues of greatest importance to the protection of consumers and the effective operation of the markets we regulate.

The key compliance and enforcement factors we will have regard to in considering risk and deciding what compliance and enforcement approach is appropriate are summarised below.

### Compliance and enforcement factors



Not every factor will be relevant, or equally relevant, in every situation. We may also consider other factors relevant to a particular matter or circumstance. Together, these considerations take



into account the actual and potential impact of non-compliance and the likelihood that non-compliance will occur, or continue to occur.

### 3.1 Monitoring and investigating compliance

We can access information from a wide range of sources to monitor compliance and identify and investigate potential breaches of the national energy laws.

When considering how best to monitor and investigate compliance, we may use one or more of the following tools, depending on the seriousness of the conduct and other relevant circumstances.

Information gathered using any of these tools – whether provided voluntarily or under compulsion – can be used in any of our compliance and enforcement activities.



#### Information from consumers, regulated businesses and other stakeholders

We receive information on potential compliance concerns from stakeholders (including consumers, energy businesses, energy ombudsman schemes, other market bodies, government agencies and consumer groups) in the form of calls, correspondence and meetings.

We have a number of regular networks through which compliance concerns are raised and referred, including our Customer Consultative Group.



#### Voluntary self-reporting

Where binding reporting requirements do not apply, we receive voluntary self-reports from regulated businesses or AEMO where they have identified breaches of national energy laws through their own internal monitoring and quality assurance processes.



#### Market data

We receive data on activities in wholesale and retail energy markets and natural monopoly network sectors for a range of purposes under national energy laws. We can use information and data received or collected in the course of other aspects of the AER's work for compliance and enforcement purposes, and vice versa.



#### Information requests and targeted reviews

We ask regulated businesses and/or AEMO for information about their compliance – both in respect of identified matters and as part of wider reviews of compliance practices and processes in an emerging area of concern.



#### Reporting obligations under national energy laws

We can impose binding reporting requirements on regulated businesses and AEMO under AER Guidelines, requiring information and data relevant to their compliance with national energy laws to be provided to us on a regular basis. For example:

- Compliance Procedures and Guidelines under the Retail Law currently require authorised retailers and electricity and gas distributors to report breaches of selected obligations to us within a specified period.

- Electricity Ring-fencing Guidelines currently require electricity distributors to submit annual reports on compliance.
- Forecasting Best Practice Guidelines currently require AEMO to submit a report demonstrating that it has complied with applicable requirements and considerations under the Guidelines in preparing its Inputs Assumptions and Scenarios Reports and Integrated System Plans.

The national energy laws also impose direct obligations on energy businesses to report information to the AER for the purposes of monitoring compliance. For example:

- Participants in the Retailer Reliability Obligation (RRO) set out in Part 2A of the National Electricity Law and Chapter 4A of the Electricity Rules are required to submit information on contract positions, generator capacity, and trading rights to support the AER's monitoring of RRO compliance.



### Compliance audits

For obligations on authorised retailers and electricity and gas distributors under the Retail Law and Rules, and for participants in the RRO, we can undertake, or require a regulated business to undertake or participate in, audits of their compliance.



### Compulsory notices

We can serve a compulsory notice on a person if we have reason to believe they are capable of providing information, producing a document or giving evidence that we require for the performance or exercise of our functions or powers under national energy laws. A compulsory notice may require the recipient to:

- Provide information in writing signed by the recipient or competent officer of the recipient within the time and in the manner specified.
- Produce documents to us, or to a person specified in the compulsory notice.
- Appear before a member of the AER or a specified AER Senior Executive Service employee at a time and place specified in the compulsory notice to give evidence, orally or in writing, and produce documents.

The AER Compulsory Notice Guidelines provide information about our use of these powers.

## 3.2 Encouraging compliance and addressing non-compliance

We have a range of compliance and enforcement options available to us to encourage compliance with national energy laws, and to respond to and address potential non-compliance. How we respond will depend on the circumstances in which the conduct has arisen, with regard to the compliance and enforcement factors.

When considering how best to encourage compliance and address non-compliance, we may take one or more of the actions summarised in the tables below.

- Where the potential risk flowing from the conduct is lower – for example because the harm that has resulted is relatively low, the conduct is relatively isolated and does not appear to reflect ongoing or systemic behaviours, and demonstrable efforts have been made to correct and compensate for the conduct – we may consider resolving a matter administratively.
- Where we consider the matter requires a more formal sanction but may still be resolved without legal proceedings – for example because there are lower levels of harm or detriment, the conduct

is not as widespread, or where the facts or the interpretation of the relevant obligations are not controversial or in dispute – we may consider issuing infringement notices. We will consider court-based resolution should the recipient of the notice choose not to pay.

- Where resolution of a matter requires a stronger commitment than an administrative resolution will provide, we may consider accepting a court enforceable undertaking. If the party subject to an enforceable undertaking does not comply with its commitments, we are then able to seek court orders including declarations of a breach or injunctions.
- Where the conduct is serious – for example, because it has caused, or could potentially cause, significant harm, the conduct is widespread, the party in question has a history of previous breaches of national energy laws or has demonstrated a blatant, ongoing or serious disregard for the law, or the matter raises complex questions about the interpretation of national energy laws – we may consider seeking a court-based outcome.

The more serious the conduct, which we assess with reference to the compliance and enforcement factors, the more likely it is that we will pursue an enforcement outcome.

## Compliance options



### Education and guidance

We can publish education and guidance materials to:

- Clarify and inform others of our expectations of compliance.
- Extend the reach of other compliance/enforcement activities by sharing learnings from those activities with a wider audience.
- Provide consistency and transparency in AER messaging on compliance practices.
- Encourage adoption of 'best practice' compliance approaches.

These materials are not binding on us or on regulated businesses or AEMO.



### Administrative resolutions

We can recommend improvements to compliance practices adopted by a regulated business or AEMO, and accept a voluntary commitment from them to take agreed steps to address non-compliance and reduce the risk of future incidents – for example by implementing a compliance program, improving internal operational procedures, conducting staff training or to provide consumer redress (for example, debt waivers).

A decision to resolve a matter administratively is not acceptance or approval of the conduct, nor does it remove or transfer responsibility for the conduct.

## Enforcement options



### Infringement Notices

We can issue infringement notices where we consider that a breach of a civil penalty provision has been committed.

The National Electricity, Gas and Energy Retail Regulations classify each civil penalty provision into one of three tiers. The penalty payable under an infringement notice is currently \$67,800 for alleged Tier 1 and 2 breaches, or \$33,900 for Tier 3 breaches.

Payment of an infringement notices does not constitute an admission of a breach, but if a business chooses to make payment then the AER cannot later bring proceedings in relation to that breach.



### Court Enforceable Undertakings

We can accept a court enforceable undertaking from a regulated business or from AEMO in relation to any of our areas of responsibility under the national energy laws.<sup>8</sup> Enforceable undertakings can provide tailored solutions to address conduct that has given rise to the alleged breach. For example, an enforceable undertaking might include commitments to undertake an audit to ensure that the business has identified the root cause of the breach and the risk of future breaches is mitigated, or could contain commitments that relate to consumer redress (for example, debt waivers).

We are able to seek court orders including declarations of a breach or injunctions if AEMO or a regulated business has not complied with a court enforceable undertaking.



### Civil Proceedings

We can institute and conduct civil proceedings for alleged breaches of the national energy laws.<sup>9</sup>

We may seek declarations in relation to the breaches as well as a range of orders, including to undertake an action to cease or remedy the breach, implement a compliance program, perform a community service or release a public notice. We can also apply for an injunction to restrain the party from engaging in the conduct or require action to be taken.

If the obligation that has been breached is a civil penalty provision, we may seek orders for payment of civil penalties. There are three tiers of penalty provisions, reflecting three levels of severity of breaches:

- Tier 1 provisions carry maximum penalties for corporations of \$10 million, or if greater, three times the benefit obtained from the breach if this can be determined, or if not, 10% of annual turnover.
- Tier 2 provisions carry maximum penalties for corporations of up to \$1,435,000 (plus \$71,800 per day for continuing breaches).
- Tier 3 provisions carry maximum penalties for corporations of up to \$170,000 (plus \$17,000 per day for continuing breaches).

These amounts will be indexed every three years to ensure their deterrent value is maintained.

The national energy laws set out the factors which the court must consider in determining the amount of the civil penalty to be paid.<sup>10</sup>

<sup>8</sup> National Energy Retail Law, s. 288; National Electricity Law, s. 59A; National Gas Law, s. 230A.

<sup>9</sup> National Energy Retail Law, s. 289; National Electricity Law, s. 59; National Gas Law, s. 229.

<sup>10</sup> National Energy Retail Law, s. 294; National Electricity Law, s. 64; National Gas Law, s. 234.

## Revocation of retail authorisation or exemption



We can revoke a retailer authorisation if there is a material failure by a retailer to meet its obligations, and a reasonable apprehension that the retailer will not be able to meet its obligations in the future. Revoking a retailer authorisation prohibits a retailer from selling energy in any participating jurisdiction.<sup>11</sup>

We can also revoke retail exemptions if we are satisfied that there has been a material failure by the exempt seller to meet the conditions imposed on it by its exemption.<sup>12</sup>

<sup>11</sup> We are required to provide reasons for any revocation (National Energy Retail Law, s. 120(3)) and are required to give the retailer an opportunity to demonstrate why its authorisation should not be revoked and to present a proposal to address our concerns (National Energy Retail Law, s. 120(4)).

<sup>12</sup> National Energy Retail Law, s. 111.

## **4 Reporting on our compliance and enforcement activities**

Our vision, set out in our Strategic Plan, is to be open and accountable in our work, and engaged with our stakeholders.

We will report publicly on our compliance and enforcement activities:

- By announcing outcomes as individual activities reach key milestones and matters are resolved.
- In mid-year and annual reports bringing those activities together.

Our reports will be made available on our website, with the option of subscribing to compliance reporting content.