

# AER Compulsory Notice Guidelines

November 2020

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CONSULTATION DRAFT

# 1 Introduction

The National Electricity Law (NEL), National Energy Retail Law (NERL) and National Gas Law (NGL), (together, the National Energy Laws) contain compulsory information-gathering powers that enable the Australian Energy Regulator (AER) to obtain information, documents and evidence in relation to its functions and powers.

Those powers are contained in section 28 of the NEL, section 206 of the NERL and section 42 of the NGL (the compulsory notice sections).

In particular, the compulsory information-gathering powers are critical to the AER's ability to carry out its regulatory role in wholesale and energy markets, including investigating of possible contraventions of the National Energy Laws and Rules. These investigations necessarily centre on the search for evidence to determine whether conduct contravenes the National Energy Laws and whether enforcement or other action is required to address any market or consumer harm. Under the compulsory information-gathering powers, the AER can require a person to provide information, documents and/or give evidence under oath or affirmation.

These guidelines are published in accordance with section 28ZF of the NEL, section 218 of the NERL and section 68 of the NGL. They are required to include information about the exercise of the AER's powers under the relevant sections, including about:

- (a) the rights and obligations of persons who are served with a relevant notice under that section;
- (b) the penalties applying under that section for non-compliance with a notice; and
- (c) the purposes for which information obtained under that section may be used.

These guidelines include information about the powers that were introduced by the *Statutes Amendment (National Energy Laws) (Penalties and Enforcement) Act 2020*.

## 1.1 Overview of the compulsory notice sections

If the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance or exercise of a function or power conferred on it under the National Energy Laws or the National Electricity Rules (NER), National Energy Retail Rules (NERR) or National Gas Rules (NGR) (together, the National Energy Rules), the AER may serve a compulsory notice on that person.

Extracts of the compulsory notice sections are provided at Attachment A to these guidelines.

Specifically, a compulsory notice may be issued by the AER to require the recipient to:

- (a) provide information in writing signed by the recipient or competent officer of the recipient within the time and in the manner specified; and/or
- (b) produce documents to the AER, or to a person specified in the compulsory notice; and/or

- (c) 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 power under paragraph (c) was introduced by amendments to the National Energy Laws, which came into force when the *Statutes Amendment (National Energy Laws) (Penalties and Enforcement) Act 2020* was proclaimed in [MONTH 2020].

The power is investigative, not judicial. It does not involve the AER making a determination as to the facts or applying the law to them in any way that is binding or authoritative. Similarly, it does not involve the AER making a finding that a party has engaged in a contravention of the National Energy Laws or National Energy Rules.

## 1.2 Scope and use of compulsory notices

Generally, the AER obtains most of its information through cooperation and voluntary means. However, there are circumstances where the AER considers it appropriate to obtain information, documents and evidence through the use of its compulsory powers, as outlined in these guidelines.

The decision to issue a compulsory notice is not taken lightly. The AER uses the powers to properly investigate potential contraventions of the National Energy Laws and National Energy Rules resulting in harm to energy markets and/or consumers.

The AER may issue a compulsory notice to a party that is the subject of an AER investigation or to other third parties who may have relevant information, documents or evidence.

There is a considered process of review by the Chair or Board member of the AER before a decision is taken to issue a compulsory notice.

AER officers will consider whether the information, documents or evidence are necessary and relevant to the AER's discharge of its functions and powers. Consideration is also given to whether the relevant information, documents or evidence is likely to be otherwise available, including whether it is likely to be provided voluntarily. In many cases, the AER will request information voluntarily prior to relying upon its compulsory powers.

However, the voluntary production of information, documents and evidence is not always appropriate. For example, in circumstances where:

- it is important for the AER's decision making on investigations to have confidence that it has full and complete information on key issues in circumstances where voluntary requests will not deliver the same confidence
- a party may have previously failed to respond or respond fully to a voluntary request
- a party is unable to provide the information voluntarily because of legal or confidentiality restrictions on disclosure
- a third party requests that the information or documents be compulsorily required to avoid being seen to be cooperating freely with the AER and to be protected from possible retaliation from the party that is the subject of an AER investigation
- the AER has obtained information from other sources (including market enquiries) that is inconsistent with the information voluntarily provided by the party under investigation

- the AER has concerns that a voluntary request will be met with delays or protracted negotiations impacting on the AER's ability to carry out its functions and appropriately act to address risk of harm to energy markets, energy security or to consumers
- a party does not want to cooperate with the AER
- critical information required by the AER will be most efficiently sought through the use of a compulsory notice
- the AER has a particular forensic reason to issue a compulsory notice.

Prior to issuing a compulsory notice, the AER will also consider:

- whether there is a risk that the information, documents or evidence may otherwise be destroyed, not provided or provided only on terms unacceptable to the AER
- whether it may be appropriate to use compulsory powers to obtain such information, documents from a potential respondent for evidentiary purposes, including obtaining oral evidence under oath or by way of affirmation
- the burden of the compulsory notice on the recipient, including time and cost considerations.

### **1.2.1 Burden on the recipient**

The AER is required to and will have regard to the burden of the compulsory notice on the recipient before exercising its powers, in particular, the time and cost burden it imposes on the recipient including having regard to digital technology.

The Chair or Board Member issuing a compulsory notice will balance the likely time and cost burden of the compulsory notice on the recipient (to the extent known) with the value to the AER of the information, documents or evidence being sought. This includes assessing whether the notice provides the recipient with a reasonable time to comply.

Sufficient time must be allowed for the recipient to undertake the necessary searches (including electronic searches) for documents sought, to make appropriate enquiries and to seek any legal advice or representation. The AER determines what it believes to constitute a reasonable time to comply with a compulsory notice or to attend an examination on a case by case basis, taking into account a range of factors that determine whether shorter or longer periods of time may be given.

The prescribed timeframe for a recipient to comply with a notice will vary based on the scope of the compulsory notice.

Where possible, the AER limits the scope of a compulsory notice and takes steps to minimise the compliance and cost burden on a recipient. In particular, the AER endeavours to target the compulsory notice appropriately and takes into account the following factors:

- the urgency of the investigation and significance of the information, documents and evidence to facilitate enforcement action to stop any contravening conduct and minimise consumer and competitive harm
- the volume of information and documents sought including the extent to which documents are likely to be stored electronically, the relevant time period that applies to the documents, the

number of categories of documents and the number and location of potential custodians of documents

- the nature of the documents sought (for example, economic data may take more time to retrieve and produce from databases compared to business records kept in the ordinary course that are likely to be easier and faster for a recipient to retrieve and produce)
- whether a sample of a category or type of document will suffice or a more limited data set or time series
- whether certain information and documents sought are of more critical importance to its investigation and therefore required sooner with other documents to be produced over a longer timeframe
- the identity of the proposed recipient, i.e., whether the recipient is a party to the investigation or a third party
- the organisational structure of the proposed recipient
- any other information or knowledge that the AER possesses about the way in which the proposed recipient of the notice conducts its document management system, including its digital environment.

In appropriate circumstances, the AER may consult with a proposed recipient prior to a compulsory notice being issued to it in order to better understand its document management system and digital environment. This may also assist in understanding the structure of the organisation and the identity of the most relevant people within the organisation who are likely to hold required documents. These discussions may also be useful in determining the most appropriate scope of the information and documents required to be produced under the notice. This can result in efficiencies for both the recipient of the notice and the AER's investigative process.

Recipients of a compulsory notice can also raise any questions they may have in relation to the notice, including the scope and terms of a notice, with the AER as soon as possible for AER consideration. This includes any issues in relation to the burden of responding to the compulsory notice as well as any clarifying questions.

For example, where a party must undertake extensive enquiries to locate potentially responsive documents or assess the volume of such documents, they should advise the AER of this early on and provide a date as soon as possible thereafter by which they will be in a position to update the AER on whether they have any questions in relation to the notice.



## **2 Rights and obligations of persons served with a compulsory notice**

### **2.1 What must be provided**

The compulsory notice will state that the recipient must provide information, produce documents or give oral evidence on specified day(s), at a specified place and a specified time.

The information and documents required will be detailed in schedules to the compulsory notice. Reasonable time will be allowed to comply with a compulsory notice. It is the responsibility of the recipient to comply with the compulsory notice to the extent it is capable of doing so within the relevant timeframe. This does not involve producing any documents created after the date of the compulsory notice. Documents are to be provided in original format, without redactions.

Usually, the AER office in the state or territory where the response to the compulsory notice is to be lodged is specified in the compulsory notice. Where the recipient is remote from an AER office, the compulsory notice usually specifies response by registered mail to the nearest AER office. Responses may also be provided electronically – see section 2.3 below.

A recipient is obliged to comply with a compulsory notice. The obligations of the recipient are set out in sub-sections (3)-(5a) of the compulsory notice provisions.

#### **2.1.1 Privilege against self-incrimination**

Under sections 28(6) of the NEL, 206(6) of the NERL and 42(6) of the NGL, it is a reasonable excuse for a person to fail to provide information, give evidence or produce a document under a compulsory notice on the grounds that the information, evidence or document might tend to incriminate the person, or make the person liable to a criminal penalty.

Two further matters relating to the privilege against self-incrimination or exposure to penalty in the context of compulsory notices should be noted. First, the privilege is not available to a corporation. Therefore, information and documents produced under a compulsory notice by corporations are able to be used in civil penalty proceedings or criminal proceedings against corporations and individuals. Secondly, the privilege only applies to information provided by an individual under a compulsory notice, or evidence given by an individual in a compulsory examination. By contrast, any documents already in existence at the time the compulsory notice is issued and produced in response to that compulsory notice by an individual are admissible against the individual in any criminal proceedings.

#### **2.1.2 Legal professional privilege**

A compulsory notice does not require a person to provide information that is the subject of legal professional privilege, or produce a document which would disclose information that

is the subject of legal professional privilege.<sup>1</sup> However, the AER expects compulsory notice recipients to provide particulars to substantiate any assertion of legal professional privilege over documents not produced in order for the AER to assess compliance with the compulsory notice. The AER is likely to seek the following particulars:

Document description				Claim of legal professional privilege				
Names of all authors and recipients (together with their positions)	Date and time	Type of document (e.g. email, letter)	Document title	Category of LPP applicable (litigation/advice) and grounds of claim	Whether the document is in electronic or hard copy format	Address of the premises where the document is kept	Whether privilege applies to the whole or part of the document	For third party privilege claims, the identity of the privilege holder

### 2.1.3 Duties of confidence

Under sections 28(7) of the NEL, 206(7) of the NERL and 42(7) of the NGL, a person is not excused from providing information, producing a document or giving evidence under a compulsory notice on the ground that to do so would amount to a breach of any duty of confidence.

However, a person will not be subject to a liability for breach of confidence, breach of contract or any other civil wrong merely because they complied with a compulsory notice issued by the AER.<sup>2</sup>

### 2.1.4 Cabinet material

A compulsory notice does not require a person to:

- provide information that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or
- produce a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or
- provide information, give evidence or produce a document, that would disclose the deliberations of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory.<sup>3</sup>

### 2.1.5 Relevance

The AER endeavours to target compulsory notices appropriately to ensure that only material that is necessary and relevant is sought for the performance or exercise of its powers and functions under the National Energy Laws.

Where the notice describes a category of document that must be provided, but only part of a document is relevant to that category, the entire document must be provided.

<sup>1</sup> NEL s. 28(8); NERL s. 206(8); NGL, s. 42(8).

<sup>2</sup> NEL s. 28(10); NERL s. 206(10); NGL s. 42(10).

<sup>3</sup> NEL s. 28(9); NERL s. 206(9); NGL s. 42(9).

Redactions may be made for reasons of privilege as discussed above, but not for relevance.

## 2.2 Penalties for non-compliance with a compulsory notice

Refusal or failure to comply with the compulsory notice by the due date, without reasonable excuse or unless a variation is granted, is a criminal offence which may attract fines not exceeding \$6 300 for individuals, or fines not exceeding \$31 500 for companies (NEL s. 28(3); NERL s. 206(3); NGL s. 42(3)).<sup>4</sup> It is also an offence for a person to provide information or give evidence in response to a compulsory notice that the person knows is false or misleading in a material particular (NEL s. 28(4); NERL s. 206(4); NGL s. 42(4)).

A number of new offence provisions have been included in the National Energy Laws framework to prohibit a person:

- without reasonable excuse, from refusing or failing to be sworn or to make an affirmation (NEL s. 28(9b); NERL s. 206(9b); NGL s. 42(9b));
- without reasonable excuse, from failing to answer a question that the person is required to answer (NEL s. 28(3a); NERL s. 209(3a); NGL s. 42(3a));
- from threatening, intimidating or coercing another person, or causing or procuring damage, loss or disadvantage to another person, because that other person proposes to provide information, give evidence or produce a document in response to a compulsory notice, or proposes to appear (or has appeared) in response to a compulsory notice (NEL s. 28(18), NERL s. 209(18); NGL s. 42(18)).
- The AER may refer any non-compliance to the Commonwealth Director of Public Prosecutions for consideration of whether the recipient should be prosecuted for an offence under a compulsory notice provision. This includes where the recipient of a compulsory notice refuses or fails to comply with that compulsory notice (including refusing to answer questions in an examination) or knowingly furnishes information, produces documents, or gives evidence that is false or misleading.
- If a person refuses or fails to comply with a compulsory notice, the AER may also apply for a court order directing the person to comply with the compulsory notice.<sup>5</sup>

It is also an offence to knowingly giving false or misleading information to the AER, or knowingly producing false or misleading documents to the AER in purported compliance with the compulsory notice, under sections 137.1 and 137.2 of the Criminal Code (Cth). By virtue of the application of subsections 4B(2) and (3) of the Crimes Act (Cth), a court may impose a maximum penalty of 12 months imprisonment and/or \$13,320 for each offence committed by a natural person, and \$66,600 for each offence committed by a body corporate under sections 137.1 and 137.2 of the Criminal Code (Cth).<sup>6</sup>

<sup>4</sup> Schedule 2 clause 37B of the NEL, Schedule 2 clause 47A of the NGL, and clause 300B of the NERL provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts will be published on the AER's website.

<sup>5</sup> NEL ss. 28(11) and (12); NERL ss. 206(11) and (12); NGL ss. 42(11) and (12).

<sup>6</sup> The penalties for these offences are expressed in penalty units. The values stated above are correct as at September 2020 when the value of one penalty unit is \$222.

## 2.3 Production of electronic documents

The AER will sometimes attach to a compulsory notice cover letter guidance on the production of electronic documents, which sets out the AER's preferred formats for receiving material in response to a compulsory notice. There is no obligation to comply with the guidance, however compliance will assist the AER in assessing the matters that may contravene the National Energy Laws and Rules as quickly as possible. The AER may contact a notice recipient prior to or shortly following the issuance of the compulsory notice to discuss production methodologies, and will be available for ongoing consultation regarding the production of documents. Early and regular communication between the AER, notice recipients and their legal advisors regarding production methodologies and formats is encouraged.

The AER also uses a secure file sharing service which may be used by the recipient of a notice to provide a response to the AER.

## 2.4 Service of a Compulsory notice

Service of compulsory notices is governed by particular provisions of the NEL, NGL and NERL.<sup>7</sup>

A document may be served on a body corporate by:

- (a) leaving it at the registered office or usual place of business of the body corporate with an officer of the body corporate;
- (b) sending it by post, facsimile or similar facility to its registered office or its usual place of business; or
- (c) sending it electronically to that body corporate or an officer of the body corporate.

A document may be served on a natural person by:

- (a) delivering it to the person personally,
- (b) leaving it at, or sending it by post, facsimile or similar facility to the last known address of the place of residence or usual place of business of the person; or
- (c) sending it electronically to that person.

## 2.5 Variation

In appropriate circumstances, the AER can vary a compulsory notice which may involve changing the timeframe for compliance to allow for an extension, changing the date of an oral examination or narrowing the scope and terms of a compulsory notice where there are unintended consequences.

Where the variation would be lengthy and/or complex, the AER may decide to revoke the original compulsory notice and issue a new one.

Where a recipient considers that there are genuine reasons why it may not be able to comply with the compulsory notice on or before the due date, or considers there to be issues raised by the scope and terms of the compulsory notice, it should make contact (e.g. by phone or email) with the AER as soon as possible after receipt of the compulsory notice. A written application should then be made setting out the reasons for the proposed variation and a date by which it considers that it can comply. This may involve proposing a

<sup>7</sup> NEL Schedule 2 Part 6; NGL Schedule 2 Part 6; NERL section 319.

staged response to the AER where some information is still able to be provided by the due date.

AER officers will then consider whether to recommend that the AER issue a variation to the compulsory notice. Where approaches are made shortly before the due date, it is likely to be difficult for the AER to consider the application prior to the due date.

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## **3 Conduct of an oral examination**

### **3.1 General**

An oral examination may be conducted before the full Board of the AER but is normally conducted before a member of the AER or an AER Senior Executive Service (SES) employee who is authorised to hear the evidence, or before an AER SES employee who is specified in the compulsory notice. Such examinations are conducted in private.<sup>8</sup>

### **3.2 Practical arrangements**

The AER will often seek to engage with a proposed examinee prior to issuing the compulsory notice so that it can take into account the examinee's availability when fixing the date of the examination. Such an approach reduces the burden on the examinee, provides certainty and enhances the efficiency of the AER's investigative process.

Examinations are normally conducted within standard business hours. Where an examinee explains in writing that exceptional circumstances prevent or unreasonably impede attendance within business hours, the AER may, at its discretion, reschedule an examination outside business hours and vary the compulsory notice accordingly. Examinations will, wherever possible, be held in the AER office in the state or territory where the examinee resides. The AER may, however, facilitate an examinee to appear via video conferencing facilities in appropriate circumstances. An examinee who appears at an examination remotely will be required to abide by certain procedures to ensure the integrity of the examination, and will be informed of these prior to the examination.

An examinee will not normally be examined for more than one and a half hours at a time before being given a 15 minute adjournment. In most circumstances, an examination will not exceed five hours in any one day, except following consultation with the examinee. For example, if a short extension allows the examination to be concluded that day which avoids the need to extend the examination into a further day. AER officers will arrange suitable stationery, telephone and photocopier access and refreshments (but not meals) for all participants at the examination.

### **3.3 Use of oath or affirmation**

The AER or a person specified in a compulsory notice may require evidence to be given under oath or by way of affirmation.<sup>9</sup> For that purpose, the AER or person specified in the compulsory notice may administer the oath or affirmation.

It is the AER's policy to administer an oath or affirmation as a matter of course in examinations under the compulsory notice sections.

<sup>8</sup> *Constantine v Trade Practices Commission* (1994) ATPR 41–291.

<sup>9</sup> NEL s 28(9a), NERL s 206(9a), NGL s 42(9a)

### **3.4 The AER's use of counsel**

Counsel and/or an instructing solicitor may assist the member of the AER or SES employee hearing the evidence. Counsel representing the AER usually assists by asking questions during the examination. AER officers will also be present and may ask questions of the examinee.

### **3.5 Examinee's legal representation**

As a matter of procedural fairness, the AER will permit an examinee the assistance of a legal adviser.

The compulsory notice will be issued with a covering letter outlining that the examinee may have their legal adviser present, subject to such reasonable conditions as the AER may wish to impose (e.g. the provision of a confidentiality undertaking by the legal adviser). While an examinee is generally permitted to be legally represented, there may be objections to a particular legal adviser if that legal adviser's presence would prejudice or has the potential to prejudice the investigation—for example, where the legal adviser:

- is being instructed by more than one examinee in the same matter
- also acts for the subject of the investigation, not being the examinee
- declines to give an undertaking not to disclose the content of the examination to any person other than the examinee until such time as the AER has concluded its inquiry or otherwise consents
- may themselves be at a real risk of investigation by the AER in relation to the matter

An examinee is entitled to a legal adviser in an examination and it will not usually be appropriate for in-house lawyers and other representatives of an examinee's employer to attend an examination due to the likelihood of there being a conflict of interest. The examinee's legal adviser will normally only be permitted to:

- object to questions asked as being unclear, unfair, likely to reveal information over which a claim of legal professional privilege could properly be made, or irrelevant to the subject matter of the examination
- re-examine the examinee to clarify any response to an earlier question
- make submissions on any relevant matter at the completion of the examination.

It is the AER's preference that an examinee disclose to the AER as soon as reasonably practicable the identity of the legal adviser whom they intend to have present, in order for any conflict of interest (such as representation of another party relevant to the investigation) to be identified prior to the day of the examination. This will allow for alternative representation to be arranged if any issue, for example, a conflict, is identified, and for the examination to proceed without unnecessary delay.

A legal adviser who prejudices the examination—for example, by continually objecting on minor issues to the extent of being obstructive—may be excluded.

### **3.6 Direction to examinee not to disclose**

The AER has the power to direct an examinee not to disclose the content of the examination to any person other than a legal adviser (for the purpose of obtaining legal advice) until such time as the AER has concluded its inquiry or otherwise consents.

This direction to the examinee protects the private nature of the compulsory oral examination process as far as is reasonably practicable.

The direction prevents examinees from disclosing to third parties (such as the company employing the examinee) what was said in the examination or the fact that certain kinds of information were disclosed in the examination. As a general rule, the AER will send a letter to the examinee withdrawing the direction for non-disclosure at an appropriate time. This will usually be when the investigation has been completed. The period of non-disclosure would not extend beyond the institution of proceedings in respect of matters the subject of the investigation.

However, a party can make contact with the AER and request that the direction for non-disclosure be withdrawn at an earlier stage in circumstances where it considers there are sound reasons for such a withdrawal. For example, it may enhance the efficiency of an investigation including through potential resolution of the matter or better clarification of the facts.

It is likely that any legal adviser present during an examination will also be required to give an undertaking not to disclose the content of an examination to any party not involved in the examination.

### **3.7 Exclusion of third parties**

Third parties are excluded from examinations under the National Energy Laws notwithstanding that they may have a direct interest in the evidence to be given. For example, an employer whose company is under investigation has no right of attendance at the examination of an employee.

The exclusion of third parties is supported on the basis that examinations under the National Energy Laws are investigative and private rather than judicial proceedings, so that no right of attendance arises.

Attendance by the AER will include members of the AER, legal or other expert advisers and AER officers directly involved in the investigation plus transcription employees.

### **3.8 Adjournment**

An examination may be adjourned to a date advised to the examinee when the examination is not concluded in one day or where the AER considers there may be further questions to be put to the examinee at a later date. The AER will not adjourn an examination as a matter of course. However, where further examination is reasonably foreseeable in light of the evidence given or due to other examinations that are yet to be conducted, it is likely that the AER will adjourn an examination.

### **3.9 Transcript**

Where appropriate, a full transcript of the evidence given by an examinee will be made available to the examinee as soon as reasonably practicable after the conclusion of the examination, including any resumption of adjourned examinations. Where an examination has been adjourned and not yet concluded, the transcript will not normally be made available during the intervening period.



There may be circumstances where, to maintain the integrity of its investigation, the AER does not make the transcript of evidence available until the conclusion of the whole investigation, of which the examination is only a part.

Transcripts made available to examinees will be accompanied by a letter inviting them to identify any errors in the transcript by a specified date and advising them that the transcripts are confidential.

## 4 Use of information provided under a compulsory notice

### 4.1 Purposes connected with the performance or exercise of a function or power of the AER

The AER may use information provided to it by a person in compliance with a compulsory notice under the compulsory notice sections<sup>10</sup> for any purposes connected with the performance or exercise of a function or power of the AER under the National Energy Laws or National Energy Rules.

Section 44AAF of the *Competition and Consumer Act 2020* (Cth) imposes an obligation on the AER to take all reasonable measures to protect information obtained in confidence or by compulsion, from unauthorised use or disclosure.

Use of or disclosure of the information for the purposes of performing the function of members or employees of the AER, is taken to be authorised use and disclosure of the information.<sup>11</sup>

Section 44AAF(3) provides that disclosing information to the Australian Competition and Consumer Commission, Australian Energy Market Commission, Australian Energy Market Operator, Clean Energy Regulator, or other person prescribed by regulations (which currently include various Commonwealth, state and territory regulatory bodies), is an authorised use of the information. Those bodies may use the information for any purpose connected with the performance of their functions or powers.

The NEL includes additional provisions on the treatment of information collected under section 28 for the purpose of the AER's wholesale market monitoring functions which are discussed at section 4.2 below.

Further information on the AER's general approach to the use and disclosure of information is set out in the AER/ACCC Information Policy, which is available on the AER website.<sup>12</sup>

### 4.2 AER's wholesale market monitoring functions

#### 4.2.1 General

The NEL requires the AER to monitor the wholesale market and report on its performance at least every two years.<sup>13</sup> The AER is required to identify and analyse whether:

- there is 'effective competition' within the relevant wholesale market, as defined in the NEL
- there are features of the market that may be detrimental to effective competition within the market
- there are features of the market that may be impacting detrimentally on the efficient functioning of the market and the achievement of the national electricity objective.

This monitoring and reporting role supports the efficient operation of the wholesale electricity market as it allows early detection of issues affecting market performance. The AER has other performance reporting obligations across a range of wholesale, retail and network areas that pre-date these functions. In wholesale these have generally focussed on short term outcomes, compliance issues and individual price events. The wholesale monitoring and reporting functions will take a longer term view and focus on competition issues.

<sup>10</sup> NEL s. 28ZD; NERL s. 216; and NGL, s.66.

<sup>11</sup> Competition and Consumer Act, s 44AAF(6).

<sup>12</sup> <https://www.aer.gov.au/publications/corporate-documents/acc-and-aer-information-policy-collection-and-disclosure-of-information>

<sup>13</sup> NEL Part 3 Division 1A.

## 4.2.2 Publicly available information

The AER must, in the first instance, use publicly available information to carry out its wholesale market monitoring functions.<sup>14</sup> There is a range of public information the AER will rely on, including information and data published by the Australian Energy Market Operator, the Australian Energy Market Commission and jurisdictional regulators, as well as data available through the ASX. The AER may also collect primary data through direct engagement or surveys of market participants and other stakeholders.

## 4.2.3 Confidential information

If the AER identifies an issue, then it may issue a compulsory notice under section 28 of the NEL to wholesale electricity market participants to acquire non-public information.

The NEL includes additional provisions on the treatment of information collected under section 28 for the purpose of the wholesale market monitoring functions.

Section 18D(2)–(6) of the NEL provides that:

- any information obtained using the section 28 powers for the purpose of the market monitoring function is taken to have been given in confidence
- the AER must not use this confidential information for any purpose other than the performance of the wholesale market monitoring functions
- the AER must not disclose the confidential information unless the disclosure is for the purpose of the wholesale market monitoring or reporting functions and the information can be combined or arranged in a way that does not reveal confidential aspects of the information or the identity of whom the information relates
- the AER must return any documents obtained within 12 months or as soon as reasonably practical after 12 months.

The AER treats any information it obtains under section 28 for the purpose of the wholesale market monitoring functions in accordance with these obligations.

<sup>14</sup> NEL s. 18D(1)(a).

# Annexure A - Compulsory notice sections

## National Electricity Law - Section 28

### 28—Power to obtain information and documents in relation to performance and exercise of functions and powers

(1) If the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance or exercise of a function or power conferred on it under this Law or the Rules, the AER may, by notice in writing, serve on that person a notice (a relevant notice).

(2) A relevant notice may require the person to do 1 or more of the following

(a) provide to the AER, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any information of the kind referred to in subsection (1); or

(b) produce to the AER, or to a person specified in the notice acting on its behalf, in accordance with the notice, any documents of the kind referred to in subsection (1); or

(c) appear before the AER, or before a member of the staff assisting the AER who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice, to provide any information or to give any evidence of the kind referred to in subsection (1), either orally or in writing, and to produce any documents of the kind referred to in subsection (1).

(3) A person on whom a relevant notice is served must comply with the relevant notice unless the person has a reasonable excuse.

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

(3a) A person must not, when appearing under subsection (2)(c), refuse or fail to answer a question that the person is required to answer for the purpose of providing information or giving evidence unless the person has a reasonable excuse.

Maximum penalty: \$6 300.

**Note** — See Schedule 2 clause 37B, which provides for criminal penalty amounts specified to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(4) A person must not, in purported compliance with a relevant notice, provide information or give evidence that the person knows is false or misleading in a material particular.

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

(5) It is a reasonable excuse for the purposes of subsection (3) if the person served the relevant notice is not capable of complying with that notice.

(5a) It is a reasonable excuse for the purposes of subsection (3a) if the person is not capable of providing the information or giving the evidence (as the case may be) to which the question relates.

(6) It is a reasonable excuse for a natural person to—

(a) fail to provide information or give evidence of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice; or

(b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice acting on behalf of the AER, if to do so might tend to

incriminate the person, or make the person liable to a criminal penalty, under a law of this jurisdiction or another jurisdiction in Australia (whether or not that other jurisdiction is a participating jurisdiction).

(7) It is not a reasonable excuse for a person to—

(a) fail to provide information of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant compulsory notice; or

(b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant compulsory notice acting on behalf of the AER,

on the ground of any duty of confidence.

(8) This section does not require a person to—

(a) provide information that is the subject of legal professional privilege; or

(b) produce a document the production of which would disclose information that is the subject of legal professional privilege.

(9) This section does not require a person to—

(a) provide information or give evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or

(b) produce a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or

(c) provide information, give evidence or produce a document, that would disclose the deliberations of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory.

(9a) The AER, or a person specified in a relevant notice under this section, may require evidence given under subsection (2)(c) to be given on oath or affirmation and for that purpose the AER or specified person (as the case may be) may administer the oath or affirmation.

(9b) A person must not, without reasonable excuse, refuse or fail to be sworn or to make an affirmation under subsection (9a).

Maximum penalty: \$6 300.

**Note** — See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(10) A person incurs, by complying with a relevant notice, no liability for breach of contract, breach of confidence or any other civil wrong.

(11) Subject to the preceding subsections, the Court may, on application by the AER on behalf of the Commonwealth, if satisfied that a person has breached subsection (3) or (3a), make an order that the person take such action as the Court requires for remedying the breach.

(12) To avoid doubt, the Court may act under subsection (11) if satisfied on the balance of probabilities that a person is in breach of subsection (3) or (3a) (as the case may be).

(13) The AER must not exercise, or continue to exercise, a power under subsection (1) in relation to a matter (and any notice under that subsection will cease to have effect)—

(a) after the AER has commenced proceedings in relation to the matter, other than proceedings for an injunction (whether interim or final); or

(b) if proceedings for a final injunction have been commenced by the AER—after the close of pleadings in those proceedings.

(14) Subsection (13) does not prevent the AER from—

(a) using any information, evidence or document acquired under this section in any proceedings if the information, evidence or document has been obtained before the commencement of those proceedings; or

(b) exercising a power under this section for a purpose other than for the purposes of proceedings referred to in that subsection.

(15) Any information, evidence or document obtained under subsection (14)(b) may be used in any proceedings if it is found to be relevant to those proceedings.

(16) The Regulations may make any other provision in relation to the form, content or service of a notice under this section.

(17) An annual report for the AER must include the following information relating to the relevant reporting period for that report:

(a) the number of notices (if any) given under subsection (2)(c) during the reporting period to appear to provide information or to give evidence orally;

(b) in relation to a notice under paragraph (a)—a general description of the nature of the matter or matters in respect of which the compulsory notice was given;

(c) the number of proceedings (if any) commenced during the reporting period to challenge a notice given under subsection (2)(c) to appear to provide information or to give evidence orally.

(18) A person must not—

(a) threaten, intimidate or coerce another person; or

(b) cause or procure damage, loss or disadvantage to another person,

because that other person—

(c) proposes to provide information, give evidence or produce a document in response to a notice under this section; or

(d) proposes to appear, or has appeared, in response to a notice under this section.

Maximum penalty: \$6 300.

**Note—** See Schedule 2 clause 37B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(19) In this section—

**acting SES employee** has the same meaning as in the *Public Service Act 1999* of the Commonwealth;

**SES employee** has the same meaning as in the *Public Service Act 1999* of the Commonwealth.

## National Energy Retail Law

### 206—Power to obtain information and documents

(1) If the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance or exercise of a function or power conferred on it under this Law, the National Regulations, the Rules or an application Act, the AER may serve on that person a notice (a relevant notice).

(2) A relevant notice may require the person to do 1 or more of the following:

(a) provide to the AER, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any information of the kind referred to in subsection (1); or

(b) produce to the AER, or to a person specified in the notice acting on its behalf, in accordance with the notice, any documents of the kind referred to in subsection (1); or

(c) appear before the AER, or before a member of the staff assisting the AER who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice, to provide any information or to give any evidence of the kind referred to in subsection (1), either orally or in writing, and to produce any documents of the kind referred to in subsection (1).

(3) A person on whom a relevant notice is served must comply with the relevant notice unless the person has a reasonable excuse.

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

**Note** — See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(3a) A person must not, when appearing under subsection (2)(c), refuse or fail to answer a question that the person is required to answer for the purpose of providing information or giving evidence unless the person has a reasonable excuse.

Maximum penalty: \$6 300.

**Note**— See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(4) A person must not, in purported compliance with a relevant notice, provide information or give evidence that the person knows is false or misleading in a material particular.

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

**Note**— See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(5) It is a reasonable excuse for the purposes of subsection (3) if the person served the relevant notice is not capable of complying with that notice.

(5a) It is a reasonable excuse for the purposes of subsection (3a) if the person is not capable of providing the information or giving the evidence (as the case may be) to which the question relates.

(6) It is a reasonable excuse for a natural person to—

(a) fail to provide information or to give evidence of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice;

(b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant compulsory notice acting on behalf of the AER,

if to do so might tend to incriminate the person, or make the person liable to a criminal penalty, under a law of this jurisdiction or another jurisdiction in Australia (whether or not that other jurisdiction is a participating jurisdiction).

(7) It is not a reasonable excuse for a person to—

(a) fail to provide information of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice; or

(b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice acting on behalf of the AER,

on the ground of any duty of confidence.

(8) This section does not require a person to—

(a) provide information that is the subject of legal professional privilege; or

(b) produce a document the production of which would disclose information that is the subject of legal professional privilege.

(9) This section does not require a person to—

(a) provide information or give evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or

(b) produce a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or

(c) provide information, give evidence or produce a document that would disclose the deliberations of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory.

(9a) The AER, or a person specified in a relevant notice under this section, may require evidence given under subsection (2)(c) to be given on oath or affirmation and for that purpose the AER or specified person (as the case may be) may administer the oath or affirmation.

(9b) A person must not, without reasonable excuse, refuse or fail to be sworn or to make an affirmation under subsection (9a).

Maximum penalty: \$6 300.

**Note**— See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(10) A person incurs, by complying with a relevant notice, no liability for breach of contract, breach of confidence or any other civil wrong.

(11) Subject to the preceding subsections, the Court may, on application by the AER on behalf of the Commonwealth, if satisfied that a person has breached subsection (3) or (3a), make an order that the person take such action as the Court requires for remedying the breach.

(12) To avoid doubt, the Court may act under subsection (11) if satisfied on the balance of probabilities that a person is in breach of subsection (3) or (3a) (as the case may be).

(13) The AER must not exercise, or continue to exercise, a power under subsection (1) in relation to a matter (and any notice under that subsection will cease to have effect)—

(a) after the AER has commenced proceedings in relation to the matter, other than proceedings for an injunction (whether interim or final); or

(b) if proceedings for a final injunction have been commenced by the AER—after the close of pleadings in those proceedings.

(14) Subsection (13) does not prevent the AER from—

(a) using any information, evidence or document acquired under this section in any proceedings if the information, evidence or document has been obtained before the commencement of those proceedings; or



(b) exercising a power under this section for a purpose other than for the purposes of proceedings referred to in that subsection.

(15) Any information, evidence or document obtained under subsection (14)(b) may be used in any proceedings if it is found to be relevant to those proceedings.

(16) The National Regulations may make any other provision in relation to the form, content or service of a notice under this section.

(17) An annual report for the AER must include the following information relating to the relevant reporting period for that report:

(a) the number of notices (if any) given under subsection (2)(c) during the reporting period to appear to provide information or to give evidence orally;

(b) in relation to a notice under paragraph (a)—a general description of the nature of the matter or matters in respect of which the notice was given;

(c) the number of any proceedings (if any) commenced during the reporting period to challenge a notice given under subsection (2)(c) to appear to provide information or to give evidence orally.

(18) A person must not—

(a) threaten, intimidate or coerce another person; or

(b) cause or procure damage, loss or disadvantage to another person,

because that other person—

(c) proposes to provide information, give evidence or produce a document in response to a notice under this section; or

(d) proposes to appear, or has appeared, in response to a notice under this section.

Maximum penalty: \$6 300.

**Note** — See section 300B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(19) In this section—

**acting SES employee** has the same meaning as in the *Public Service Act 1999* of the Commonwealth;

**SES employee** has the same meaning as in the *Public Service Act 1999* of the Commonwealth.

## National Gas Law

### 42—Power to obtain information and documents in relation to performance and exercise of functions and powers

(1) If the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance or exercise of a function or power conferred on it under this Law or the Rules, the AER may, by notice in writing, serve on that person a notice (a relevant notice).

(2) A relevant notice may require the person to do 1 or more of the following:

(a) provide to the AER, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any information of the kind referred to in subsection (1); or

(b) produce to the AER, or to a person specified in the notice acting on its behalf, in accordance with the notice, any documents of the kind referred to in subsection (1); or

(c) appear before the AER, or before a member of the staff assisting the AER who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice, to provide any information or to give any evidence of the kind referred to in subsection (1), either orally or in writing, and to produce any documents of the kind referred to in subsection (1).

(3) A person on whom a relevant notice is served must comply with the relevant notice unless the person has a reasonable excuse.

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$ 31 500.

**Note**— See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(3a) A person must not, when appearing under subsection (2)(c), refuse or fail to answer a question that the person is required to answer for the purpose of providing information or giving evidence unless the person has a reasonable excuse.

Maximum penalty: \$6 300.

**Note**— See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(4) A person must not, in purported compliance with a relevant notice, provide information or give evidence that the person knows is false or misleading in a material particular.

Maximum penalty:

(a) in the case of a natural person—\$6 300;

(b) in the case of a body corporate—\$31 500.

**Note**— See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(5) It is a reasonable excuse for the purposes of subsection (3) if the person served the relevant notice is not capable of complying with that notice.

(5a) It is a reasonable excuse for the purposes of subsection (3a) if the person is not capable of providing the information or giving the evidence (as the case may be) to which the question relates.

(6) It is a reasonable excuse for a natural person to—

(a) fail to provide information or to give evidence of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice; or

(b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice acting on behalf of the AER,

if to do so might tend to incriminate the person, or make the person liable to a criminal penalty, under a law of this jurisdiction or a law of another participating jurisdiction.

(7) It is not a reasonable excuse for a person to—

- (a) fail to provide information of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice; or
- (b) fail to produce a document of the kind referred to in subsection (1) to the AER, or to a person specified in a relevant notice acting on behalf of the AER,

on the ground of any duty of confidence.

(8) This section does not require a person to—

- (a) provide information that is the subject of legal professional privilege; or
- (b) produce a document the production of which would disclose information that is the subject of legal professional privilege.

(9) This section does not require a person to—

- (a) provide information or give evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or
- (b) produce a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or
- (c) provide information, give evidence or produce a document, that would disclose the deliberations of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory.

(9a) The AER, or a person specified in a relevant notice under this section, may require evidence given under subsection (2)(c) to be given on oath or affirmation and for that purpose the AER or specified person (as the case may be) may administer the oath or affirmation.

(9b) A person must not, without reasonable excuse, refuse or fail to be sworn or to make an affirmation under subsection (9a).

Maximum penalty: \$6 300.

**Note—** See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(10) A person incurs, by complying with a relevant notice, no liability for breach of contract, breach of confidence or any other civil wrong.

(11) Subject to the preceding subsections, the Court may, on application by the AER on behalf of the Commonwealth, if satisfied that a person has breached subsection (3) or (3a), make an order that the person take such action as the Court requires for remedying the breach.

(12) To avoid doubt, the Court may act under subsection (11) if satisfied on the balance of probabilities that a person is in breach of subsection (3) or (3a) (as the case may be).

(13) The AER must not exercise, or continue to exercise, a power under subsection (1) in relation to a matter (and any notice under that subsection will cease to have effect)—

- (a) after the AER has commenced proceedings in relation to the matter, other than proceedings for an injunction (whether interim or final); or
- (b) if proceedings for a final injunction have been commenced by the AER—after the close of pleadings in those proceedings.

(14) Subsection (13) does not prevent the AER from—

- (a) using any information, evidence or document acquired under this section in any proceedings if the information, evidence or document has been obtained before the commencement of those proceedings; or

(b) exercising a power under this section for a purpose other than for the purposes of proceedings referred to in that subsection.

(15) Any information, evidence or document obtained under subsection (14)(b) may be used in any proceedings if it is found to be relevant to those proceedings.

(16) The Regulations may make any other provision in relation to the form, content or service of a notice under this section.

(17) An annual report for the AER must include the following information relating to the relevant reporting period for that report:

(a) the number of notices (if any) given under subsection (2)(c) during the reporting period to appear to provide information or to give evidence orally;

(b) in relation to a notice under paragraph (a)—a general description of the nature of the matter or matters in respect of which the notice was given;

(c) the number of proceedings (if any) commenced during the reporting period to challenge a notice given under subsection (2)(c) to appear to provide information or to give evidence orally.

(18) A person must not—

(a) threaten, intimidate or coerce another person; or

(b) cause or procure damage, loss or disadvantage to another person,

because that other person—

(c) proposes to provide information, give evidence or produce a document in response to a notice under this section; or

(d) proposes to appear, or has appeared, in response to a notice under this section.

Maximum penalty: \$6 300.

**Note—** See Schedule 2 clause 47B, which provides for criminal penalty amounts to be adjusted every 3 years to reflect movements in the consumer price index. The adjusted amounts are published on the AER's website.

(19) In this section—

**acting SES employee** has the same meaning as in the *Public Service Act 1999* of the Commonwealth;

**SES employee** has the same meaning as in the *Public Service Act 1999* of the Commonwealth.