

AER Powers and Civil Penalty Regime

Consultation Paper

Senior Committee of Officials

June 2018

Submissions are invited on this consultation paper by Friday 29 June 2018. Electronic submissions are preferred and can be sent to the COAG Energy Council Secretariat at energycouncil@environment.gov.au.

Those who wish to provide hard copies by post may do so by addressing their submissions to:

COAG Energy Council Secretariat
GPO Box 787
Canberra ACT 2601

All submissions will be published on the Council website (www.coagenergycouncil.gov.au) unless stakeholders have clearly indicated that a submission should remain confidential, either in whole or in part.

Please note that this paper does not provide legal advice about any of the laws discussed in it, and it should not be relied on for any purpose. It is intended as a consultation paper only. It does not reflect the final views of officials or Council policy.

The Senior Committee of Officials consists of officials from the state, territory and Commonwealth agencies with responsibility for energy policy. It operates under the COAG Energy Council framework.



Table of Contents

1. Introduction.....	4
1.1. Scope	4
1.2. Structure	4
1.3. Making a submission.....	4
1.4. What will happen after this consultation?	5
2. Giving the AER a power to compel individuals to appear before it and give evidence	6
2.1. Existing powers to collect information	6
2.2. Need for a new power for the AER	6
2.3. Policy issues.....	7
2.4. The AER's grounds for using the new power	7
2.5. Use of information	8
2.6. Penalties for non-compliance and providing false information.....	8
2.7. Requiring evidence on oath or affirmation	9
2.8. Privilege against self-incrimination	9
2.9. Guidelines on the use of the new power	10
2.10. Other issues	11
3. Proposed changes to the civil penalty regime under the National Energy Laws	13
3.1. Civil penalty regime.....	13
3.2. Current penalty rates.....	13
3.3. Policy issues.....	14
3.4. Principles for determining which provisions could attract the highest penalty rate	14
3.5. Infringement notices	15
3.6. Required law changes.....	16

1. Introduction

This consultation continues the COAG Energy Council's work following the 2013 *Review of Enforcement Regimes under the National Energy Laws* (the Enforcement Review)¹. The COAG Energy Council has previously consulted on other aspects of the review, in 2014 and 2016².

At its meeting in November 2017, the COAG Energy Council agreed to progress other recommendations from the review:

- amending the national energy laws to give the Australian Energy Regulator (AER) the power to compel individuals to appear before it and give evidence (recommendation 13)
- conducting a targeted review of whether additional provisions of the national energy laws or subordinate instruments should attract the highest maximum civil penalty amount (recommendation 5).

1.1. Scope

This paper considers the national energy laws and their subordinate instruments:

- National Electricity Law (NEL), National Electricity Rules (NER) and National Electricity Regulations
- National Gas Law (NGL), National Gas Rules (NGR) and National Gas Regulations
- National Energy Retail Law (NERL), National Energy Retail Rules (NERR) and National Energy Retail Regulations.

The provisions of the NEL are used to provide examples in this paper. These provisions are mirrored in the NGL and NERL.

1.2. Structure

Section 2 of this paper discusses the COAG Energy Council's decision to give the AER a power to compel individuals to appear before it and give evidence.

Section 3 discusses whether additional provisions of the national energy laws or subordinate instruments should attract the highest maximum civil penalty amount.

The AER has consulted with staff of the Australian Energy Market Commission (AEMC) on a preliminary list of civil penalty provisions that may warrant the highest civil penalty amount. Staff of the Australian Energy Market Operator (AEMO) have also provided operational input in relation to the preliminary list. This list is at **Appendix A**.

1.3. Making a submission


Stakeholders are invited to provide written submissions on the consultation paper by close of business on **Friday 29 June 2018**.

All stakeholder submissions will be published on the Council website unless stakeholders have clearly indicated that a submission should remain confidential, either in whole or in part. Electronic submissions are preferred and can be sent to the COAG Energy Council Secretariat at energycouncil@environment.gov.au.

Those who wish to provide hard copies by post may do so by addressing their submissions to:

¹ The 2013 *Review of Enforcement Regimes under the National Energy Laws* report is available on the COAG Energy Council website at: www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Review-of-Enforcement-Regimes-under-the-National-Energy-Laws-Final-Report.pdf

² www.coagenergycouncil.gov.au/publications/energy-market-reform-bulletin-no-22-consultation-recommendations-review-enforcement, www.coagenergycouncil.gov.au/publications/energy-market-reform-bulletin-no-29-discussion-paper-key-recommendations-arising-review, and www.coagenergycouncil.gov.au/publications/energy-working-group-bulletin-no-43-review-enforcement-regimes-under-national-energy



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1.4. What will happen after this consultation?

Submissions on this consultation paper will be considered and used to inform Ministers at the COAG Energy Council meeting in August 2018.

Should Ministers decide to progress any of the options outlined in this paper, there will be further opportunities for consultation on any legislative changes.

2. Giving the AER a power to compel individuals to appear before it and give evidence

The 2013 *Review of Enforcement regimes under the National Energy Laws* recommended that the AER should be given a power to compel individuals to appear before it to give evidence.

The review argued that this would improve the AER's ability to investigate breaches of the national energy laws. For example, this would allow the AER to obtain unedited evidence, make it easier to get answers to technically complex questions, and allow for the more timely collection of information.³

At the COAG Energy Council meeting in November 2017, the Council agreed to amend the national energy laws, and subordinate instruments if necessary, to give the AER this power.

2.1. Existing powers to collect information

The AER has powers to gather the information it needs to fulfil its functions and powers. These powers are currently limited to requiring the provision of documents, or information in writing. The relevant provisions are replicated in each of the national energy laws:

- s. 28 of the NEL
- s. 42 of the NGL
- s. 206 of the NERL.

Under the national energy laws, the AER can use its powers to obtain written information and documents if “the AER has reason to believe that a person is capable of providing information or producing a document that the AER requires for the performance or exercise of a function or power conferred on it” under the national energy laws and rules (see e.g. s. 28(1) of the NEL).

Other regulators, including the Australian Competition and Consumer Commission (ACCC), have a power to compel people to appear and give evidence. For example, under s. 155 of the *Competition and Consumer Act 2010* (CCA), the ACCC has the power to obtain information and documents, and can require people to appear and give evidence verbally or in writing, including on oath or affirmation.

In Western Australia, under section 46 of the *Economic Regulation Authority Act 2003*, the Economic Regulation Authority has powers like that of the ACCC and the Productivity Commission to compel people to appear before it to give evidence. However, this can only be used in the context of its inquiry function.

2.2. Need for a new power for the AER

The 2013 Review noted the challenges the AER faces without a power to compel people to appear and give evidence:

- Information obtained through the current information request process can be highly technical and complex. Giving the AER the ability to question the relevant personnel and require an explanation would assist its understanding of, and ability to interpret, such information. This could avoid the need for several rounds of written exchanges, or bring to light information that would otherwise not be revealed until a trial.
- Written responses to information requests may be subject to editorial supervision. For example, where an offence involves a mental element, the response of a decision-maker involved in a potential breach may be edited by others who were not personally involved in the relevant conduct. This has the potential to create inconsistencies between the written

³ Standing Council on Energy and Resources (2013) *The Review of Enforcement Regimes under the National Energy Laws*, pp. 118-120.

responses and the oral evidence that might be given before a court by the decision-maker.

- Allowing the AER to question individuals involved in a potential breach would allow it to obtain information from those individuals nearer to the time of the conduct in question. As such, those individuals would have a clearer memory of the relevant events than they would if questioning did not occur until the matter reached trial.
- Further lines of inquiry might develop during oral questioning that can be pursued immediately, thereby expediting the AER's information request process⁴.

In its Retail Electricity Pricing Inquiry preliminary report, the ACCC noted that the AER's current lack of a power to require an individual involved in conduct to appear before it and give verbal evidence constitutes "...a significant deficiency in the AER's powers."⁵

The ACCC considers that "...in order for the AER to effectively investigate and deter unlawful conduct in the wholesale market, amendments should be made to enable the AER to require individuals to give evidence before it, similar to the ACCC's powers under section 155(1)(c) of the Competition and Consumer Act."⁶

2.3. Policy issues

The COAG Energy Council has agreed to amend the national energy laws to give the AER a power to compel people to appear before it and give evidence (referred to as 'the new power' in this paper). An equivalent power is also being considered for Western Australia's Economic Regulation Authority.

There are a number of policy issues that need to be resolved to allow for the drafting of legislative amendments, particularly:

- the AER's grounds for exercising the new power
- penalties for non-compliance and providing false information
- whether the AER should be able to require evidence be given on oath or affirmation
- privilege against self-incrimination and penalty privilege
- how the AER can use information collected using the new power
- the need for guidelines on the use of the new power
- replicating existing provisions around the AER and ACCC's information gathering powers, including the time up until which the AER may exercise its new power.

Stakeholders are invited to comment on the Council's proposed policy positions.

2.4. The AER's grounds for using the new power

Under the national energy laws, the AER can use its powers to obtain information and documents if "the AER has reason to believe that a person is capable of providing information or producing a document that the AER requires for the performance or exercise of a function or power conferred on it" under the national energy laws and rules (see e.g. s. 28(1) of the NEL).

The ACCC's information gathering powers under the Competition and Consumer Act (CCA) can be used in relation to a matter that constitutes, or may constitute, a contravention of the CCA (s. 155(1)), and in other, limited circumstances. Under Part VIIA of the CCA, the ACCC can also collect information for the purposes of conducting an inquiry .

⁴ *The Review of Enforcement Regimes under the National Energy Laws*, 2013, p.120

⁵ Australian and Competition and Consumer Commission (2017) 2017, Retail Electricity Pricing Inquiry: Preliminary Report, p. 94. Available at www.accc.gov.au/system/files/Retail%20Electricity%20Inquiry%20-%20Preliminary%20report%20-%202013%20November%202017.pdf

⁶ Ibid. pg. 94-95.

If the grounds for the AER's use of its current information gathering powers were applied to its new power, the AER would be able to compel individuals to appear and give evidence for any purpose related to the AER's functions or powers. For example, the AER could collect verbal evidence on oath or affirmation in relation to network revenue determinations, in addition to its enforcement work.

Under the ACCC model, the AER's use of the new power would likely be limited to enforcement matters, although the legislation could specify other uses of the power. The AER would be able to collect verbal evidence on oath or affirmation for the purpose of investigating a breach of the energy laws or rules.

Proposed position: For consistency with the current national energy laws, the AER's grounds for using the new power should be the same as its grounds for using its existing information gathering powers, i.e. in relation to any of the AER's functions or powers.

Consultation question:

1. ***Do you agree that the AER should be able to use its new power, to compel individuals to appear before it and give evidence, in relation to any of its functions or powers?***

2.5. Use of information

The AER has significant discretion in how it uses the information it obtains in its investigations. The AER can use information obtained under any of the national energy laws "...for a purpose connected with the performance or exercise of a function or power of the AER" (see e.g. s. 28ZI of the NEL).

The ACCC can also use material obtained using its information gathering powers in a range of contexts. The ACCC's guide to the use of its powers under s. 155 of the CCA indicates that while the ACCC "is under an implied legal obligation to use information, documents or evidence provided in response to a s. 155 notice for the purpose for which the notice was issued", the ACCC takes the view that other provisions of the CCA allow further use of this information⁷. In particular, s. 155AAA allows the information collected under s. 155 to be disclosed to an ACCC official performing their duties. The ACCC considers that, under this provision, where it has obtained material in the course of one matter, it can use this information in the course of another matter⁸.

Proposed position: Information obtained under the AER's new power should be treated consistently with the AER's existing powers to collect information. That is, the AER should be able to use this information for any purpose related to its functions or powers⁹.

Consultation questions:

2. ***Do you agree that the AER should be able to use information collected using its new power in relation to any of its powers or functions, noting the exception relating to wholesale market monitoring?***
3. ***If not, what limitations should be placed on how the AER is allowed to use information obtained through use of the new power?***

2.6. Penalties for non-compliance and providing false information

There are a number of 'offence provisions' in the Laws, the contravention of which exposes a person to a finding of guilt by a court. The maximum penalties for these offences are defined in the laws as \$2,000 for individuals or \$10,000 for a corporation. Offence provisions are distinct from

⁷ Australian Competition and Consumer Commission (2018) *ACCC Guidelines – Use of section 155 powers*, p. 11. Available at www.accc.gov.au/publications/accc-guidelines-use-of-s-155-powers.

⁸ *Ibid*, p. 11.

⁹ Noting that under s. 18D of the NEL, the AER can only use information obtained in relation to its wholesale market monitoring function for the purposes of this function.

civil penalty provisions.

Refusing to provide information to the AER, or providing false or misleading information, is an offence provision (e.g. s. 28(3) and (4) of the NEL). Officials propose that these penalties should be extended to the AER's new power.

The COAG Energy Council has previously consulted on increasing civil penalty and infringement notice amounts in line with changes in the value of money since the penalties were introduced. However, changes to the offence provision amounts have not been considered until now. Unless these amounts increase in line with changes in the value of money, their deterrent effect decreases over time.

Proposed position: For consistency, the existing penalties in the national energy laws for failing to provide information to the AER, or providing false or misleading information, should apply to the AER's new power. That is, legislative amendments should include that a natural person who refuses to appear before the AER, refuses to provide information, or provides false or misleading information, commits an offence.

The offence provision penalty amounts should be increased in line with changes in the value of money.

Consultation questions:

4. *Do you agree that the existing penalties in the national energy laws for failing to provide information to the AER, or providing false or misleading information, should apply to the AER's new power?*
5. *Do you agree offence provision penalty amounts should be increased in line with changes in the value of money?*

2.7. Requiring evidence on oath or affirmation

Under the CCA, the ACCC can require that an individual giving evidence do so on oath or affirmation (s. 155(3) and (3A)).

The AER can also compel people to appear and give evidence under oath, but only for the purpose of conducting access dispute hearings (s. 142 of the NEL and s. 201 of the NGL).

Requiring that evidence be given on oath or affirmation underlines to individuals the importance of giving truthful information.

Proposed position: When requiring individuals to give evidence under its new information gathering power, the AER should also be able to require that this evidence be given on oath or affirmation. This is in addition to its current powers with respect of access dispute hearings.

Consultation question:

6. *Do you agree the AER should be able to require evidence be given on oath or affirmation?*

2.8. Privilege against self-incrimination

The privilege against self-incrimination gives an individual the right to refuse to answer a question if the answer would be likely to incriminate them.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) outlines the importance of the privilege against self-incrimination. The Guide notes that

“...the privilege against self-incrimination is enshrined in common law in Australia.”¹⁰ According to the guide, the privilege can be overridden when justified, for example if use of the privilege could seriously undermine the effectiveness of a regulatory scheme.¹¹ However, “...the Scrutiny of Bills Committee recognises that the privilege can be overridden, but given that removing the privilege represents a significant loss of personal liberty ... the Committee will question whether there is a public benefit in the removal of the principle that outweighs the loss.”¹²

If the privilege is overridden, it is usual to provide protections for how information obtained can be used:

- ‘use’ immunity: self-incriminatory information or documents provided by an individual can’t be used in proceedings against that individual, but can be used to investigate unlawful conduct by that individual and third parties
- ‘derivative use’ immunity: information provided cannot be used to investigate unlawful conduct by that individual but can be used to investigate third parties.¹³

Under the national energy laws, an individual does not have to provide information or produce a document that would tend to incriminate them or make them liable to a criminal penalty (see e.g. s. 28(6) of the NEL). A corporation does not have this protection.

Unlike the national energy laws, under the CCA an individual is not excused from providing information or producing a document on the grounds that it could incriminate them or expose them to a penalty. However, any information gained by the ACCC cannot be used as evidence in a criminal proceeding against that person, except in limited circumstances (s. 155(7)). This is an example of a use immunity.

The ‘penalty privilege’ is a similar concept, such that in some situations an individual does not have to provide information that could expose them to a civil penalty. There is some uncertainty in the courts about the situations where penalty privilege can be claimed, in particular whether penalty privilege can only be claimed in a court, or also in respect of actions by a regulator. Officials consider it would be a significant barrier to the AER’s performance of its function if individuals were able to claim a penalty privilege when being questioned about possible breaches of a civil penalty provision.

Proposed position: Given there are limited criminal penalties in the national energy laws, officials do not consider there are grounds to move away from the current practice that an individual can claim a privilege against self-incrimination in respect of criminal penalties.

However, officials also consider that the national energy laws should be clarified such that a penalty privilege cannot be claimed in respect of the AER’s information gathering powers, including the new power to compel people to appear and give evidence.

Consultation questions:

7. *Do you agree that individuals compelled to appear before the AER under the new power should have the right to exercise a privilege against self-incrimination for criminal offences?*
8. *Do you agree that individuals or corporations compelled to provide information to the AER under its existing powers (e.g. s. 28 of the NEL), and under the new power, should not be able to exercise a penalty privilege for civil penalties?*

2.9. Guidelines on the use of the new power

¹⁰ Attorney General’s Department (2011) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p. 94. Available at www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx

¹¹ *Ibid* p.95.

¹² *Ibid*. pg 96.

¹³ *Ibid*. p.96.

Although not required by its legislation, the ACCC publishes a guideline on the use of its information collection powers under s. 155 of the CCA.

Officials consider that the AER should be required to produce a guide that outlines how it will exercise its new power to compel individuals to appear before it and give evidence. A guide would help stakeholders understand the AER's new power and what to expect when appearing before the AER.

The guide should provide information on:

- the AER's power to compel people to appear and give evidence
- the rights and obligations of individuals called to give evidence to the AER
- penalties for non-compliance
- how information obtained can be used by the AER.

The guide should not create limits on how the AER exercises its power and uses any information obtained.

Proposed position: Legislative amendments should include a requirement for the AER to produce a guide on the use of its new power to compel individuals to appear and give evidence.

Consultation question:

9. *Do you agree with the proposal for the AER to be required to produce a guideline on the use of its new information collection powers?*

2.10. Other issues

There are a number of existing provisions in respect of the AER's and ACCC's information gathering powers that should be extended to the AER's new power, including:

- It is a reasonable excuse not to provide information if a person is not capable of providing the information (see e.g. s. 28(5)) of the NEL.
- A person does not have to disclose information that is subject to legal professional privilege (s. 28(8) of the NEL) or was prepared for a Commonwealth, state or territory Cabinet (s. 28(9) of the NEL). Section 155 of the CCA includes similar provisions.
- A person does not incur a liability for breach of contract or confidentiality from having to comply with an AER notice (s. 28(10) of the NEL) (noting that the CCA does not contain an analogous provision).
- The AER must take all reasonable measures to protect information given to it from unauthorised use. (Section 44AAF of the CCA, and Division 6 of Part 3 of the NEL, govern the confidentiality of information given to the AER, and should be sufficient to protect information obtained under the new power).
- Where the AER requires information for the purposes of investigating a breach of the national energy laws or rules, it should be able to request this information up until the point it begins proceedings on the matter. This would replicate s. 155(4) of the CCA, under which the ACCC can require that information, documents or verbal evidence be provided until the ACCC begins proceedings.

Proposed position: The above provisions should be extended to the AER's new power.

Consultation questions:

10. *Do you agree the provisions described above should be extended to the AER's new power?*

11. Are there other provisions in the national energy laws or similar laws that should be applied to the AER's new power?

3. Proposed changes to the civil penalty regime under the National Energy Laws

The 2013 Enforcement Review recommended conducting a targeted review of the civil penalty regime to determine whether there are any specific additional provisions under the laws, rules or regulations that should attract the higher maximum penalty rate of \$1,000,000 for bodies corporate and \$200,000 for individuals.

In November 2017, the COAG Energy Council agreed to conduct this review, which commences with this consultation paper. The Council noted that a targeted review would aim to identify:

- the principles to be used to recommend applying the highest maximum penalty rate to a provision
- which specific provisions, if any, should attract the highest maximum penalty level
- any unintended consequences from applying maximum penalty levels to some provisions.

3.1. Civil penalty regime

The 2013 Enforcement Review describes the purpose of a civil penalty regime as “promoting compliance with important statutory obligations, through the provision of a serious and enforceable penalty which acts as a deterrent against breach of obligations, but which does not involve the imposition of a criminal sanction”¹⁴.

The NEL, the NGL and the NERL each include a civil penalty regime. Under the regime, certain provisions of the national energy laws and rules are defined as civil penalty provisions. Following an action by the AER, a court can require that an individual or corporation pay a civil penalty when a breach of the provision is proven.

In most cases, the AER can also issue infringement notices when it has reason to believe an individual or corporation has breached a civil penalty provision. The exception relates to the electricity wholesale market rebidding provisions. The AER is not able to issue infringement notices for breaches of r. 3.8.22A of the NER.

Civil penalty provisions are made following a recommendation by the AEMC to the COAG Energy Council; the AEMC cannot designate a rule clause as a civil penalty provision. Once accepted by the Council, the relevant provisions are designated as civil penalty provisions through changes to the regulations under the relevant South Australian Acts.

3.2. Current penalty rates

Civil penalties for all but one provision in the national energy laws are:

- for a natural person, an amount not exceeding \$20,000, and an amount not exceeding \$2,000 for every day during which the breach continues
- for a body corporate, an amount not exceeding \$100,000, and an amount not exceeding \$10,000 for every day during which the breach continues (NEL s. 2).

The exception relates to electricity wholesale market rebidding provisions under r. 3.8.22A of the NER, which requires that offers, bids and rebids must not be false or misleading. The NEL specifies the maximum rebidding civil penalty for any person as an amount not exceeding \$1,000,000 for any person, and an amount not exceeding \$50,000 for every day during which the breach continues (NEL s. 2).

¹⁴ Standing Council on Energy and Resources (2013) *The Review of Enforcement Regimes under the National Energy Laws*, p. 18.

Penalties for infringement notices are an amount not exceeding \$4,000 for a natural person, or \$20,000 for a body corporate. These amounts reflect common practice, outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, that infringement notice penalties should not exceed 20 percent of the relevant civil penalty¹⁵.

3.3. Policy issues

Feedback on the issues below will be used to inform Ministers about whether some additional clauses of the national energy laws and rules should attract the higher civil penalty amount, and how any changes could be implemented.

3.4. Principles for determining which provisions could attract the highest penalty rate

A decision-making framework is needed to identify which additional provisions of the national energy laws or rules, if any, could attract the higher maximum civil penalty amount, if any. To warrant a higher civil penalty amount for breaches of some provisions, the consequences of a breach should be quantitatively or qualitatively more serious than a breach of provisions attracting a lower penalty.

The 2013 Enforcement Review considered principles that could be used for deciding which provisions should be prescribed as civil penalty provisions (not for distinguishing between higher and lower penalty provisions). These principles were:

- the size of any possible economic benefit or detriment that could be caused by a breach of the provision
- the importance of the provision to the operation of the electricity or gas system
- the importance of the provision for the achievement of the objectives of the national energy laws
- the difficulty in investigation and enforcement of breaches of the provision¹⁶.

Officials have used these as a starting point to develop the principles below, which officials believe can be used to distinguish between civil penalty provisions attracting a higher and lower civil penalty amount.

The AER has consulted with staff of the AEMC on a preliminary list of additional civil penalty provisions that may warrant the higher civil penalty amount. Staff of AEMO have also provided operational input in relation to the preliminary list. Comments are invited on whether these provisions are appropriate to attract the higher penalty amount, and whether additional provisions could also attract the higher amount.

Proposed position: The framework for deciding whether a provision of the national energy laws should attract the higher civil penalty amount should be whether a breach would be particularly significant with regard to:

- the efficient investment in, and efficient operation of the energy market
- the reliability, security and safety of supply in the electricity or gas system
- the long term interest of consumers and their ability to reasonably access electricity and gas services
- consumer harm.

Consultation questions:

¹⁵ Attorney General's Department (2011) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p.59.

¹⁶ Standing Council on Energy and Resources (2013) *The Review of Enforcement Regimes under the National Energy Laws*, p.98.

12. *Do you agree these principles can be used to decide whether a civil penalty provision should attract a higher or lower civil penalty amount?*

13. *Are there other principles that could be used?*

14. *Are the civil penalty provisions identified in Appendix A appropriate to attract the higher civil penalty amount?*

15. *Are there additional provisions that could be added to the list in Appendix A?*

3.5. Infringement notices

The AER can issue infringement notices when it has reason to believe a natural person or body corporate has breached a civil penalty provision. A natural person or body corporate can choose to pay the infringement penalty rather than face court action. Payment of the notice is not taken as an admission of liability, but the AER cannot take further action on the matter once the penalty is paid. Penalties for infringement notices are an amount not exceeding \$4,000 for a natural person, or \$20,000 for a body corporate.

During the 2013 Enforcement Review, some stakeholders noted that higher civil penalties would imply higher infringement penalties, given the practice of setting infringement penalties at 20 percent of the relevant civil penalty. Some stakeholders suggested that this could undermine the usefulness of infringement notices, by raising penalty levels to the point that market participants preferred to test their cases in court, rather than paying the infringement penalty.

Infringement notices are an important part of the AER's enforcement toolkit. They are an option to encourage compliance short of court action, which lowers enforcement costs for both the AER and market participants.

Officials consider that, should the COAG Energy Council decide to extend higher penalties to additional civil penalty provisions, the AER should have the option to issue infringement notices for these provisions. Infringement notice penalties should continue to be 20 percent of the relevant civil penalty amount. If a breach of these provisions is serious enough to warrant a higher civil penalty amount, the infringement notice amount should also be higher.

The AER does not currently have the option to issue an infringement notice in relation to the electricity market rebidding provisions. However, the AER has advised officials that having this option available would enhance its enforcement work in this area.

Proposed positions: The AER should be able to issue infringement notices for breaches of all civil penalty provisions, including any attracting the higher penalty amount.

Infringement notice penalties should be one fifth of the relevant civil penalty amount, even if this results in high infringement penalty amounts.

The option to issue an infringement notice should also be available for breaches of the rebidding provisions.

Consultation questions:

16. *Do you agree that, if additional civil penalty provisions were to attract the higher maximum civil penalty amount, the AER should be able to issue infringement notices for breaches of these provisions?*

17. *Do you agree infringement notice amounts for these breaches should be 20 percent of the relevant civil penalty amount?*

18. *Do you agree the AER should be able to issue infringement notices for breaches of the electricity market rebidding provisions?*

3.6. Required law changes

Implementing any recommended changes to the civil penalty regime will require changes to the Laws and subordinate instruments. Currently, the only higher penalty amount is in relation to the rebidding civil penalty provision in the NEL. The NGL and NERL do not provide for any provisions attracting a higher penalty amount.

Law changes could create a two-tier civil penalty regime. The civil penalty regime for each of the national energy laws could be changed to provide for a higher and lower civil penalty amount. The regulations could specify which civil penalty provisions attract the higher civil penalty amount, with the remainder attracting the lower civil penalty amount.

The AEMC's rule change processes often include recommendations for new or amended provisions of the energy rules to be civil penalty provisions. Should a two-tier civil penalty regime be created, it would need to allow for:

- the AEMC to make recommendations about new or amended provisions that should be civil penalty provisions
- the AEMC to make recommendations about whether these provisions should attract the higher or lower civil penalty amount
- the COAG Energy Council to implement these recommendations through changes to regulations, should it agree to do so.

Proposed position: Should the COAG Energy Council decide some civil penalty provisions should attract the higher civil penalty amount, the national energy laws should be amended to create a two-tier civil penalty regime, with the regulations setting out the clauses that attract the higher and lower civil penalty amounts.

Consultation questions:

19. Do you agree that this description reflects the changes that would be needed to introduce a two-tier civil penalty regime in the national energy laws?

20. Are there other issues you would like to raise in response to this consultation?