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**29 June 2018**

Dear Sir / Madam,

**AER Powers and Civil Penalty Regime – Consultation Paper**

AGL Energy (AGL) welcomes the opportunity to comment on the Council of Australian Governments Energy Council (Energy Council) Consultation Paper on the AER Powers and Civil Penalty Regime.

AGL is one of Australia's leading integrated energy companies and the largest ASX listed owner, operator and developer of renewable generation. Our diverse power generation portfolio includes base, peaking and intermediate generation plants, spread across traditional thermal generation as well as renewable sources. AGL is also a significant retailer of energy and provides energy solutions to over 3.5 million customers in New South Wales, Victoria, Queensland, Western Australia and South Australia.

[Regulatory Environment](#)

AGL considers that the proposed changes to the AER's powers and the civil penalty regime which they oversee represent a marked shift in the nature of compliance monitoring and enforcement under the National Energy Laws. Much of the rationale for these powers is based on a review of very different regulatory regimes overseen by the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investment Commission (ASIC).

Framing the functions and powers of the AER against these broader regulatory frameworks misses many of the unique features of the current operation of the National Energy Laws, particularly given the AER's role as an industry specific regulator. The AER has a much different focus to that of the ACCC or ASIC, in this role. This includes being a regulator with significant, energy-focussed, technical expertise overseeing a limited and known pool of relevant entities. The AER's role is much more formalised in terms of ongoing compliance assessment and reporting and through the provision of detailed guidance to industry participants as well as the market operator (AEMO) and the rule making body (AEMC)

Additionally, the National Energy Laws are far more dynamic in nature than the legislation relevant to the functions of either the ACCC or ASIC. For instance, there are over 3000 pages of highly technical rules which are subject to regular revision. To-date, there have been over 100 versions of the National



Electricity Rules published since 2005. These Rules are able to be amended through a formalised rule change process to enable regulatory interventions that can quickly rectify market behaviours that are shown to be against the long-term interests of consumers. Such legislative amendments are not seen in relation to the frameworks administered by either the ACCC or ASIC.

As noted above, regulated entities participate in a market that is overseen by an independent market operator, with a high degree of information transparency particularly related to behaviours in the wholesale market and product information in the retail market. In many cases the specific obligations that apply to regulated participants are highly technical in nature. Often they require ongoing guidance from both the market operator and the AER, particularly as the market evolves and new obligations are added. This requires a much more cooperative relationship between the market operator, the regulator and market participants to ensure the best outcomes for end-use customers. This level of cooperation and coordination will only need to increase, particularly as new technologies are introduced into the market and new innovative products are offered to consumers.

Recent experiences have highlighted that as new technologies and innovative products enter the market, in many cases the regulatory regime lacks clarity in how it should be applied. Having a more adversarial relationship between the market operator, regulator and market participants will only reduce the cooperation needed to ensure that the current transitional period is smooth and efficient.

#### [Powers to compel provision of information under oath or affirmation](#)

AGL considers that compelling compliance by means of persuasion is generally most effective and least costly for regulators. It is for this reason that AGL did not support the recommendation that the AER be given the power to compel the provision of evidence under oath or affirmation. We consider that such a change should not have been made on the basis it was an invasive, even draconian, power. Further, AGL has previously questioned whether there was empirical evidence which demonstrates that regimes under which this power is available are characterised by greater levels of compliance.

Given these factors, the ability of the AER to utilise such powers of compulsion should be subject to strong checks and balances, and utilised only for limited purposes where existing powers are manifestly inadequate to gather the required information (such as recalcitrant participants or individuals who refuse to cooperate with the regulator).

Similar to the ACCC model, these powers should be limited to those matters linked to enforcement and should not extend to the full range of AER functions or powers.

#### [Increased Civil Penalties](#)

Increased penalties, particularly for individuals, are likely to make regulated entities and their staff more reluctant to come forward voluntarily to discuss and disclose potential compliance issues and create a more adversarial and distrustful relationship with the regulator. Such a power might become an impediment to more informal information sharing and efficient resolution of compliance breaches.



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The necessity of much higher penalties, including for individuals, seems dubious given the overall high level of compliance within the market. The need for increased deterrence is not clear, given the reputational impact of non-compliance within the market. This potential for reputational damage is reflected in a relatively low frequency of formal enforcement powers. Agreed resolutions to regulatory concerns, including administrative undertakings, have been highly effective when combined with compliance bulletins and reporting by the regulator.

The push for higher civil penalties signals a potential change in direction for compliance and enforcement within the energy market. This raises serious concerns given the nature of technical compliance that relatively junior staff at the operational level are required to observe, in a highly dynamic market. Noting the particular changes in this market that have occurred and accelerated since the completion of the original Energy Council review in to this framework, it is not clear that those original findings are still appropriate at this time.

We have provided additional information relating to specific questions for the consultation paper in Appendix A to the submission. If you have any queries about this submission, please contact Chris Streets on (03) 8633 6758 or [Cstreets@agl.com.au](mailto:Cstreets@agl.com.au).

Yours sincerely,

Elizabeth Molyneux

General Manager Energy Markets Regulation



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## Appendix A - Consultation questions

**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?**

AGL does not agree that the AER should be able to use any such new powers of compulsion on such a wide basis. Given the nature of the relationship between the regulator and participants, in contrast to the ACCC or ASIC, the nature of the power granted to the AER should not be broader in nature.

The multitude of administrative, technical or informational obligations related to functions that would not cause any significant degree of harm to the general public should not be subject to the same invasive powers as those utilised by the ACCC and ASIC in potential enforcement actions against more detrimental conduct. The National Energy Laws generally do not relate to issues around unconscionable conduct, misleading or deceptive behaviours, harassment, coercion, cartel conduct or unsafe products.

**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?**

For similar reasons as stated in response to question 1, we do not consider that any information collected under a broad power to compel should be able to then be utilised in relation to any powers or functions. Such a remit would only increase the potential impact of the already adversarial proposed powers.

**3. If not, what limitations should be placed on how the AER is allowed to use information obtained through use of the new power?**

Any information collected should be limited as far as practicable to the purpose for which it was obtained, as defined against the specific obligations against which the enforcement activities are aimed. The limits for which the information is being obtained should be clearly set out for any individuals subject to such a compulsion.

**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?**

Depending on the scope of the proposed powers to compel information, such penalties may be appropriate. However, this would only be where these powers are more clearly related to enforcement functions.

**5. Do you agree offence provision penalty amounts should be increased in line with changes in the value of money?**

We would support that the current quantum of offence provision penalty amounts be subject to some form of indexation or linkage to a penalty unit. However, the proposed increases in the base amounts of the penalty provisions are not supported.

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

If a prohibition against the provision of false or misleading information when providing information under such compulsion were to be applied, then we would not consider that any such oath or affirmation would be necessary. Such a highly formal process would have the potential to make the provision of information a far more adversarial process with added emotional stress, markedly so for the junior staff who would be more likely to be operationally involved with specific obligations under the National Energy Laws

**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?**

We would strongly recommend that the right to exercise privilege against self-incrimination be retained for any individuals compelled to provide information.

**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?**

For reasons of procedural fairness we would also support the right to exercise penalty privilege in those instances.

**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?**

As noted in the cover letter to this submission, the market heavily relies upon guidance from the AER to develop appropriate compliance processes and understand the likely actions of the regulator. To provide certainty to the market as to when such powers are likely to be exercised, and how, relevant guidance should be required. This guidance should be consulted upon through process in line with the Rules consultation process.

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

- i. It is a reasonable excuse not to provide information if a person is not capable of providing the information (see for example s. 28(5) of the NEL).
- ii. 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.

- iii. 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).
- iv. 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).
- v. 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.

We support the extension of the above provisions to any such exercise of the power to compel information, with the exception of point v. We consider that once a decision has been made to begin enforcement proceedings that the AER should cease to rely upon these powers to compel and should be subject to the appropriate discovery processes available with court oversight.

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

We do not have any substantive comments relating to this question.

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

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

The above principles draw heavily on the National Energy Laws objective clauses. While these are an appropriate framework for assessing rule changes and guiding administrative decision-making functions it is not clear that they are fit for purpose in determining the applicability of higher or lower penalty amounts.

Penalties are more appropriately linked to causal elements, such as intent, recklessness or negligence in addition to the potential for consumer harm. Given many of the obligations within the National Energy

Laws are related to technical matters or provision of information, and are not linked to activities for which there are strong incentives to circumvent, we consider that principles i. through iii. would potentially suggest higher penalties for obligations than are warranted.

We would suggest that any principles are more clearly linked to the need for appropriate levels of deterrence against behaviour aimed at circumventing obligations that would result in consumer harm.

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

See answer to question 12.

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

We consider that many of the proposed provisions do not warrant higher civil penalties. For example, the obligations outlined under clauses 3.7.2 and 3.7.3 provide no real incentive to circumvent. Additionally, many of the obligations relating to system security provide a real incentive to all market participants to comply with. The potential reputational and financial risk from contributing to a system security event is more likely to provide the right incentive to comply.

We would consider that increasing the penalties related to obligations with no clear incentive to circumvent would need to be based on evidence of repeated non-compliance with the relevant requirements, rather than simple on the potential for harm.

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

**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?**

We consider this is an arbitrary amount and would disproportionately impact on individuals subject to such a notice. Given that individuals are less likely to be financially able to challenge an infringement notice in court there is real concern around the fairness of a regulator applying such a notice in these instances.

As the civil penalty amount relates to the maximum amount that could be determined by the courts, the large this value the greater the range of potential penalties. To imply that all alleged breaches of an obligation warrant a ten-fold increase in the penalty faced by an individual does not appear to be supported by any empirical evidence.

These issues also apply to the determining an arbitrary “minimum” penalty for alleged breaches, even though a body corporate is more likely to be able to challenge this value in court where required.



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

Given the electricity market rebidding provisions require a highly subjective assessment of very complicated decisions being taken in a dynamic market environment, we do not support the use of infringement notices in these instances.

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

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

We do not have any substantive comments relating to this question.

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

The cover letter to this submission raises additional issues we would wish to be considered as part of the Energy Council's consultation process.