

29 June 2018

COAG Energy Council Energy Secretariat
Department of the Environment and Energy

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Dear Secretariat

AER Powers and Civil Penalty Regime – Submission to Consultation Paper

AusNet Services recognises the importance of having transparent and robust enforcement frameworks to support Australia's energy markets. We are pleased to make this submission in response to the COAG Energy Council (**COAG EC**) consultation paper which proposes to give the Australian Energy Regulator (**AER**) a new information gathering power and increase the maximum penalty amount for a contravention of certain civil penalty provisions to \$1 million.

In principle, AusNet Services supports the COAG EC's proposal to grant the AER a power to compel individuals to provide information or documents or give evidence, subject to the exercise of the power being shaped by the same legal and procedural safeguards that apply to equivalent powers granted to other regulatory agencies like the Australian Competition Consumer Commission and the Australian Securities and Investments Commission. Introducing an intrusive enforcement power such as this without appropriate limits governing its use risks damaging the working relationships between the regulator and market participants, increasing compliance costs (which are typically passed on to consumers) and impeding the effective operation of the market. AusNet Services notes the thorough analysis presented by Allens Linklaters and NERA Economic Consulting in the final report for the Review of Enforcement Regimes under the National Energy Laws (**Final Report**). We urge the COAG EC to remain mindful of the recommendations made in the Final Report, in particular that the proposed power be limited to investigations of contraventions or potential contraventions of the National Energy Laws and Rules.

Financial penalties can be an effective way to promote compliance with legal obligations. Civil penalties of the magnitude now proposed are such that the principles of proportionate risk-based enforcement require that the higher penalty apply only to those provisions where a contravention is likely to result in significant detriment to consumers and/or the market. AusNet Services is also concerned to ensure that where a provision to which the higher penalty amount applies is expressed to apply to a 'Transmission Network Service Provider', the Rules place beyond doubt whether responsibility for compliance lies with AEMO or the Declared Transmission System Operator (as appropriate).

If it would assist the COAG EC to discuss any of the matters raised in AusNet Services' submission or in the broader consultation process, please contact Kelvin Gebert, Manager Regulatory Frameworks, on 03 9695 6603 or kelvin.gebert@ausnetservices.com.au.

Yours sincerely



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AER POWERS AND CIVIL PENALTY REGIME

Submission to the Consultation Paper

29 June 2018

A. BACKGROUND

The final report in the *Review of Enforcement Regimes under the National Energy Laws (Final Report)* contained the following two recommendations:

- Recommendation 13: The National Energy Laws should be amended to give the AER the power to require a person to provide information on oath or affirmation where the information to be provided relates to a matter that constitutes, or may constitute a contravention of the National Laws or Rules.¹
- Recommendation 5: The [COAG Energy Council] consider initiating a further targeted review, including the opportunity for further stakeholder consultation, to assess whether there are any specific additional provisions of the National Energy Laws, Regulations or Rules that should attract the higher maximum penalty rate of \$1,000,000 for bodies corporate and \$200,000 for individuals.²

The COAG Energy Council (**COAG EC**) is now seeking stakeholders' views through a public consultation process in relation to its proposal to implement Recommendations 5 and 13.

In principle, AusNet Services supports the proposal to implement the Recommendations. However, we urge the COAG EC to remain mindful of the thorough analysis set out in the Final Report which underpins each recommendation. Implementing these proposals, particularly Recommendation 13, without the limits and safeguards recommended in the Final Report will erode the effectiveness of the enforcement regime to the detriment of the national energy markets and consumers, and risks damaging the productive working relationships that the AER has developed with regulated businesses.

B. AER POWERS

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?*

The AER's functions and powers under the National Energy Laws and Rules are wide-ranging. Not only is it empowered to investigate breaches or possible breaches and to take enforcement action in response to alleged contraventions, the AER is responsible for making economic regulatory decisions, preparing and publishing performance and compliance reports, and arbitrating access disputes.

In the context of the AER's overall functions it would be inappropriate for the AER to compel individuals to appear and give evidence (including under oath or affirmation) other than in

¹ Allens Linklaters and NERA Economic Consulting, *Review of Enforcement Regimes under the National Energy Laws – A Report Prepared for the Standing Council on Energy Resources* (November 2013) ('Final Report') 121.

² *Ibid* 96.

relation to an investigation into a contravention, or possible contravention, of the National Energy Laws or Rules. As the Final Report acknowledges, the proposed power “is intrusive and [its] practical use should be limited to serious contraventions where there is a demonstrated need for the exercise of the power.”³ To allow the AER to compel individuals to give evidence, for example, to explain the assumptions underpinning a regulatory proposal or to explain its performance reporting is excessive. Further, there is no evidence that such enquiries cannot be satisfactorily addressed using the information gathering powers already available to the AER under section 28 of the NEL and its equivalents⁴ or through the informal but increasingly collaborative approach adopted by the AER and network businesses to regulatory reviews.

Allowing the AER to exercise the power in relation to any of its functions or powers would be inconsistent with the scope of equivalent powers granted to the Australian Competition Consumer Commission (**ACCC**) (under section 155(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**)) and the Australian Securities and Investments Commission (**ASIC**) (under section 19 of the *Australian Securities and Investments Commission Act* (Cth) (**ASIC Act**)). The exercise of these powers is expressly confined to matters that constitute or may constitute a contravention of the relevant legislation. AusNet Services notes the Final Report’s view that the AER’s access to the power should be “in a similar manner to that which applies to other regulators.”⁵

It is clear from language of Recommendation 13 and the accompanying discussion that the Final Report recommended that the new power, if given to the AER, should be subject to the same limitation. The COAG EC has not presented any explanation for its proposal to allow the AER to exercise the new power in circumstances that go significantly beyond those recommended in the Final Report, and which are given to other regulators. In the absence of a compelling policy argument to the contrary, AusNet Services submits that the limitations on the scope of the power expressly reflected in Recommendation 13 should not be exceeded.

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?*

Consistent with the views we expressed in response to Question 1, AusNet Services submits that the AER’s use of information collecting using the new power should be limited to the purpose for which the notice was issued. This will ensure equivalence with the limitations that apply by virtue of section 155 to the ACCC’s use of information, documents or evidence provided in response to a notice issued under that section.⁶

We acknowledge that it would be open to the AER to seek to rely on other provisions of the National Energy Laws to authorise its use of information and evidence provided under compulsion in the exercise or performance of its other powers or functions, as the ACCC has done. However, permitting such a course is not appropriate in the energy market context because of the wide range of conduct covered by the National Energy Laws and Rules. Allowing the information or evidence to be used for any purpose would effectively render it ‘at large’ and make it available for use without the provider of the information having an opportunity to provide context or clarification.

Therefore, AusNet Services strongly encourages the COAG EC to limit the use of information given under compulsion, particularly where it is given under oath or affirmation, to the purposes relating to the investigation of contraventions and possible contraventions of the National Energy Laws and Rules.

³ Ibid 119.

⁴ National Gas Law s 42; National Energy Retail Law s 206.

⁵ Final Report, above n 1, 121.

⁶ See Australian Competition and Consumer Commission, *ACCC Guidelines – Use of section 155 powers* (Canberra, 2016) 11.

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

For the reasons given above, AusNet Services considers the AER's use of information, documents or evidence collected using the proposed power should be limited to the purpose for which the notice was issued i.e. investigation a contravention or suspected contravention of the National Energy Laws or Rules.

There may be situations where conduct investigated by the AER, including through the use of the proposed power, may reveal information or evidence that is relevant to the enforcement portfolios of other enforcement including the ACCC e.g. behaviour that suggests cartel conduct or a misuse of market power. AusNet Services does not oppose authorising the AER to disclose information in such circumstances, subject to the recipient organisation affording the individual the same protections as are available under the National Energy Laws, and honouring any representations made by the AER as to additional protections or guarantees to the benefit of the individual.

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?*

Penalties for failing to provide information where that information is reasonably available to the recipient of the notice or for providing false or misleading information are consistent with equivalent provisions including s 28 of the NER, s 42 of the NGR and s 206 of the NERL. The CCA and ASIC Act provide for similar consequences.

Therefore, AusNet Services supports the application of these penalties to the proposed information power on the condition that the recipient of the notice benefits from the same protections as currently apply under the National Energy Laws. Specifically, the recipient is excused from compliance with the notice where:

- a. the recipient is not capable of complying;
- b. compliance might tend to incriminate the recipient or render him or her liable to a criminal penalty;
- c. the information, document or evidence is subject to legal professional privilege.

The recipient of the notice should also be protected from liability for breach of contract, breach of confidence or any other civil wrong arising from compliance with a notice issued by the AER.

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

In principle, AusNet Services does not object to increasing the penalty amounts to reflect changes in the value of money on the basis that failing to maintain parity dilutes the deterrent effect of a penalty and can impede the effectiveness of the enforcement framework. AusNet Services encourages the COAG EC to provide details of its proposed penalty limits at the earliest opportunity.

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

AusNet Services does not oppose the proposal to permit the AER to require evidence to be given on oath or affirmation on condition that the exercise of the power is limited to investigating actual or potential contraventions of the National Energy Laws and Rules, and that the other legal protections identified in the preceding answers are available to the recipient of the notice.

As explained further in response to Question 9 below, AusNet Services considers it is essential that the AER explain the circumstances in which it considers it would be appropriate to require an individual to give evidence under oath or affirmation, and what the process for conducting the examination is expected to be.

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?*

AusNet Services supports the COAG EC's proposed position to allow individuals to claim a privilege against self-incrimination. This is consistent with the existing protections made available to recipients of a notice to provide information and documents under the National Energy Laws,⁷ and reflects the importance of affording the privilege to individuals compelled to submit to examination.

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?*

AusNet Services does not oppose removing the privilege against liability for a civil penalty provision from the National Energy Laws. However, it reiterates its support for the COAG EC's proposal to retain the privilege against self-incrimination in respect of criminal penalties.

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?*

AusNet Services strongly supports the COAG EC's proposal to require the AER to produce a guideline on how it intends to use the proposed information gathering power. Ensuring that market participants understand the AER's approach to exercising the proposed power is essential to maintaining confidence in the enforcement framework.

The guideline should be crafted to allow industry participants to understand how the AER expects it would use the power and how that use fits with its other regulatory tools. At a minimum, the guidelines should explain:

- a. the circumstances in which the AER would exercise the power
- b. the relationship between the power and other enforcement tools and approaches currently available to the AER
- c. the legal and procedural safeguards the recipient of the notice is entitled to rely on
- d. the purposes that information, documents or evidence collected in response to a notice may be used where that purpose is not related to the reason for issuing the notice
- e. the circumstances in which the AER may require a person to give evidence under oath or affirmation
- f. how the examination would likely be carried out, including matters such as the right of the recipient of the notice to legal counsel
- g. the process for responding to a notice and what is required to comply
- h. how the AER's obligations to act as a model litigant are reflected in its exercise of the proposed power.

The ACCC's guidelines on the use of its section 155 powers may provide a starting point for the matters for inclusion in the AER's guideline.

⁷ National Electricity Law s 28(6); National Gas Law s 42(6); National Energy Retail Law s 206(6).

10. *Do you agree the provisions described above [ss 28(5), 28(8), 28(9), Div 6 Part 3 of the NEL and ss 44AAF and 155(4) of the CCA] should be extended to the AER's new power?*

AusNet Services agrees with the COAG EC's proposal to extend the protections contained in the provisions identified above to apply to the proposed power. This codifies the protections available to individuals if the proposed power is exercised, and ensures it is used in a way that is consistent with similar powers granted to other regulatory authorities.

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

AusNet Services suggests the proposed power be subject to substantially the same limitations as equivalent powers granted to other regulatory authorities. The constraints should include, but not be limited to, requiring the power be used in good faith and not for a collateral purpose. In addition, the power to issue a notice should cease when the AER commences proceedings in relation to the matter(s) that are the subject of the notice.

Limitations that apply by virtue of the application of other statutes or the common law concerning procedural fairness and privacy should not be prevented from binding the AER.

C. CIVIL PENALTY REGIME

12. *Do you agree these principles [set out on page 14 of the Consultation Paper] can be used to decide whether a civil penalty provision should attract a higher or lower civil penalty amount?*

AusNet Services supports the development and use of a set of principles to determine the appropriate penalty amount to apply to a civil penalty provision. However, with one exception, it does not consider the principles set out in the Consultation Paper are capable of providing adequate guidance.

The principles in the Consultation Paper are the elements of the national objectives that appear in each of the National Energy Laws, plus consumer harm. While the national energy objectives are a relevant consideration in guiding enforcement policy, they fail to capture the factors that are relevant to determining the appropriate penalty amount for a given civil penalty provision. Drawing on the discussion contained in the Final Report and principles of regulatory best practice, AusNet Services submits that the applicable principles should comprise:

- a. the expected degree and extent of harm to consumers and to the relevant market of the contravention
- b. the potential for the contravention to adversely affect the operation of the electricity or gas system
- c. the expected economic benefit to the contravener likely to arise from the contravention
- d. the deterrent effect of the penalty amount
- e. the penalty applicable for equivalent contraventions (if any) in other industries or under other legislation.

AusNet Services also notes the Final Report's recommendation that the provisions which attract a higher level of penalty should be subject to the parliamentary scrutiny.⁸ The Consultation Paper is silent as to COAG EC's position on this issue.

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

Please see answer to Question 12.

⁸ Final Report, above n 1, 91.

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

It is the case that in any penalty regime, the party who bears the compliance obligation must be capable of identifying the specific obligations that bind it and what is required to ensure compliance. This certainty assumes greater importance as the adverse consequences of non-compliance increase.

As the COAG EC is aware, the transmission network service provider (**TNSP**) function in Victoria is split between AEMO and the declared transmission system operators (**DTSOs**), which include AusNet Services. In other jurisdictions, an integrated TNSP is wholly accountable for the obligations of the TNSP, and the National Electricity Rules (**NER**) is structured and drafted in line with this model.

Victoria finds itself in a situation where it is unclear whether a reference to the NSP or TNSP in a specific clause is intended to bind the DTSO (usually AusNet Services) or AEMO. In many instances, this confusion cannot be resolved by reference to the NER or to accepted practice. This creates a risk for AusNet Services that it may be exposed to considerable compliance and financial costs in circumstances where it is understood that it was not required to comply with a specific penalty provision, either in its entirety or in part. This risk becomes unacceptably high if the proposal to increase the maximum penalty of some provisions to \$1 million is implemented.

The identification provisions to which the higher penalty will apply calls into sharp relief the importance of placing beyond doubt the identity of the party required to comply with a civil penalty provision. While there is a mechanism that purports to provide the required clarity in Chapter 5, it is incomplete. In addition, there is no attempt made to clarify this issue in any other chapter of the NER. To remove all doubt and to provide stakeholders (particularly AusNet Services and other DTSOs) with the certainty they require, AusNet Services encourages the COAG EC to give specific and careful consideration to Victoria's needs. Any amendments to the Rules could be made as part of the package to implement COAG's policy response to the Enforcement Review.

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

AusNet Services is concerned by the absence of sound, evidence-based reasoning to justify the inclusion of the provisions listed in Appendix A. The Final Report makes it clear that the process of identifying the civil penalty provisions that will attract a higher maximum penalty is "a complex and inevitably contentious task."⁹ Further, it is not apparent what, if any, principles the COAG EC used to select the provisions listed in Appendix A or the basis on which it assessed recommendations made by the AER in conjunction with AEMO and the AEMC.

At this time, AusNet Services does not consider that any additional provisions of the Energy Rules should be added. Rather, it urges the COAG EC to revisit Appendix A and, using the principles identified in AusNet Services' response to Question 12, provide a clear and thorough explanation as to why it considers each provision warrants a maximum civil penalty of \$1 million.

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?*

Subject to our response to Question 17, AusNet Services does not object to this proposal on the basis that it supports the principle that a regulator's effectiveness is generally enhanced where it has available to it a range of enforcement tools that can be tailored to suit the enforcement priority and nature of the contravention.

⁹ Ibid 83.

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

Assuming the higher maximum civil penalty amount is set at \$1 million, the COAG EC's proposal would fix the amount payable under an infringement notice at \$200,000. While this proportion is consistent with the guidance in the Attorney General's Department's *Guide to Framing Commonwealth Offences*, AusNet Services is concerned that the amount is disproportionate to the consequences of infringing the provisions listed in Appendix A. This concern is heightened by the absence of a sound explanation as to why the provisions in Appendix A are appropriately subject to a higher maximum penalty. Additionally, as noted in the Final Paper, if the financial consequences of specific breaches are set too high, businesses may seek to avoid them by incurring unnecessary compliance costs and may decline to assist the AER in investigating compliance, thereby increasing the cost of enforcement.¹⁰

Notwithstanding that fixing the amount of the infringement notice at \$200,000 would be consistent with the Guide, it would represent a significantly larger amount than those applied in the comparative regimes considered in the Final Report.¹¹ In the absence of a robust justification for the departure and a clear explanation as to why each provision warrants the higher penalty,¹² AusNet Services does not support fixing infringement notices under the National Energy Laws at 20 per cent of the civil penalty amount.

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

AusNet Services does not object to the proposal to allow the AER to issue infringement notices in response to alleged contraventions of the rebidding provisions as it increases the enforcement tools available to the AER. A decision to issue an infringement notice rather than pursue court proceedings is a decision that should be taken by the AER in accordance with its *Compliance and Enforcement Statement of Approach*.

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?*

In the event that the COAG EC decides to apply a higher penalty amount to certain civil penalty provisions, the Consultation Paper proposes that the two-tier civil penalty regime would be given effect through the amendments the National Energy Laws and Regulations. AusNet Services agrees that this high-level description is consistent with the nature of the changes that would need to be made to give effect to the proposal, but notes for completeness that provision would also need to be made to review and, where necessary, amend the clause notes contained in the energy rules identifying the provisions that are classified as civil penalty provisions.

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

There are no further issues AusNet Services wishes to raise. We repeat our offer to provide assistance to the COAG EC in order that it can address the issues raised in this submission.

¹⁰ Ibid 84.

¹¹ Ibid 97.

¹² See further the response to Question 12.