

29 June 2018

COAG Energy Council Secretariat
GPO Box 787
Canberra ACT 2601
Email: energycouncil@environment.gov.au

Dear Secretariat,

RE: COAG Energy Council Consultation Paper – AER Powers and Civil Penalty Regime

Endeavour Energy appreciates the opportunity to provide feedback to the COAG Energy Council's (the Council) consultation paper – *AER Powers and Civil Penalty Regime* (the paper). This paper follows the Council's 2013 *Review of Enforcement Regimes under the National Energy Laws* (the review) and seeks to progress two key recommendations:

- **Recommendation 5:** initiating a further targeted review 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; and
- **Recommendation 13:** amending the National Energy Laws 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.

This review was particularly focussed on the AER's ability to administer the National Electricity Customer Framework (NECF) that was introduced in several states over 2012 and 2013. In principle we support the Council's recommendations from the 2013 review and support an effective regulatory framework that appropriately incentivises compliance, enables the AER to fulfil its investigative and enforcement functions, and that provides confidence to all participants.

Information gathering powers

We consider regulators need sufficient authority to access relevant information in a timely manner to effectively perform its regulatory and governance functions and redress the information asymmetry that may otherwise exist. The AER already has far ranging powers (RINs and RIOs) to compel NSPs to provide information in the form it requires allowing the AER to perform its economic regulatory functions.

We therefore question the broadened scope of the recommendations in the consultation paper compared to the focus of the 2013 review. Of note, the grounds on which the AER may exercise their new information gathering power in performing any and all of its functions, beyond the targeted enforcement activities set out in the 2013 review.

We are not aware that the current arrangements have been critically lacking or unduly constraining the AER's ability to effectively regulate networks. Rather, in recent years there has been a movement towards a more consultative and transparent regulatory determination process. This has recently culminated in the 'NewReg' trial; a joint initiative of the AER, AusNet Services, Energy Consumers Association (ECA) and Energy Networks Australia (ENA). We are supportive of the progress being made and are concerned the introduction of more onerous information gathering powers could signal a movement back towards a litigious regulatory framework.

We are also concerned that enhancing the AER's information gathering powers to mirror those of the ACCC would contradict the findings of the 2015 Review of Governance Arrangements for Australian Energy Markets that suggested greater separation between the AER and ACCC was needed to ensure the AER is as independent and as organisationally capable as possible.

In our opinion, Ofgem is a more comparable body rather than the ACCC given that it is a national energy economic regulator, and like the AER, undertakes enforcement work in conjunction with its independent regulatory activities. As outlined in Ofgem's enforcement guidelines, there is no obligation on parties to provide oral representations.¹

We consider that as a matter of principle the allocation of powers to any authority should be targeted to directly address the known tasks and difficulties of those tasks and no further. To our assessment, the case for bringing the AER's powers in to line with the ACCC's has only been made with respect to its enforcement functions as per the 2013 review recommendations.

Civil penalties

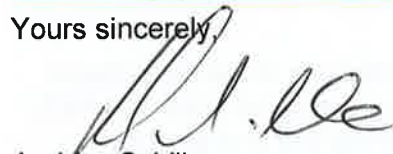
Civil penalties provide an incentive for NSPs to avoid actions that are contrary to the interests of customers. It is important that financial penalties are set at a level that encourages an efficient and reasonable level of investment in certain activities and compliance measures.

We are supportive of the principles identified by the Council for assessing whether a breach should attract a higher civil penalty. We acknowledge there may be additional provisions in the energy laws that may warrant the highest civil penalty. This should apply to breaches that relate to events with serious consequences for customers and the energy market and where increasing the potential penalty will lead to more efficient investment in the necessary systems and processes to deliver service outcomes that customer's value.

We question whether such a large increase in civil penalties is warranted or will result in improved outcomes for customers. The ensuing increase in infringement notices may reduce their effectiveness and result in increased legal costs as cases are more readily tested in court. We suggest further and more targeted consideration is given to determining an appropriate civil penalty level.

If you have any queries or wish to discuss this matter further please contact Jon Hocking, Manager Network Regulation at Endeavour Energy on (02) 9853 4386 or via email at jon.hocking@endeavourenergy.com.au.

Yours sincerely,



Andrew Schille
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Endeavour Energy

¹ Ofgem (2017) *Enforcement guidelines*, pp. 47-48