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AER Powers and Civil Penalty Regime – June 2018 Consultation Paper

EnergyAustralia welcomes the opportunity to provide a submission on the COAG Energy Council's consultation paper on amending the enforcement powers of the Australian Energy Regulator (**AER**) and the energy industry civil penalty regime (**Consultation Paper**).

EnergyAustralia is one of Australia's leading energy companies, providing gas and electricity to 2.6 million household and business customer accounts in NSW, Victoria, Queensland, South Australia and the Australian Capital Territory. EnergyAustralia also controls over 4,500MW of generation in the National Electricity Market (**NEM**). We have a modern energy portfolio underpinned by coal and gas power plants and complemented by modern energy sources such as wind, solar and batteries.

Our business is committed to providing our customers with the highest levels of service delivery and customer satisfaction. On a day-to-day basis we are guided by our corporate values to ensure "our customers are our priority" and we "do the right thing", including by aiming to comply with the spirit and intent of the laws and subordinate instruments that govern the operation of the NEM. In doing so, we pride ourselves on maintaining constructive and transparent relationships with regulators, including the AER.

We also firmly believe in the importance of effective energy policy that enhances the long term interests of Australian energy consumers and we support pragmatic change when a shortcoming is identified that could lead to regulatory failure.

EnergyAustralia recognises the crucial role the AER plays in administering and enforcing the National Electricity Law, National Gas Law, National Energy Retail Law and their subordinate instruments. In particular, we recognise the complexity of the energy industry and the need to respond quickly to change. EnergyAustralia supports a robust regulatory regime with a regulator that is appropriately empowered to investigate and enforce compliance breaches.

However, we urge the COAG Energy Council to further consider whether there is a shortcoming in the AER's enforcement powers that warrants the extent of change proposed in the Consultation Paper. Based on the information available to EnergyAustralia, there does not appear to be a clear, compelling case for substantially broadening the AER's information gathering powers, particularly where the rights of individuals will be adversely affected.

In EnergyAustralia's view, any power to compel individuals to appear and give evidence requires limitations to achieve the appropriate balance between empowering the regulator and recognising the rights of individuals. Without limitations, EnergyAustralia is concerned that the proposed reform could fundamentally change the relationship between market participants and the AER. Ongoing

cooperation and consultation between these participants and the AER is paramount in maintaining a well-functioning energy market yet, unrestricted, the proposed reform could transform the current consultative investigation framework into an adversarial one.

For the proposed changes to the civil penalty regime, we submit that more consideration needs to be given to the principles for establishing which provisions should attract higher civil penalties. The fundamental purpose of pecuniary penalties is to punish and deter. Therefore, it is important that they are applied to clearly defined, protective (rather than administrative) provisions that either involve an element of culpability and intent or would likely deliver a significant financial gain. In our view, the majority of the provisions identified in Appendix A to the Consultation Paper fall short of these requirements.

EnergyAustralia further submits that, given the complex nature of the energy industry, regulated entities should be entitled to a defence against a pecuniary penalty provision where they can establish that they have acted honestly and reasonably in all the circumstances. This is an appropriate standard for compliance in an environment where judgments are required by regulated entities and, in many of the examples provided in Appendix A, also by the Australian Energy Market Operator.

Our views are expanded in the attached submission. If you require further information about any aspect of our submission, please contact Samantha Nunan, Industry Regulation Lead on 03 8628 1516 or at Samantha.Nunan@energyaustralia.com.au.

Yours sincerely

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1. EXECUTIVE SUMMARY

Background

On 30 May 2018 the COAG Energy Council has released a consultation paper which sets out a preliminary intention to grant the Australian Energy Regulator (**AER**) a power to compel individuals to appear before it and give evidence and a review of whether additional provisions of national energy laws and subordinate instruments should attract the highest maximum civil penalty. This followed the report released in November 2013 by Allens Linklaters and NERA Economic Consulting, titled "Review of Enforcement Regimes under the National Energy Laws – A Report Prepared for the Standing Council on Energy and Resources" (**Enforcement Review**).

Concerns about reform

As explained in this submission, EnergyAustralia has serious concerns about the impact that these reforms, as proposed, are likely to have on:

(a) the constructive and effective relationship between the AER and regulated entities in working together to ensure there is a reliable, safe and efficient energy market;

(b) the rights of individuals working in the regulated energy industry and, consequently, the ability to attract and retain people to work in the regulated energy industry; and

(c) the behaviour of regulated entities seeking to comply with increasingly complex, quickly changing, and nationally inconsistent energy laws and subordinate instruments—with the most likely outcome more conservative, risk-averse behaviour and lower investment, undermining the achievement of a reliable, safe and efficient energy market.

EnergyAustralia submits that the detriments arising from these reforms are not counterbalanced by public benefits, and asks the COAG Energy Council and the AER to consider the benefits of continuing a collaborative regulatory approach, rather than an adversarial one.

EnergyAustralia supports a robust regulatory regime with a regulator that is appropriately empowered to investigate and enforce compliance breaches. However, we urge the COAG Energy Council to further consider whether there is a shortcoming in the AER's enforcement powers that warrants the extent of change proposed in the Consultation Paper.

2. CONTEXT FOR THE REFORMS

The Consultation Paper was released a considerable time after the Enforcement Review, which concluded in November 2013. In assessing this Consultation Paper, it is important to consider the context of the Enforcement Review and the developments in regulated energy markets since then.

The impetus for the Enforcement Review was not because of widespread or systemic compliance issues with National Energy Laws. Rather, it was to provide an independent view on the effectiveness of the national energy regulatory framework comprising the National Electricity Law, National Gas Law and National Energy Retail Law (**National Energy Laws**) in respect of the National Electricity Market (**NEM**) following a very significant series of regulatory reforms, including:

(a) major reform of market governance and institutions, including, in 2005, the establishment of the Australian Energy Market Commission (**AEMC**) to make rules

and the AER as the national regulator, and in 2009 the establishment of the Australian Energy Market Operator (**AEMO**) to manage the NEM and gas markets;

(b) major reform of the National Electricity Law and National Gas Rules in 2005 and the development of the National Gas Law and National Gas Rules to replace the third party access code for natural gas pipeline systems; and

(c) the introduction of the National Energy Customer Framework (**NECF**) in 2012 under the National Energy Retail Law and National Energy Retail Rules, except in Victoria which continues under its own, partly harmonised, retail regime.

This was in circumstances where the original regulatory regime had been established in the mid-1990s without significant review or reform.

Since then, and in particular since the AER was established in 2005, EnergyAustralia submits that, while there is always the need to improve and ensure best practice, there has been a productive working relationship between the regulatory and governance institutions of the NEM, with no evidence of ongoing widespread or systemic regulatory compliance issues.

EnergyAustralia considers a very significant number of the regulatory compliance issues that have been identified are the result of the self-reporting and independent audit mechanisms with which regulated entities (particularly energy retailers) comply. It is difficult to reconcile the need for heightened pecuniary penalties and the threat of compulsory examination in light of the prevailing processes.

EnergyAustralia is concerned that the Consultation Paper proceeds on two implicit, but not fully considered, assumptions. The first is that the AER should have the same (and, in fact, on closer examination broader) powers as peak-regulatory bodies such as the Australian Competition and Consumer Commission (**ACCC**) and the Australian Securities and Investments Commission (**ASIC**). These regulatory bodies, because of the nature of the laws they administer, necessarily have enforcement divisions that take an investigative, prosecutorial and adversarial approach, and have been given police-like powers (and, in the case of the power to compel individuals to attend an examination, court-like powers).

The second is that the AER's current information gathering powers are inadequate, which is adversely affecting the AER's ability to investigate breaches. While EnergyAustralia does not have visibility into the investigative challenges experienced by the AER, these assumptions should be based on compelling, factual evidence.

We expand on these two assumptions in section 3.

EnergyAustralia submits that adopting a similar adversarial approach to the regulation of the complex, changing, and nationally inconsistent National Energy Law framework is highly likely to drive worse, rather than better, energy market outcomes. Consequently, EnergyAustralia submits that the COAG Energy Council should carefully consider whether it has sufficient evidence of clear public benefits to justify the measures proposed.

3. A POWER TO COMPEL INDIVIDUALS TO APPEAR AND GIVE EVIDENCE

The Consultation Paper proposes that the AER be given a broad power to compel individuals to appear and give evidence in relation to any of its functions and powers, asks whether any limits should be placed on how information obtained in that way can be used, and asks whether individuals are entitled to exercise privileges against self-incrimination or exposure to penalty.

EnergyAustralia does not agree that these reforms are appropriate for three main reasons.

Firstly, at a practical level, the reform would not further its stated aims, nor those of the AER more generally. Unlike other regimes, the kind of evidence necessary to prove a breach of National Energy Laws, or promote compliance generally, is unlikely to be found in the imperfect recollections of individuals.

Secondly, more substantively, EnergyAustralia considers that the threat, and use, of this power would have a profound detrimental impact on the individuals examined, imposing cost on their employer and potentially those people individually, in circumstances where the breach of many of the National Energy Laws is not likely to result in immediate and clear harm to the public, and where compliance judgments can be difficult due to the complexity of the energy market.

Thirdly, the AER already has powers to compulsorily obtain information and documents, and has not indicated (as far as EnergyAustralia is aware) that the combination of this power, and voluntary cooperation from regulated entities, is not sufficient in enforcing compliance in retail or wholesale markets. EnergyAustralia could, however, envisage the AER may benefit from the ability to interview network businesses in the context of performing its economic regulatory functions or powers[1], given the different incentives faced by natural monopolies.

In EnergyAustralia's view, any power to compel individuals to appear and give evidence requires limitations to achieve the appropriate balance between empowering the regulator and recognising the rights of individuals.

3.1 The aims of the reform

The AER plays a critical role in ensuring Australia has as efficient an energy market as possible, ultimately for the benefit of consumers. It is a truism to note that operating in this market and complying with its regulations is extremely complex. The enforcement of its regulations is, as a matter of course, also extremely complex.

EnergyAustralia recognises that this complexity means that it is necessarily difficult for the AER to identify a possible regulation breach, find the information necessary to determine whether there has been a breach, interpret that information, and repeat the process as necessary in light of fresh discoveries or understanding. Regulated entities face the same difficulties in keeping up with ongoing regulatory reform, and making judgments about regulatory compliance. As a result, many regulated entities continue to invest in large compliance teams.

The complexity of much of the information obtained means that the AER often requires assistance in interpreting it, from the people who can give the best answer to their inquiries, and as quickly as possible.

The proposed reform, as EnergyAustralia understands it, seeks not to solve a systemic problem[2] but to enhance the AER's ability to identify relevant information in respect of a possible breach (and potentially identify further breaches), understand that information faster, and better identify who was responsible for a confirmed breach.

3.2 The reform will not further its aims

EnergyAustralia does not consider that the reforms will enhance the AER's ability to perform its duties, nor that a comparison with the ACCC is valid. EnergyAustralia considers that the reform would not be a simple extension of the AER's ability to investigate breaches of energy

[1] Identified as a potential use in the Consultation Paper at p. 8.

[2] No such problem was found to exist in the Enforcement Report (pp. 74 – 76).

regulations, but would fundamentally change the relationship between market participants and the AER. Ongoing cooperation and consultation between participants and the AER is paramount in maintaining a well-functioning energy market. However, in the form proposed by the COAG Energy Council, the reform would change the current consultative investigation framework into an adversarial one.

In particular, this is due to the proposal to allow the AER to exercise the power to compel individuals to appear and give evidence in relation to *any* of its functions and powers. The AER's functions and powers are much broader than enforcement and include, inter alia, monitoring and reporting functions, regulatory functions and powers and, most significantly, any other power conferred on it under subordinate instruments.[3] As discussed in section 3.5 and 3.6, if the AER were to be granted a power to compulsorily examine individuals in relation to *any* of its functions or powers, there would be a heightened need to ensure that individual rights are protected.

Co-operation paramount

Complying with the regulations administered by the AER often requires fine technical, financial and operational judgments and, in many cases, the law requires market participants to follow directions of the AEMO (which itself must exercise judgment in deciding what direction to make, in real-time, often in consultation with market participants). In some cases, knowing whether the "right" call has been made will not become apparent until after the event.

These factors call for cooperation between the market administrator, the regulator and the regulated. Under the current system, there are incentives to cooperate, as participants have an interest in ensuring there is a safe and reliable system because that underpins the success of those businesses. In our experience, the AER's current approach to enforcement and compliance is successfully promoting cooperation and compliance in retail and wholesale markets and there is significant merit in continuing this approach.

However, the introduction of this new power could unintentionally discourage cooperation. A compulsory examination is necessarily one-sided, and its main focus is to identify who was at fault and to what extent, in an adversarial and confronting setting. Individuals may become more reluctant to speak generally, for fear of being questioned under threat of prosecution by the AER in the future.

While EnergyAustralia recognises the importance of upholding National Energy Laws, and the need to prevent serious wrongdoing, reducing incentives to cooperate by increasing legal risk has the potential to make it less likely that market problems will be uncovered (as regulated entities may be more reluctant to self-report), and reduce cooperation that might prevent minor problems becoming more widespread.

Outside some retail provisions, there is rarely a direct connection between an individual entity's conduct and the consequent detriment, and usually ample opportunity to intervene and avoid those outcomes before they arise without resort to court proceedings. A mode of inquiry that serves best to identify who was at fault is not suited to this sort of situation.

Comparison with other regulators

One argument raised in the Consultation Paper in favour of granting the AER a compulsory examination power is the fact that other agencies have it. EnergyAustralia submits that

[3] National Electricity Law, section 15; National Gas Law, section 27; National Energy Retail Law, section 204.

enforcement powers should be tailored to each regulator, and therefore the enforcement powers of another regulator do not justify extending them to the AER.

By way of illustration, it makes sense for the ACCC and ASIC as regulators of prohibitions that typically involve conduct of a more serious nature to have greater powers of investigation. Contraventions of prohibitions regulated by the ACCC and ASIC are more likely to involve misconduct by individuals, who will have little incentive to cooperate with an investigation, and significant incentives (including financial incentives) to conceal conduct.

To this end, the ACCC, for example, frequently instigates civil proceedings (in 2016-17 alone, ACCC litigation commenced, continuing or concluded totalled more than 60 instances[4]). In contrast, the AER has initiated civil proceedings for compliance breaches only three times since 2005 (twice for breaches of wholesale provisions of the National Electricity Rules and once for a breach of the National Energy Retail Law).

This contrast is not surprising. Enforcing compliance with the *Competition and Consumer Act 2010* is the ACCC's 'bread and butter'.[5] On the other hand, as EnergyAustralia understands it, the AER's compliance and enforcement functions in retail and wholesale markets, while equally important, operate in a fundamentally different way given the ongoing nature of dealings between the AER and energy market participants. EnergyAustralia's view is underscored by the AER's approach to enforcement, highlighted in its Compliance and Enforcement Statement of Approach:

> *The prevention of contraventions of obligations under the national energy laws is preferable to the AER taking enforcement action after a breach has occurred. Through our work we seek to encourage a culture of compliance.*[6]

While compliance with the National Energy Laws is important, those laws are fundamentally designed to achieve safe, reliable and efficient regulated markets in circumstances where there is considerable argument over the "right policy prescription" and is fraught with complexity and debate. Compliance is not best achieved through adversarial investigative powers directed at individuals, who are highly unlikely to gain personally from breaching National Energy Laws.

The above comparison seeks merely to highlight that the Enforcement Review's comparisons of the AER and ACCC may not be apt. EnergyAustralia therefore cautions against granting the AER an invasive power possessed by the ACCC solely on the basis of such a comparison.

Speed and accuracy

The Consultation Paper suggests that oral responses are superior to written responses for coming quickly to an understanding of the relevant information. EnergyAustralia considers this highly unlikely for two reasons.

Firstly, the technical and complex nature of much of the information means that it is unlikely that oral testimony will be the best evidence, particularly as individuals will typically make decisions in team environments, with each individual contributing their expertise and perspective and working within the framework of written mandates.

[4] ACCC and AER Annual Report 2016-17, Appendix 9.

[5] See, for example, ACCC and AER Annual Report 2016-17, p. 32.

[6] AER, Compliance and Enforcement Statement of Approach, April 2014, p. 5.

Secondly, employees are unlikely to be able to rely solely or even primarily on their memory to explain why they acted in a particular way, even relatively soon after the event. The ability to consult with documents, notes, colleagues and superiors means an individual will be far more likely to give accurate and detailed responses than if required to answer a question on the spot. This is particularly pertinent in the wholesale market trading context, where information the AER may seek could relate to judgment exercised by a trader for a specific dispatch interval in a given trading day.

In *Australian Energy Regulator v Stanwell Corporation Limited*, one of the three enforcement proceedings instigated by the AER (and the only case relied on in the Enforcement Review), Dowsett J relevantly stated: [7]

> *I formed the impression that the applicant's February request and the s 28 notice inevitably led the respondent's employees, including Mr Gnanananthan, to reconstruct the thought processes which led to the impugned rebids. I do not use the word "reconstruct" in a necessarily pejorative sense. The case concerns numerous decisions based upon a wide range of information and taken in very short time frames. Such decisions inevitably reflected the weight given by individual traders to particular aspects of the information available to them and the dual, and, to some extent, conflicting objectives of maximizing the volume of electricity supplied and the price at which it was supplied. Such decisions, no doubt, also reflected the particular personalities and experiences of the traders, some being more risk-averse than others. The difficulties inherent in testifying after the event concerning such thought processes should not be under-estimated…*
>
> *… I accept Mr Gnanananthan as an honest witness, but it is difficult to avoid the conclusion that his recollections are largely based on reconstruction. This view simply reflects the reality of the situation and the extreme difficulty of undertaking the task which was expected of him in these proceedings. In general, the best evidence of his reasons for rebids is that contained in his log entries.*

We respectfully submit that it is unclear how circumstances could be significantly different if the AER procured this type of evidence orally under oath prior to a trial. While the passage of time between the event itself and the provision of evidence would be shorter, the evidence would nonetheless be obtained after the fact and would be based on the same thought processes.

3.3 Impact on employees

Significant incursion on the individual

The power to compel a person to attend a place to answer questions is a powerful and invasive enforcement tool. It impedes on an individual's personal liberties, overrides any right to privacy, and can cause significant personal stress.

It also imposes costs on an individual (and/or their employer) as the person is taken away from their employment, and will generally need to obtain legal representation. This may be provided by a person's employer, but typically the lawyer will be engaged by and for the employer, and not for the individual required to attend the examination. It is certainly possible, however, that in certain cases, in particular those in which a contravention is identified, the interests of the employee and employer would not be aligned and the employee would require their own legal representation.

[7] *Australian Energy Regulator v Stanwell Corporation Limited* [2011] FCA 991 (30 August 2011) at [115] and [302].

The fact that the AER administers provisions of the law that are highly technical and/or procedural means individuals in a wide range of roles will be exposed to the threat of compulsory examination, from directors and senior management, to more junior staff, which may heighten the impact of the power on individuals, and consequently on regulated entities ability to attract and retain people.

3.4 The AER's current information gathering powers

As EnergyAustralia understands it, the Enforcement Review and the Consultation Paper both proceed on the assumption that the AER's current information gathering powers are inadequate. However, we consider further evidence may be required to establish whether that is in fact the case for the following reasons.

First, as noted above, the AER is an infrequent instigator of civil proceedings. Yet a key rationale for the Enforcement Review recommendation for the new AER power seems to be premised on the basis that the AER is in a similar position to the ACCC; that is, being inundated with enforcement matters such that it must prioritise which of those matters ought to proceed to trial. For example:

> *[The new power] will give the AER the ability to make a more informed and accurate assessment of whether a breach has occurred. This, in turn, will enable it to better assess whether to initiate civil proceedings in the first place and, if so, to better frame its case. Such an outcome would avoid wasteful litigation as a result of the prospects of success, or the issues in dispute, not being able to be properly framed and assessed.*[8]

Second, the Enforcement Review relies on the judgment in *Stanwell* to support its conclusion that written documents can be inadequate compared to evidence received from an interview of relevant personnel due to, inter alia, the ability for written responses to be edited.

While we do not dispute that the judgment refers to some "editorial supervision" in the preparation of written responses, it does not automatically follow that *Stanwell* is conclusive proof that the AER's case would have been better run had it been able to interview witnesses under oath in advance of the trial. EnergyAustralia makes the following observations about the *Stanwell* judgment:

- The AER sought information from the witnesses using two methods: (1) its formal and coercive information gathering power in section 28 of the National Electricity Law and (2) an informal request. The Enforcement Review may conflate the two methods when it refers to the difficulties associated with the "information request process".[9]

- Some comments the trial judge made about the AER's approach to obtaining information include: "the February Inquiry was unfocussed and the s 28 notice sought information concerning a large number of rebids" and "there was no real attempt to recreate the atmosphere of the trading room or to appreciate the pressures to which traders are subject." There is no commentary about the utility of the AER obtaining oral evidence under oath.[10] A more targeted discovery of documents under section 28 may have proven fruitful.

[8] Enforcement Review, p. 119.

[9] *Stanwell* at [97]-[99], [302]-[308]; [350]; Enforcement Review, p. 120.

[10] *Stanwell* at [306]-[307], [348]-[351].

- As noted earlier, the trial judge considered the nature of the trading room itself was a key factor in the utility of the traders' evidence and placed weight on written log entries and oral evidence.[11]

In relation to the first point, EnergyAustralia further observes that it is unclear whether the AER relies extensively on its section 28 coercive information gathering powers (and equivalent Gas and Retail powers) when conducting enforcement functions.[12] EnergyAustralia queries whether it may be premature to dismiss the utility of these powers when only one example has been presented where, in combination with other informal methods of obtaining information, they have not produced the desired result.

Finally, the Enforcement Review implies that the AER's information gathering powers have less force than comparable ACCC powers because knowingly providing false or misleading information under the National Energy Laws does not attract a criminal penalty.[13] As EnergyAustralia understands it, while not provided for in the National Energy Laws, knowingly providing false or misleading information to the AER when exercising a function or power would nevertheless attract a criminal penalty (12 months imprisonment) under the *Criminal Code Act 1995*.[14]

3.5 Protections if compulsory examinations are introduced

If an expansion is deemed necessary, EnergyAustralia considers that it should be subject to clear, legislated constraints in order to protect individuals.

The Consultation Paper rightly identifies that the right to exercise the privilege against self-incrimination and the right to exercise the privilege against exposure to a penalty are significant rights that wherever possible should not be overridden by statutes.

EnergyAustralia also agrees that the AER should be required to produce a guideline explaining how it will use any new powers it obtains.

Further, EnergyAustralia considers that while, on the evidence, an expansion is not appropriate, any compulsory examination power should only be used where:

- the regulatory agency is investigating a suspected and serious breach of a National Energy Law that is designed to protect the public (and is otherwise subject to a civil penalty, which is discussed further below);
- the AER is satisfied that a compulsory examination, rather than an alternative method, is the most appropriate method for obtaining relevant evidence necessary to investigate that breach;
- the individual is given proper notice of the examination and the questions to be asked; and
- if the individual is also granted protections, including the right to claim a defence where they have acted honestly and reasonably in all the circumstances, and where they will not be required to give evidence that will self-incriminate them or expose them to a penalty.

[11] *Stanwell* at [302] and [350].

[12] EnergyAustralia understands the AER uses these powers regularly to obtain information for reporting and benchmarking activities.

[13] Compliance Review.

[14] Criminal Code Act 1995, section 136.1.

Oath and affirmation

While it is important that individuals provide honest answers to the AER, requiring individuals to provide evidence under oath or affirmation will create a more adversarial, court-style setting, which will increase pressure on individuals examined and further reduce the potential for the kind of free and collaborative exchange between the AER and individuals that is likely to further a safe, reliable and efficient energy market.

It will also mean individuals will need to be more guarded in their answers in order to avoid the risk of perjury. As a result, the answers provided will be more limited, and therefore it will be more difficult to obtain information through open questions calling for open responses.

EnergyAustralia submits that requiring evidence to be given under oath or affirmation is not necessary, as individuals will necessarily understand that it is not appropriate to provide misleading information (particularly as it is already a criminal offence to knowingly provide misleading information), and the need to be honest can be explained in a less formal and confronting manner.

3.6 Other limits on information gathering powers

EnergyAustralia agrees that the following protections and limits should be imposed on the AER's information gathering powers generally:

(a) it is a reasonable excuse not to provide information if a person is not *reasonably* capable of providing the information;

(b) a person is not required to disclose information that is subject to legal professional privilege (although EnergyAustralia submits this is already the case);

(c) a person does not incur a liability for breach of contract or confidentiality from having to comply with an AER notice;

(d) the AER must take all reasonable measures to protect information given to it from unauthorised use; and

(e) 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 only up until the point it begins proceedings on the matter.

4. CIVIL PENALTY REGIME

EnergyAustralia does not consider that an increase to civil penalties is justified, in circumstances where EnergyAustralia is not aware of evidence of widespread or serious disregard for the law. As noted above, in recent years the AER has made only three civil penalty applications. We further observe that the AER has not issued a significant number of infringement notices for breach of civil penalty either. According to the AER's website, approximately 40 infringement notices have been issued since 2006 which suggests few (if any) demonstrated examples of systematic non-compliance. As noted below, we do agree that the two most frequently breached provisions may warrant higher civil penalties.

Further, EnergyAustralia submits that the existing civil penalty regime requires further scrutiny. For example, EnergyAustralia observes that the provisions in Appendix A to the Consultation Paper largely focus on the wholesale market whereas there may be scope to review the appropriateness of the civil penalties more broadly.

Purpose of pecuniary penalties

The fundamental purpose of pecuniary penalties is to punish and deter. As a consequence, they should only be applied to National Energy Laws that apply to conduct that:

(a) if engaged in, would harm the public—ie are protective, rather than administrative, in nature;

(b) involves an element of culpability and intent, or, if engaged in, would be likely to deliver a significant financial gain or consumer detriment; and

(c) is clearly defined, so that a prudent regulated entity would clearly understand when it is, or is not, in breach (ie would pass a "bright-line test"). This is particularly important in a delegated rule-making environment, where an expedited rule-making process has been adopted to reflect the fast changing nature of energy regulation, but also means the drafting style is less formal, and in some cases less precise, than the drafting style of experienced Parliamentary Counsel.

Application to the provisions in Appendix A

This is not the case for many of the proposed provisions. The justifications for increased penalties in Appendix A to the Consultation Paper:

(a) do not identify any immediate threat to the public, only potential system security and reliability issues if there is widespread misconduct, other than indirectly where a retailer or distributor does not register life support at a premises;

(b) do not identify elements of culpability, intent or the possibility of market participants obtaining a financial gain through misconduct, other than potentially in respect of market manipulation; and

(c) in many cases, do not pass the bright-line test (although EnergyAustralia concedes that provisions requiring the market participant to follow dispatch instructions from AEMO are generally clear).

The two provisions that EnergyAustralia agrees may warrant increased civil penalties are rule 125(2)(d) of the National Energy Retail Rules and clause 4.9.8(a) of the National Electricity Rules. In the case of the former, which relates to protecting life support customers from interruption to their electricity supply by distributors without advance notification, is the clear leader for infringement penalties with 18 occurrences. We consider this provision does pass the requisite hurdles because the evidence suggests that distributors are not sufficiently deterred from engaging in behaviour that has the potential to seriously harm a vulnerable segment of the community.

The latter relates to failure by market participants to follow dispatch instructions from AEMO unless to do so would, in the participant's reasonable opinion, be a hazard to public safety or materially risk damaging equipment. The AER has issued eight infringement notices for breaches of this provision to date and it would appear to pass the requisite hurdles given failure to comply with dispatch instructions could place consumers at risk of blackouts or equipment damage. As noted above, this provision would also likely pass a "bright-line test".

Protections against pecuniary penalties

Given the complex nature of the energy industry, EnergyAustralia submits that regulated entities should be entitled to a defence against a pecuniary penalty provision where they can establish that they have acted honestly and reasonably in all the circumstances.

EnergyAustralia submits this is an appropriate standard for compliance in an environment where invariably some level of judgement or interpretation is required by both regulated entities and AEMO. For example, it provides for a defence where AEMO has issued an instruction that a regulated entity could not reasonably comply with due to operational limitations.