

SUBMISSION

AER POWERS AND CIVIL PENALTY REGIME
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Introduction

The Energy Users Association of Australia (EUAA) is very pleased to make this short submission to the COAG Energy Council's Senior Committee of Officials consultation paper.

We are the peak body representing Australian energy users. Our membership covers a broad cross section of the Australian economy including significant retail, manufacturing and materials processing industries. Our members are highly exposed to movements in both gas and electricity prices and have been under increasing stress due to escalating energy costs.

These increased costs are either absorbed by the business, making it more difficult to maintain existing levels of employment or passed through to consumers in the form of increases in the prices paid for many everyday items.

In summary, the EUAA supports proposed amendments to the national energy laws to give the Australian Energy Regulator the power to compel individuals to appear before it and give evidence. We agree with the conclusions of the 2013 Review of Enforcement regimes under the National Energy Laws that this power would improve the AER's ability to investigate breaches of the national energy laws, 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.

The EUAA supports this power to be used both the AER's exercise of:

- its enforcement powers, and
- its economic regulatory functions

We consider that these powers have the potential to considerably improve the AER's efficiency in exercising its statutory responsibilities by:

- obtaining unedited evidence directly from individuals;
- removing the need to rely on documentation for answers, particularly for technically complex questions which may require additional explanation; and
- enabling timelier collection of information.

The current process of getting information in written form can be cumbersome and time consuming e.g. through a Regulatory Information Notice. Having the ability to directly question individuals should provide for improved timeliness and efficiency in the AER understanding the network's position rather than a back and forth RIN process that can take weeks.

We would note that the AER in exercising these new powers should recognise principles of natural justice. For example, in seeking particular individuals to appear before it, it should ensure that the requested individual is indeed the best person to provide the information and that the information sought should be clear prior to the appearance.

The EUAA also supports the proposed changes to the civil penalties regime under the National Electricity Laws. But then the use of penalties is not the preferred method of achieving efficient energy markets that meet the National Electricity and Gas Objectives. These reforms are but one part of a much wider package of measures required to achieve these outcomes.

We also support the submission on this matter made by Energy Consumers Australia.

Comments on the specific consultation questions

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

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. 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?

Yes, the AER should be able to use its new power to compel individuals to appear before it in relation to any of its functions or powers – both enforcement and economic regulation. We see no difference in principle between the two functions. Good regulatory practice requires the efficient collection of quality information to enable the best decisions to be made in the long-term interests of consumers.

We agree that the AER should be treated consistently with the AER's existing powers to collect information i.e. it should be able to use any information gained in relation to any of its power of functions. Where it is obtained in the course of one matter, it should be able to use that information in the course of another matter.

In exercising these powers, the AER should have reasonable grounds for believing that the person called has the knowledge it seeks and the general nature of the information sought should be communicated to that individual prior to their appearance before the AER. This new power should not be used as a "fishing expedition".

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?

Yes, the existing penalties in 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.

Yes, the penalty amounts should be increased in line with the value of money with CPI a suitable index.

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

Yes, we agree that the AER should be able to require evidence to be given on oath or affirmation. This is consistent with most powers to compel and give evidence and reinforces the importance of accuracy of the information being provided.

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?

Yes, individuals compelled to appear before the AER should have the right to exercise a privilege against self-incrimination for criminal offences. As the Paper notes “...the privilege against self-incrimination is enshrined in common law in Australia.”

However, we agree that this protection should not be available where they are civil penalties applied for the failure to appear or provide information. We agree with the Consultation Paper that allowing this penalty privilege for civil penalties could be a significant barrier to the AER’s performance of its functions.

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?

Yes, the AER should be required to produce a guideline on the use of its new information collection powers. We are entering a new landscape with these new powers. There will be uncertainty in many stakeholder’s minds about how they will apply in a practical sense. The guideline will assist in a smooth transition.

We would see the guidelines being more a principals document, than being highly prescriptive, particularly in its early days. The intent should be to show potential parties appearing before the AER that this is meant to be a co-operative process to efficiently obtain information to assist the AER in fulfilling its responsibilities. The guideline would be a live document that is constantly updated reflected experience in its application.

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?

We agree that the list or provisions in Section 2.10 of the Consultation Paper should be extended to the AER’s new power. In seeking particular individuals to appear before it, it should ensure that the requested individual is indeed the best person to provide the information and that the information sought should be clear prior to the appearance. We are not aware of any additional provisions that might be included.

Finally, we would recommend that the COAG Energy Council set in place a review process on the operation of the new powers. As suggested in the ECA submission, this could be completed say within 3 years of when the powers are first exercised by the AER, or six years after coming into force, whichever is the earlier.

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

We support the comments on these matters made in the ECA submission.

We would emphasise the central importance of the long-term interests of consumers and “consumer harm” in the framework for deciding the level of civil penalty.

We support the ability of the AER to issue infringement notices as part of its enforcement activities.

Finally, we support the Law and Rules making it clear that any civil penalties associated with the AER’s exercise of its economic regulatory powers are not able to be passed through as part of a network’s regulated revenue cap.



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2 July, 2018