



COAG Energy Council

# COAG Energy Council

Senior Committee of Officials

## National Energy Laws enforcement and penalties framework reforms

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Explanatory note for stakeholder consultation

November 2019

## Acronyms

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
COAG	Council of Australian Governments
NEL	National Electricity Law
NGL	National Gas Law
NERL	National Energy Retail Law
REPI	ACCC's Retail Electricity Pricing Inquiry
RRO	Retailer Reliability Obligation
SCO	Senior Committee of Officials of the COAG Energy Council

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## 1. Introduction

The Council of Australian Governments' (COAG) Energy Council (the Energy Council) is responsible for key national reforms in the energy sector, including to the “national energy law” regulatory framework, which comprises the *National Electricity Law* (NEL), the *National Gas Law* (NGL), the *National Energy Retail Law* (NERL), and associated rules and regulations.<sup>1</sup>

The Energy Council recognises the importance of the national energy laws being underpinned by a robust enforcement regime that gives all participants, especially customers, the necessary confidence to participate in energy markets. To this end, in 2010 the Energy Council agreed to:

*“a comprehensive review of the enforcement regimes across all the national energy laws to ensure that the interests of customers continue to be protected, and the integrity of the energy market is maintained.”<sup>2</sup>*

Officials subsequently engaged an independent consultant to undertake a review of the national energy laws enforcement regimes. In 2013, the Energy Council was presented with *The Review of Enforcement Regimes under the National Energy Laws* (the Enforcement Review),<sup>3</sup> which made a number of recommendations to enhance the regime. In December 2014, following its own consultation processes on the report's recommendations, the Council agreed to a number of those recommendations and released a consultation paper to progress this policy.

A further consultation paper was released in April 2016.<sup>4</sup> In December 2016, Ministers agreed to increase the maximum civil penalty and infringement notice levels in line with the Consumer Price Index (CPI); to making a one-off increase to bring these penalties in line with the current value of money; and to ensure future penalty levels increase in line with CPI.

Further developments in the energy policy context resulted in a decision by the Energy Council, at its meeting in November 2017, to proceed with progressing other recommendations (recs 5 and 13) made in the Enforcement Review. A further consultation paper was released in May 2018 to outline the proposed approach to these recommendations.<sup>5</sup>

On 11 July 2018, the Australian Competition and Consumer Commission (ACCC) delivered the final report of its Retail Electricity Pricing Inquiry (REPI)<sup>6</sup> and made a number of recommendations in relation to the existing penalties and enforcement framework.

The ACCC affirmed that the reforms previously agreed by the Energy Council to increase civil penalties were important to implement and underpinned the integrity of the market and consumer confidence. Specifically, the ACCC stated:

*“The ACCC considers that the current civil penalty amounts are insufficient to impose a credible level of deterrence and provide meaningful consequences to businesses. Therefore, the ACCC considers that the penalties should be increased to provide the Australian Energy*

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<sup>1</sup> The NEL, NGL and NERL are Commonwealth-State-Territory cooperative legislative schemes. Each national law is set out in a statute of South Australia and applied as a law in force in each jurisdiction that participates in each cooperative scheme through legislation known as an ‘application Act’. See *National Electricity (South Australia) Act 1996* (SA); *National Gas (South Australia) Act 2008* (SA); *National Energy Retail Law (South Australia) Act 2011* (SA).

<sup>2</sup> Energy Council Communique, 11 June 2010.

<sup>3</sup> A full copy of the final Report may be accessed here:

<http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Review-of-Enforcement-Regimes-under-the-National-Energy-Laws-Final-Report.pdf>

<sup>4</sup> <http://coagenergycouncil.gov.au/publications/energy-working-group-bulletin-no-43-review-enforcement-regimes-under-national-energy>

<sup>5</sup> See: <http://www.coagenergycouncil.gov.au/publications/energy-market-reform-bulletin-no44-aer-powers-and-civil-penalty-regime-consultation>

<sup>6</sup> REPI report: <https://www.accc.gov.au/regulated-infrastructure/energy/electricity-supply-prices-inquiry/final-report>

Regulator (AER) with a greater level of flexibility in its response to address breaches of the national energy laws.”<sup>7</sup>

The ACCC made further recommendations extending beyond those already being actioned by the Energy Council, including:

- **Recommendation 42:** that maximum penalties under the national energy laws should align with those of the Australian Consumer Law – the greater of \$10 million, three times the benefit gained from breaching the rules, or 10 percent of annual turnover
- **Recommendation 43:** that the rebidding rules that currently attract a \$1 million civil penalty be subject to the highest penalty tier (as proposed under Rec 42)
- **Recommendation 44:** that amendments should be made to clarify that the AER may seek various types of court orders, including allowing that a third party may be required to undertake a community service order
- **Recommendation 45:** that the AER be provided the power to require individuals to give evidence before it
- **Recommendation 46:** that a new lower infringement penalty amount be available to the AER for minor breaches, and that penalties for destroying evidence or providing false or misleading information to the AER be aligned with the Australian Consumer Law (ACL).<sup>8</sup>

In December 2018, the Energy Council agreed to those recommendations and to a consolidated body of drafting instructions to give effect to the enforcement and penalty policy positions taken to date. It also agreed to some further amendments, including:

- inclusion of a safeguard in relation to the AER’s oral evidence power to require annual reporting by AER on the use of the power;
- extending the penalty regime changes to operate consistently across the national energy laws, including the National Gas Law.

The following draft Bill and regulations that are the subject of this consultation paper give effect to the policy decisions taken by the Energy Council up to and including December 2018, as outlined above:

- *Statutes Amendment (National Energy Laws) (Penalties and Enforcement) Bill 2019*
- *National Electricity (South Australia) (Penalties) Variation Regulations 2019*
- *National Gas (South Australia) (Penalties) Variation Regulations 2019*
- *National Energy Retail (South Australia) (Penalties) Variation Regulations 2019*

Overall, the proposed changes detailed in the draft Bill and regulations will strengthen the AER’s enforcement powers and the penalty regime under the national energy laws and provide a stronger deterrent against breaches of the law and rules, particularly in the case of significant breaches, or breaches that impact the integrity of energy markets.

In summary, the key changes to be implemented by the draft legislation include:

- Adopting a three-tier civil penalty regime in the laws.
- Increasing civil and offence penalty levels and indexing them in line with the Consumer Price Index.
- Enhancing the AER’s information gathering powers.
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<sup>7</sup> REPI report p 324.

<sup>8</sup> The recommendations as presented here are truncated versions of the original. The verbatim text of the recommendations can be found in the REPI report.

The Bill and regulations are published alongside this consultation paper. The draft Bill and regulations are not final until endorsed by the Energy Council. Responses to this consultation paper will aid the Energy Council in determining the final form of any amendments to the national energy framework.

## Consultation

To assist in understanding the draft amendments, the key outcomes of the Bill and associated regulations are outlined in further detail below. The Energy Council's Senior Committee of Officials (SCO) encourages stakeholders to provide feedback, preferably through a written submission, on the draft amendments.

This paper does not include any specific questions on which a response is sought. Noting the previous consultation processes that have occurred and that the drafting of the Bill and regulations reflects the agreed policy intent of the Energy Council, SCO is primarily interested in comments from stakeholders on drafting omissions or errors, and whether the amendments will raise any practical implementation or transitional concerns.

SCO will publish submissions received on the COAG Energy Council's website. If the submission contains confidential information (or a confidential attachment) please make it clear in writing what should or should not be published.

Submissions are requested to be provided by 06 January 2020.

For more information, please contact the COAG Energy Council Secretariat:

- email: [energycouncil@environment.gov.au](mailto:energycouncil@environment.gov.au)  
(02) 6275 9261
- web: <http://www.coagenergycouncil.gov.au/contact-us/contact-us>

## 2. Penalties framework amendments

In relation to the penalties framework in the national energy laws, the Bill will have three main effects. It will:

- Increase the penalty rates.
- Create a new tiered civil penalty framework
- Provide for penalties to be indexed into the future

In addition to providing a brief description of the operation of the existing framework, each of these changes is explained in more detail below.

### Current framework

Certain provisions of the national energy laws, regulation and rules are said to be civil penalty provisions if they are so identified in the laws, or in the associated regulations.<sup>9</sup>

If a person or a corporation does not comply with, or breaches the requirements set out in a civil penalty provision, then the AER may:

- take action resulting in a Court applying a civil penalty; or
- issue an infringement notice.

Each of the national energy laws specify the monetary penalty amounts which may be applied in the case of a breach of civil penalty provision. In the case of a matter the AER takes to Court, the law specifies the maximum civil penalty a Court may apply, but the Court has discretion to apply a lesser amount. In the case of an infringement notice, however, the amount of the penalty specified in the

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<sup>9</sup> See, e.g. NEL s 2AA(1), NERL s 4, and NGL s 3.

law is not subject to the discretion of the AER. Infringement penalties are generally much lower than the Court imposed penalty.

The provisions in the national laws which set the penalty rates are not identical, but have broadly the same effect. The provisions in the NGL and NERL which specify the maximum civil penalties are equivalent, with a breach by a natural person subject to a civil penalty of up to \$20,000, and \$2000 for every day the breach continues (the daily rate). In the case of a body corporate, the civil penalty is up to \$100,000, with a daily rate of \$10,000.<sup>10</sup>

In the NEL, the penalties are the same as the NGL and NERL, with one variation in relation to rebidding practices.<sup>11</sup> In the case of a breach of those provisions the civil penalty does not exceed \$1 million for both natural persons and corporations, with a daily rate of \$50,000.

In relation to infringement notices, the relevant provisions<sup>12</sup> provide for a maximum penalty of \$4,000 for a natural person, or \$20,000 for a corporation.

Each of the national energy laws also contain a number of criminal offence provisions. Those provisions are readily identifiable because they specify the applicable monetary penalty in the case of a breach.<sup>13</sup> The monetary amounts that apply in relation to each of the offence provisions vary between \$500 and \$100,000.

### Implementing a tiered penalty approach

In broad terms, the Bill amends the civil penalty framework so that a given breach may be subject to one of three tiers of penalty.<sup>14</sup> This structure allows specific provisions of the laws, regulations and rules to be subject to lesser or greater civil penalties, depending on the nature of the breach.

Once the Bill becomes law, the Energy Council may decide to specify a particular requirement of the national energy laws to be subject to one of the three available penalty tiers. This decision will be given effect through the making of regulations and will be the subject of a separate process.<sup>15</sup>

The two lowest tiers (tiers 3 and 2) are based on the existing penalty rates, as described above, but adjusted to reflect the change in the value of money since those rates were originally set. They are set out in Table 1 below.

The amendments also implement a new, higher tier (tier 1) which reflects the ACCC's recommendation that maximum penalties under the national laws be aligned with those in the ACL.<sup>16</sup> The breach of any provision of the national laws which is subject to this higher penalty tier is an amount not exceeding the greater of the following:

- A monetary penalty of up to \$10 million;
- A monetary penalty reflecting an amount calculated to be 3 times the financial benefit gained as a result of the breach;
- A monetary penalty reflecting an amount calculated to be 10% of the annual turnover of the corporation that engaged in the breach.

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<sup>10</sup> The quantum of penalty is currently set out in the definition of 'civil penalty' in each of the national energy laws (e.g. NEL s 2).

<sup>11</sup> Broadly, the rebidding framework is set out in the rules to require offers, bids and rebids into the wholesale spot market are not false or misleading - see National Electricity Rules r 3.8.22A.

<sup>12</sup> The NEL and NGL are drafted in the same manner. The NERL simply applies the provisions of the NGL. See NERL s 308, NEL s 76, NGL s 279.

<sup>13</sup> See, e.g. NEL s 20B, NGL, s 41, NERL s 158.

<sup>14</sup> The tiered approach will not extend to the offence penalty rates.

<sup>15</sup> As with the making of legislative amendments, once agreed by the Energy Council, South Australia is responsible for the making of the regulations. The effect of this change flows through to all jurisdictions that have applied the national energy laws as the laws of their own jurisdiction.

<sup>16</sup> ACCC REPI, recommendation 42.

With some exceptions, existing civil penalty provisions will be subject to the bottom tier (tier 3).<sup>17</sup>

In relation to infringement penalties, the amendments will provide for a two-tier framework. If a person or corporation breaches a tier 1 or tier 2 civil penalty provision, then they may be subject to the higher of the two tiers of infringement penalty. A breach of a tier 3 civil penalty provision will be subject to the lower infringement penalty rate. The lower rate will be based on the existing infringement penalty amount but adjusted to reflect the change in the value of money since the rate was originally set.<sup>18</sup>

Reflecting recommendation 46 of the ACCC REPI report, a further variation to the infringement penalty regime has been made to provide the AER with greater discretion in the application of an appropriate infringement penalty. In relation to a breach of a tier 3 civil penalty provision by certain types of corporate entity, the AER will be able to elect to apply a lower infringement penalty if warranted in the circumstances.<sup>19</sup>

The AER is currently able to issue infringement notices in relation to all civil penalty breaches other than a breach of the rebidding civil penalty provisions. As agreed by the Energy Council, a consequential effect of the amended framework is that the AER will be able to issue infringement notices in relation to breaches of all civil penalty provisions, including the rebidding civil penalty provisions.

The structure of the new tiered framework is reflected in clauses 6, 20, 34, 46 and 66 of the Bill.

### Retailer Reliability Obligation

The approach to the tiered framework differs slightly in the NEL. Clause 6 of the Bill, which inserts new s 2AB(1)(d), includes a specific change to the penalty rates that were applied in relation to the Retailer Reliability Obligation (RRO) provisions made in the *National Electricity (South Australia) (Retailer Reliability Obligation) Amendment Act 2019*. These amendments are intended to align the RRO penalties with the tiered approach that would apply for all other civil penalties in the national energy laws.

The specific increase to the RRO penalties is discussed further below, but the intent is to align the penalty for an initial breach with the tier 2 rate, and the penalty for a subsequent breach (by a corporation) with the tier 1 rate.

### Increase in penalty rates

In addition to introducing the tiered structure, the amendments also update the penalty rates themselves. In the main, these changes are to ensure the penalty rates reflect the change in the real value of money since the laws were originally made. In some cases, the increases have been made in response to recommendations of the ACCC, or to ensure regulatory consistency across the national energy laws.

As an example of the changes that have been made, the current corporate civil penalty rate of \$100,000 was introduced when the laws were made in 1996. In real terms, in 2018 dollars, \$100,000 is now worth \$170,000.<sup>20</sup> Amendments have therefore been made to each of the existing penalty rates to account for this change over time.<sup>21</sup> These changes will apply to civil, infringement, and offence penalty rates. The variation to the civil penalty and infringement penalty amounts is set out in **Table 1**.

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<sup>17</sup> The exceptions include the existing rebidding provisions (subject to tier 1) and the recently passed penalties under the Retailer Reliability Obligation (which will align with tiers 1 and 2).

<sup>18</sup> But varied to reflect the value of money in 2018, as discussed in the following section.

<sup>19</sup> See, e.g. clause 20, s 76(2). Where a body corporate is not a listed corporation or is a related body corporate, the AER may consider the lower infringement penalty amount is appropriate taking into account, e.g., the nature of the alleged breach.

<sup>20</sup> The Reserve Bank of Australia publishes an online inflation calculator, which can be used to verify the initial increase in penalty values from the 1996 base year: <https://www.rba.gov.au/calculator/>.

<sup>21</sup> As most of the penalty rates were set in 1996 the amended rates have been calculated using this as the base year. The rebidding penalty was set in 2003, so this is the base year for that rate.

**Table 1:** Civil Penalty and Infringement Penalty changes.

Tier	Existing Corporations	Existing Individual	Amended Corporations	Amended Individual
<b>Civil Penalties</b>				
Tier 1 - Initial	N/A <sup>22</sup>	N/A	\$10m (or 3X, or 10%)	\$500K
Tier 1 - Daily	N/A	N/A	N/A	N/A
Tier 2 - Initial	\$1m <sup>23</sup>	\$20k	\$1.435m <sup>24</sup>	\$287k
Tier 2 - Daily	\$50k	\$2k	\$71.8k	\$14.4k
Tier 3 - Initial	\$100k	\$20k	\$170K	\$33.9K
Tier 3 - Daily	\$10k	\$2k	\$17k	\$3.39k
RRO	\$1m & \$10m for subsequent breach.	\$1m	\$1.435m & \$10m (or 3X, or 10%) for subsequent breach.	\$1.435m
<b>Infringement Penalties</b>				
Tier 1 & 2 breach	N/A	N/A	\$67.8k	\$13.6k
Tier 3 breach	\$20k	\$4k	\$33.9K	\$6.79K
	N/A	N/A	Or \$6.79K <sup>25</sup>	N/A

Unlike tiers 2 and 3, the tier 1 civil penalty rates have no existing precedent. This tier is being introduced in line with recommendation 42 of the REPI report, and is aimed at ensuring the AER has a sufficient level of flexibility to adequately respond to breaches of the national energy laws.

In the case of a breach by a corporation of a tier 1 civil penalty provision, the AER may seek a penalty not exceeding the greater of - \$10 million. Alternatively, the AER may seek a penalty which reflects three times the financial benefit obtained by the corporation in consequence of the breach, or up to

<sup>22</sup> As discussed above, there is no existing analogue in the national energy laws for this penalty tier. It is based on the ACL, as reflected in Recommendation 42 of the ACCC REPI.

<sup>23</sup> This tier currently only applies to the rebidding civil penalty provisions. It is intended that the amendments to this penalty tier will be applied to other provisions in the national laws, subject to the necessary amendments to the regulations.

<sup>24</sup> As the \$1 million penalty was introduced in 2003, this has been used as the base year for the purpose of indexation.

<sup>25</sup> As discussed above, the AER may elect to apply a lower rate where appropriate.

10% of the annual turnover of the corporation. The range of available tier 1 penalty options will allow the AER to seek penalties which are appropriate to the circumstances of a given breach. This framework is set out in e.g. new NEL s 2AB(1)(c)(ii), and is mirrored in the NGL and NERL amendments.

As with the civil penalty amounts, amendments have been made to increase existing offence penalty rates to reflect the change in the value of money since the rates were originally set. The changes are reflected in **Table 2** below.

**Table 2:** Offence penalty changes

Offence Penalties	
Existing amounts	Amended amounts
\$500	\$620
\$2,000	\$3,400 or \$6300*
\$10,000	\$17,000 or \$31500*
\$20,000	\$34,000
\$100,000	\$170,000

Certain offence penalties (denoted in Table 2 by an ‘\*’) have been increased beyond the change in the value of money to reflect ACCC Recommendation 46. Increases to this higher level have been made in the case of provisions related to AER or AEMO information gathering functions.<sup>26</sup> The ACCC noted that this was important in order to support the AER’s new information gathering powers, as described in further detail below.

### Application of tiers to provisions

At this stage, the default position is that all existing penalty provisions, other than the rebidding provisions, and the RRO provisions, will be subject to the new tier 3 penalty rates. The rebidding civil penalty rate is to be set at tier 1 to reflect the Energy Council’s acceptance of Recommendation 43 of the ACCC REPI report. This is reflected in the draft regulations.<sup>27</sup>

The Energy Council will be separately consulting on which, if any, of the existing provisions in the law shall be subject to the higher tier penalty rates.

### Indexation

One of the primary policy intents of the amendments is to ensure that the values of penalties set out in the national laws is updated to reflect the value of money today. In part, this has been achieved through amendments which specify higher penalty rates, as described above.

To ensure the value of these penalty increases is maintained into the future, the amendments allow for the penalty rates to be indexed by CPI into the future, with all penalty rates in the law subject to the indexation mechanism.

The timing of the indexation is set out in the primary amendments – with the first adjustment to occur on 1 July 2023, and then on 1 July every three years after that date.<sup>28</sup> After each indexation, the Bill will require the AER to publish the new penalty rates on its website.

<sup>26</sup> See clauses 8-12, 27-30, 36, 37, 48-50, 52-61.

<sup>27</sup> See r 4 of the *National Electricity (South Australia) (Penalties) Variation Regulations 2019*.

<sup>28</sup> See Bill clauses 32(2), 42, and 69(2).

The method by which the indexing occurs is set out in the regulations under each of the national laws.<sup>29</sup> In essence, the amount by which the penalties is increased each three years is determined on the basis of changes in the preceding three years to the Consumer Price Index published by the Australian Statistician.<sup>30</sup>

### 3. Australian Energy Regulator information gathering powers

#### Current framework and context

Under the current national energy law framework, the AER has a range of general information gathering powers as set out in s 28 of the NEL, s 42 of the NGL and s 206 of the NERL. Broadly, the AER may use any information it acquires through exercise of these powers for any purpose connected with the performance or exercise of its functions or powers.<sup>31</sup>

The basic structure of these powers is as follows:

- If the AER has reason to believe that a person is capable of providing information or producing a document that the AER requires for the performance or exercise of a function or power conferred on it, then the AER may serve a notice on that person (see, e.g. NEL s 28(1))
- The notice may require the person to provide information or documents as specified (see, e.g. NEL s 28(2))
- Failure to comply with the requirements of the notice is subject to monetary penalties (see, e.g. NEL ss 28(3) and (4))

Under the current framework, the AER's general information gathering powers do not incorporate provisions which would allow the AER to compel the giving of oral evidence. As noted by 2013 Enforcement Review report and by the ACCC in its REPI report, this is in contrast to other regulators, such as the ACCC and the Australian Securities and Investment Commission (ASIC).<sup>32</sup>

Recommendation 13 of the Enforcement Review and Recommendation 45 of the ACCC REPI report recommended the COAG Energy Council provide this power to the AER, with the ACCC noting that it is "...critical that this tool is made available to the AER as soon as practicable."<sup>33</sup>

#### Expanding the information gathering powers

The key amendments in the Bill to the information gathering framework are set out in clauses 9, 37 and 49. These amendments provide the AER with power to compel or summon a person to appear before the AER and to give information or evidence or produce a document (the oral evidence power).

While a number of changes to the form of the information gathering power provisions have been made to ensure consistency across the national energy laws, and also consistency with the *Competition and Consumer Act 2010*, the amendments implementing the oral evidence power do not fundamentally alter the operation of the existing framework. For example:

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<sup>29</sup> See r 42 *National Electricity (South Australia) (Penalties) Variation Regulations 2019*, r 4 *National Gas (South Australia) (Penalties) Variation Regulations 2019*, and r 4 *National Energy Retail (South Australia) (Penalties) Variation Regulations 2019*.

<sup>30</sup> Specifically, it is based on the weighted average of capital cities index (ABS product 6401.0 - Consumer Price Index, Australia).

<sup>31</sup> See NERL s 216, NEL s 28ZD, and NGL s 66. Note that the drafting does not alter the position that information obtained in the exercise of the power for the purposes of the AER's wholesale market monitoring function may not be used for any other purpose, as reflected in NEL s 18(d)(3).

<sup>32</sup> ACCC REPI, p 325. See s 155 of the *Competition and Consumer Act 2010* (Cth) and ss 19-27 of the *Australian Securities and Investments Commission Act 2001* (Cth).

<sup>33</sup> ACCC REPI, p 326.

- The power may also be exercised if the AER has reason to believe that a person is capable of providing information, producing a document, or giving evidence that the AER requires for the performance or exercise of a function or power conferred on it.<sup>34</sup>
- The Information obtained in the exercise of the power may be used by the AER for any purposes connected with the performance or exercise of a function or power of the AER.<sup>35</sup>
- Provisions, for example, as set out in existing NEL s 28(5)-(10), related to self-incrimination, duties of confidence, disclosure of Cabinet material, and civil liability are maintained in relation the exercise of this power.
- It remains an offence to, without reasonable excuse, fail to appear and provide information requested by the AER in the exercise of the power, or to provide false or misleading information to the AER.<sup>36</sup>

### Related changes to support the information gathering framework

With the additional ability to require the provision of evidence in person, amendments have also been made to ensure the AER can require that evidence to be given under oath or affirmation.<sup>37</sup> Also, reflecting the importance of this information gathering power, a number of new offence provisions have been included in the framework to prohibit a person:

- without reasonable excuse, from refusing or failing to be sworn<sup>38</sup>
- without reasonable excuse, from failing to answer a question<sup>39</sup>
- from threatening, intimidating or coercing another person who proposes to appear before the AER or provide information to the AER in the exercise of its information gathering powers.<sup>40</sup>

While the existing information gathering provisions are subject to a penalty if a person does not comply with a notice requiring information to be provided to the AER, the AER is currently unable to apply to a Court to require a person to provide the requested information. The amendments ensure that the AER may, in future, seek appropriate orders from a Court to remedy a failure to comply with a notice.<sup>41</sup>

Under the current information gathering framework the AER must issue a notice to a person to produce information. With the addition of the oral information gathering power this will remain unchanged, however, the amendments will allow regulations to specify requirements related to the form, content or service of such notices.<sup>42</sup>

To ensure the AER can operate flexibly, and given the laws already contain specific provisions related to the service of documents, it is not intended that further regulations be made at this stage. If it were considered necessary in the future to provide further support to the AER in relation to the issuing of such notices, the regulations could require different information to be included in a notice, depending on, for example, whether the AER is seeking documentary information, or oral evidence.

### Transparency and procedural measures

<sup>34</sup> See, e.g. existing NEL s 28(1).

<sup>35</sup> See, e.g. NEL s 28ZD. Note that the drafting does not alter the position that information obtained in the exercise of the power for the purposes of the AER's wholesale market monitoring function may not be used for any other purpose, as reflected in NEL s 18(d)(3).

<sup>36</sup> See, e.g., NEL ss 28(3) and (4), and the analogous provisions of the NGL and NERL.

<sup>37</sup> See, e.g., clause 9 of the Bill – new NEL s 28(9a).

<sup>38</sup> See, e.g., clause 9 of the Bill – new NEL s 28(9b).

<sup>39</sup> See, e.g., clause 9 of the Bill – new NEL s 28(3a).

<sup>40</sup> See, e.g., clause 9 of the Bill – new NEL s 28(18).

<sup>41</sup> See, e.g., clause 9 of the Bill – new NEL s 28(11) and (12).

<sup>42</sup> See, e.g., item 9 of the Bill – new NEL s 28(16).

Also, to ensure transparency in the exercise of the oral evidence power, the amendments require the AER to report on the use of the oral evidence power in its annual report.<sup>43</sup> This report must include information on:

- the number of notices given requiring a person to appear to provide information or to give evidence orally;
- a general description of the nature of the matter or matters in respect of which the notice was given;
- the number of proceedings commenced to challenge a notice given to appear to provide information or to give evidence orally.

Additionally, the amendments require the AER to prepare and publish guidelines on the exercise of its information gathering powers, including about:

- the rights and obligations of persons who are served with a notice;
- the penalties applying for non-compliance with a notice; and
- the purposes for which information obtained in the course of exercising the powers may be used.<sup>44</sup>

An additional measure has been included in the amendments to ensure that it is clear the AER can't continue to exercise its information gathering powers in relation to a matter after the AER has commenced Court proceedings in relation to the matter. In this case, once commenced, it is appropriate for the AER to seek information through mechanisms appropriate to such proceedings, e.g. issuing a subpoena.<sup>45</sup>

## 4. Non-punitive Orders

Consistent with recommendation 1 of the 2013 Enforcement review and recommendation 44 of the ACCC REPI report, the Bill makes amendments to the national laws to expand on the types of non-punitive orders the AER may seek from a Court in order to align more closely with the orders available to the ACCC under sections 86C and 86D of the *Competition and Consumer Act 2010*. While the national energy laws currently allow the Court to make a range of orders, the changes clarify the scope of the order making power.<sup>46</sup>

Under the changes, the AER may also seek community service orders (CSOs) in the case of a breach. Specifically, the AER may seek that a Court order a person perform a specified service that relates to the breach and that is for the benefit of the community. The AER will also be able to seek an order to ensure a person does not engage in further conduct of the same nature during a specified period (a probation order under the CCA); and an order for the person to disclose or publish information specified in the order (an adverse publicity order under the CCA).

With regard to a CSO, the Bill amends relevant sections of the NEL, NGL and NERL to align with the approach taken in clause 1 of Schedule 8 of the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018*.<sup>47</sup> This amendment implements ACCC Recommendation 44 and aligns with a recent change to the ACL which allows the ACCC to seek a Court to issue a community service order requiring a person to engage a third party, at the person's expense, to perform a service required by the order.<sup>48</sup>

The policy intent behind the proposed amendment to implement Recommendation 44 recognises that the person committing a breach of the law may not necessarily be the most appropriate or capable

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<sup>43</sup> See, e.g., clause 9 of the Bill – new NEL s 28(17).

<sup>44</sup> See, e.g., clause 11 – amended NEL s 28ZF.

<sup>45</sup> See, e.g., clause 9 of the Bill – new NEL s 28(13).

<sup>46</sup> See s. 61(2) of the NEL, s. 231(2) of the NGL and s. 291(2) of the NERL.

<sup>47</sup> See, specifically, the drafting of paragraph 246(2)(aa):

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6097](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6097)

<sup>48</sup> See, e.g., clause 13 of the Bill – new NEL s 61(2)(da)-(dd), and (2a).

party to remedy the effect of the breach. Allowing a Court to order that a person appoints a third party to take specified actions will significantly improve the potential remedial outcomes.

## 5. Liability amendments

### Corporate liability provisions

The national energy laws contain corporate liability provisions which operate to deem a corporation to be in breach of the laws if an officer or employee of the corporation commits a breach. Some of the provisions are inconsistent with best practice, as outlined in the Australian Law Reform Commission (ALRC) 2003 *Principled Regulation* Report.<sup>49</sup> The Bill therefore amends provisions of the NEL, NGL and NERL to address these issues.

For example, existing NEL s 86 states:

#### **86—Corporations also in breach if officers and employees are in breach**

If an officer or employee of a corporation commits an act in their capacity as officer or employee of the corporation that would, if that act were committed by the corporation, constitute a breach of a provision of this Law, the Regulations or the Rules, the corporation is taken to have contravened that provision.

The Bill amends<sup>50</sup> this provision to read as follows:

#### **86—Corporations also in breach if officers and employees are in breach**

If an officer or employee of a corporation commits an act, which is within the scope of the actual or apparent authority of the officer or employee, that would, if that act were committed by the corporation, constitute a breach of a provision of this Law, the Regulations or the Rules, the corporation is taken to have contravened that provision.

Essentially, this change clarifies when a corporation is liable for the acts of an employee and aligns with the approach in other federal legislation.<sup>51</sup>

### Relief from liability

A further change has been made to the national laws to provide a Court with the explicit power to grant a natural person (as opposed to a corporation) relief from liability under the laws. The amendments specify that this relief may be provided if it appears to the Court that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused.<sup>52</sup>

### Penalty privilege

Penalty privilege is a similar concept to the privilege against self-incrimination. In some situations, a person may not have to divulge information that could expose them to a civil penalty.

There is some uncertainty as to when such a privilege can be claimed, so the Bill makes amendments to clarify that, were such a privilege to otherwise apply, a person is not excused from providing information, documents or evidence, as required by the law.<sup>53</sup>

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<sup>49</sup> See: <https://www.alrc.gov.au/report-95>

<sup>50</sup> See, e.g., clause 25 of the Bill.

<sup>51</sup> See, e.g., s 84 of the *Competition and Consumer Act 2010*.

<sup>52</sup> See, e.g., clause 31 of the Bill, new NEL s 160.

<sup>53</sup> See, e.g., clause 31 of the Bill, new NEL s 159.