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COAG Energy Council Secretariat
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Essential Energy submission on the AER Powers and Civil Penalty Regime

Essential Energy welcomes the opportunity to comment on the COAG Energy Council's consultation paper regarding the AER Powers and Civil Penalty Regime (the consultation paper). We have addressed the questions from the consultation paper in Attachment 1 to this letter, but briefly raise four important points.

- > Whilst we see value to stakeholders in expanding the AER's information collecting powers for compliance and enforcement activities, we see limited value for the AER's economic regulation functions. The AER has significant information gathering powers under existing legislation for the purposes of economic regulation. As such, we are uncertain as to how expanded powers in this area would be used and believe their inclusion is beyond the intended scope of the *2013 Review of Enforcement regimes under the National Energy Laws* and the recommendation made by the ACCC in its *Retail Electricity Pricing Inquiry* preliminary report that underlie the expressed need for the new powers outlined in the consultation paper.
- > We fully support the proposed requirement for the AER to make a Guideline outlining how the expanded powers will be used. This is especially pertinent should our suggestion on excluding economic regulation from the scope not be accepted.
- > We adamantly believe that where individuals give evidence that they receive protection from any potential civil penalties if they meet any of the provisions outlined in section 2.10 of the consultation paper or where a civil penalty can instead be applied to the organisation.
- > We also believe the value of a civil penalty should be decided by a Court to ensure all extenuating circumstances are considered and the penalty is proportionate to the level of harm caused.

Should you have any questions in relation to this submission, please don't hesitate to contact Natalie Lindsay, Head of Regulatory Affairs, on (02) 6589 8419.

Yours sincerely

A handwritten signature in black ink, appearing to read "Chantelle Bramley".

Chantelle Bramley
General Manager Strategy, Regulation and Transformation

Attachment – answers to consultation questions

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?

We do not agree that the new power should be extended to include the economic regulation functions of the AER.

The AER has extensive information gathering powers in relation to economic regulation so we do not see any benefit to stakeholders in including these functions in the proposed changes. Given the proposed changes are driven by a desire to limit unlawful conduct arising from compliance and enforcement activities, it is unnecessary to include economic regulation in this change.

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?

Yes, however as discussed above, there is little value in including economic regulation within the breadth of the changes.

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

As outlined above, we do not believe the powers should apply to the AER's economic regulation.

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?

So long as the privilege against self-incrimination (section 2.8 of the consultation paper) and the other exceptions noted in section 2.10 of the consultation paper are included as acceptable reasons for not providing information, then the existing penalties should apply.

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

Essential Energy agrees, to the extent that value of money is calculated in accordance with CPI or a similar measure.

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

No. Where there is already a penalty regime in place this could expose a person to two penalties. This is particularly important for individuals as they will become personally liable for any offence committed under an oath or affirmation.

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?

Essential Energy agrees that individuals 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?

It is vitally important that where an organisation can be penalised under the civil penalties regime that any individual compelled to give evidence against the organisation, is not also personally penalised.

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?

Essential Energy agrees with the proposal to require the AER to develop a guideline. This is especially important should our request for economic regulation to be excluded from the proposed changes in AER powers (see our answer to question 1). If this were the case, we would

recommend clear guidance and principles as to how the AER intends to use the proposed extended powers for economic regulation.

10. Do you agree the provisions described above should be extended to the AER's new power?

Where the AER is compelling an individual or organisation to provide information, then the provisions outlined in section 2.10 of the consultation paper should apply to ensure parties cannot be held liable for any penalties that may arise from providing that information.

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

Extensive analysis of the national energy laws and similar laws should be undertaken to ensure there is no duplication, or unintended consequences resulted from the proposed new powers. It may be more efficient for a single body to undertake this analysis rather than many interested parties each doing its own analysis.

12. Do you agree these principles can be used to decide whether a civil penalty provision should attract a higher or lower civil penalty amount?

Essential Energy agrees that the principle can be used in the approach proposed.

13. Are there other principles that could be used?

It is likely that there are, but as discussed above, Essential Energy recommends that a more detailed analysis is required to address this question.

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

Yes, the provisions appear to be appropriate.

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

Yes, the provisions appear to be appropriate.

16. Do you agree that, if additional civil penalty provisions were to attract the higher maximum civil penalty amount, the AER should be able to issue infringement notices for breaches of these provisions?

No, a Court should determine the amount to be paid to ensure that all the extenuating circumstances for the breach are heard and considered in determining the amount of any penalty. This will avoid a "one size fits all" approach to determining the amount of any penalty.

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

No, a Court should determine the amount to be paid to ensure that all the extenuating circumstances for the breach are heard and considered in determining the amount of any penalty. This will provide a fairer outcome than the "one size fits all" approach of applying a blanket 20 percent of the relevant civil penalty amount as proposed in the consultation paper.

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

No. A "one size fits all" infringement amount issued by the AER will not consider the extenuating circumstances that lead to the breach, nor the extent of harm caused. Again, this should be decided by a Court.

19. Do you agree that this description reflects the changes that would be needed to introduce a two-tier civil penalty regime in the national energy laws?

Yes.

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

A thorough review is required to be undertaken, as discussed above, to ensure the proposed changes operate as intended and do not give rise to any unintended consequences.