

# **Review of Enforcement Regimes under National Energy Laws**

**Discussion Paper**

**Energy Market Reform Working Group**

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# Chapter 1 Introduction and background

This Discussion Paper sets out the Energy Market Reform Working Group's (EMRWG's) preliminary consideration of matters to be addressed in a review of the enforcement regimes existing under the three national energy laws – the National Electricity Law (NEL), the National Gas Law (NGL) and the National Energy Retail Law (NERL) (the Enforcement Review).

The Enforcement Review will be conducted by the Commonwealth and State and Territory governments in satisfaction of a commitment made in mid-2010 by the Ministerial Council on Energy (MCE), now known as the Standing Council on Energy and Resources (SCER). SCER has policy oversight for the administration and reform of the national energy legislation, as agreed by the Council of Australian Governments (COAG) under the Australian Energy Market Agreement.<sup>1</sup>

The EMRWG intends for this Discussion Paper to be used to guide an engaged specialist consultant in undertaking the Enforcement Review. Relevant issues and questions requiring consideration as part of the Review are set out in Chapters 3-6 below.

## 1.1 Structure of Discussion Paper

Chapter 1 of this paper examines the impetus and key drivers behind the Enforcement Review. It outlines the general and specific energy policy aims of the Enforcement Review and specifies the scope of matters to be addressed in the Review. Chapter 1 also briefly outlines other non-energy regulatory reforms, the consideration of which may also assist in the Review.

Chapter 2 sets out the policy principles, as agreed by EMRWG, to guide the Enforcement Review and any potential changes to be made to the national energy laws as a consequence of the Review.

Chapter 3 discusses issues around the enforcement powers of the regulator for the three national energy laws - the Australian Energy Regulator (AER) or the Economic Regulation Authority (ERA), as relevant.

Chapter 4 examines issues relating to private enforcement action by industry participants and the potential for extension of this right to third parties.

Chapter 5 discusses the civil penalty regimes, their history and current issues.

Chapter 6 identifies questions of legal architecture and procedure necessary to support the effective enforcement of the national energy laws.

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<sup>1</sup> (2004) as amended from time to time.

## 1.2 Impetus and key drivers for the Enforcement Review

Significant national energy regulatory reforms have been achieved in recent years. These include: the major reform of the national electricity market legislative framework and the establishment of a national energy regulator, the AER, in 2005; the establishment of the Australian Energy Market Commission (AEMC) as the rule maker and developer of energy markets in 2005; the establishment of the Australian Energy Market Operator (AEMO) to manage the National Electricity Market (NEM) and gas markets in 2009; and the establishment of a National Energy Customer Framework (NECF) in 2012.<sup>2</sup>

The main impetus for undertaking this Enforcement Review came from strong stakeholder feedback in relation to the NECF. This feedback indicated dissatisfaction from consumer groups with the decision to align the civil penalty provisions of the NECF with those of the NEL and the NGL regimes, rather than the new Australian Consumer Law (ACL)<sup>3</sup>. The ACL, which commenced in January 2011, contains new enforcement powers for the Australian Competition and Consumer Commission (ACCC) that extend beyond the energy specific matters regulated by the NEL, NGL and the NERL. In particular, the maximum civil penalties that can be imposed for breaches under the ACL are significantly higher than those currently in the national energy laws.

The enforcement regime adopted for the NECF sought to achieve consistency with the existing enforcement regimes in the NEL and the NGL. It was not considered feasible, as part of the NECF project, to introduce changes to core aspects of the NECF enforcement regime in isolation from a review across the other national energy regimes in the NEL and NGL, including the issues relating to the quantum of civil penalties.

At its meeting on 11 June 2010, the MCE agreed to conduct a review of enforcement regimes across the three national energy laws. The MCE Communiqué stated:

“Ministers agreed to a comprehensive review of enforcement regimes across all the national energy legislation to ensure that the interests of customers continue to be protected, and the integrity of the energy markets is maintained.”

Although the need for the Enforcement Review was agreed by Energy Ministers in mid 2010, the EMRWG did not consider it appropriate to conduct such a significant review until the

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<sup>2</sup> Western Australia is not a party to the National Electricity Market, and operates under a different legislative framework for electricity. In Western Australia, the regulator is the Economic Regulation Authority (ERA), and the wholesale electricity market operator is the Independent Market Operator (IMO). Western Australia has not committed to implementing the National Energy Consumer Framework.

<sup>3</sup> *Australian Consumer Law (ACL)* refers to the Australian Consumer Law as set out in Schedule 2 to the *Competition and Consumer Act 2010*, formerly the *Trade Practices Act 1974*.

implementation of the NECF had occurred, particularly given the enforcement regime in the NERL was intended to be subject to the Review. The NECF commenced in the Australian Capital Territory and Tasmania (and in the offshore areas under Commonwealth law) on 1 July 2012, and in South Australia on 1 February 2013. NSW aims to implement the NECF from 1 July 2013 and Victoria from 1 January 2014 (subject to resolution of some outstanding issues), while Queensland is yet to come to a decision on the matter.

With the three national energy laws established and operating (noting some jurisdictions are still to implement the NECF), it is timely to commence the Enforcement Review. The Review will ensure the enforcement regimes in the NEL, the NGL and the new NERL are appropriate and capable of meeting both the new demands of national retail market regulation and the increasing pressure for effective enforcement in the context of the wholesale markets and network operations. Furthermore, there have been significant structural changes to the regulatory regimes governing the NEM and the national gas markets. As such, a fresh evaluation as to the effectiveness of available enforcement options for the national energy markets is warranted.

In addition to the above policy drivers for this Review, there is an underlying general need to update and modernise the enforcement regimes for the energy sector in line with current best practice regulation. The enforcement provisions of the national energy regimes (particularly the civil penalties framework) were developed largely in the early to mid-1990s and they have not been comprehensively reviewed since they commenced. As noted below, there have been recent reforms, principally at the Commonwealth level, in relation to the standards for, and legislative approaches to, establishing regulatory powers for statutory authorities (see the *Regulatory Powers (Standard Provisions) Bill 2012 (Cth)*), and also for the best practice regulation of consumer protection matters (see the ACL). It is expected that this Enforcement Review should be appropriately informed by these and other relevant developments in non-energy regulatory and consumer law matters.

### **1.3 Aims of the Enforcement Review**

#### ***General objective***

The NEL, the NGL and the NERL share the common broad objective of promoting efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.<sup>4</sup>

The general aim of this Enforcement Review is to ensure that the enforcement provisions of the NEL, the NGL and the NERL contribute to the general statutory objective.

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<sup>4</sup> See s 7 of the NEL, s 23 of the NGL, and s 13 of the NERL.

## ***Specific objectives***

The specific objectives in carrying out this Enforcement Review are to ensure that enforcement action taken under the NEL, the NGL and the NERL is:

- based on a consistent and fair regime across industry participants and fuel-type and across the different parts of the energy sectors—wholesale markets, network regulation and retail markets;
- accountable, so that industry participants know the basis upon which the AER takes enforcement action;
- proportionate to the nature and materiality of the breach;
- transparent in that industry participants know what is required by way of compliance to avoid enforcement action; and
- targeting conduct most likely to cause harm to consumers or to the integrity of the national energy market frameworks.

## **1.4 Scope of the Enforcement Review**

### ***Matters within the scope of the Review***

The following summarises the areas that the EMRWG considers *are* within the scope of the Enforcement Review.

### **Enforcement powers and functions of the regulator**

The AER is the primary body responsible for the enforcement of the three national energy laws in jurisdictions other than Western Australia and the Northern Territory.<sup>5</sup> The ERA is the primary body responsible for the enforcement of the NGL in Western Australia.<sup>6</sup>

The efficient and effective supply of electricity and natural gas to consumers is an essential service which requires a robust enforcement regime with flexible and powerful enforcement options available to the regulator.

The regulator must have the powers necessary to deal swiftly and effectively with breaches of rules that have the potential to cause widespread harm to individuals, households, businesses and industries.

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<sup>5</sup> The AER also has a role in regulating gas transmission in the Northern Territory.

<sup>6</sup> Western Australia has not implemented the NEL or the NECF, and the NGL applies only in relation to third party access to gas pipelines.

The Enforcement Review must therefore ensure that the AER and ERA have comprehensive and robust enforcement powers to support this role.

Chapter 3 reviews issues relating to the enforcement powers of the AER and ERA.

### **Private enforcement**

Presently, private enforcement rights arise primarily under the conduct provision regimes in each of the national Laws. The conduct provision regime is intended to enable bilateral enforcement of statutory obligations arising between participants where one participant may have suffered damage or loss as a result of a breach by the other of its legal obligations.

Chapter 4 considers issues about whether obligations arising between industry participants should continue to be enforceable as between the affected parties in this manner, and options for broadening private enforcement rights to extend to third party enforcement.

### **Civil penalty regimes**

Chapter 5 discusses issues relating to the civil penalty regimes in the national energy laws. The civil penalty regime is one of the primary elements of the enforcement regime for the national energy frameworks. While there has been some simplification over time of the structure of penalty rates, consideration needs to be given to the quantum of the present rates and their effectiveness as an enforcement tool for the AER and ERA.

### **Legal architecture, procedural matters**

In addition to the need to review the policy underpinnings and operation of the key enforcement mechanisms of the national laws, the EMRWG considers it is also necessary to review whether they are effectively supported by appropriate legal architecture. It will therefore be necessary to review the legal architectural and regulatory design implications of the matters subject to the Enforcement Review, to ensure that the enforcement regimes are robust and effective.

Chapter 6 identifies a range of procedural and architectural provisions that should be reviewed to ensure they are appropriate and effective to support a robust enforcement framework.

Further, there has been a significant amount of recent work done by the Australian Law Reform Commission and the Commonwealth Parliamentary Counsel toward standardising the design of general regulatory enforcement powers and the drafting of enforcement related provisions, which will be relevant to consideration of the matters in Chapter 6.

### ***Matters outside of the scope of the Review***

Not all provisions of the national energy laws that relate (directly or indirectly) to enforcement in a broad sense form part of this review.

In some cases, for example, there are specific regimes that are relevant to enforcement which have only recently been introduced as part of the NECF, such as the retailer compliance and performance reporting regime in Part 12 of the NERL and the enforceable undertakings regime inserted consistently into the NERL, NEL and NGL as part of the NECF legislative package. Those regimes have been widely consulted on in their development and do not form part of this Enforcement Review.

In other cases, quasi-enforcement provisions (such as the limited merits review provisions), have been the subject of a separate SCER initiated review process and will therefore be considered separately by the EMRWG and the SCER. These matters are also outside of the scope of this Review.

The broad subject areas that the EMRWG considers are *not* within the scope of the Enforcement Review include:

- Limited merits review;
- Judicial review regime;
- Immunity from liability;
- Small claims regime in NERL;
- Customer dispute resolution via Ombudsman in NERL;
- Compliance regime in the NERL;
- Performance reporting regime in NERL;
- Enforceable undertakings;
- Information gathering powers of AER;
- Regulatory information notices and orders; and
- Enforcement roles of the relevant market operator.

## **1.5 Other Significant Regulatory Reforms**

Detail is provided below of two recent and significant non-energy legislative reforms relevant to the design and drafting of Commonwealth regulatory powers and the best practice regulation of consumer rights and obligations. These initiatives are not directly relevant to the energy policy objectives to be achieved by this Enforcement Review and are therefore not strictly part of the primary focus of the Review. Nevertheless, they do provide some useful insight into broader reforms in related legislative areas. For this reason this Enforcement Review should have regard to these reforms, and any other relevant reforms, to the extent it is appropriate and assists in achieving the energy policy objectives of the Review.

## ***Regulatory Powers (Standard Provisions) Bill 2012 (Cth)***

The Regulatory Powers (Standard Provisions) Bill 2012 (Cth) (the Bill) is a bill of general application for the enforcement of regulatory regimes that other acts can refer to and trigger. It provides a framework of standard regulatory powers exercised by agencies across the Commonwealth and includes monitoring and investigation powers as well as enforcement provisions through the use of civil penalty, infringement notices, enforceable undertakings and injunctions.

The powers that the Bill provides will only be available if triggered or engaged by the governing legislation of a regulatory agency. The powers in the bill can be triggered in whole or in part and particular agencies may choose to only trigger certain powers that are relevant to carrying out their specific regulatory functions. The regulatory powers set out in the Bill will be engaged for all new Commonwealth legislation establishing a regulatory body. Over time it is expected existing Commonwealth regulatory agencies will engage the Bill's provisions as appropriate through the review and amendment of their existing establishment legislation.

The Bill aims first to reduce the length of a statute book, and secondly to provide greater consistency across regulatory regimes and clarity to agencies exercising regulatory powers. The greater harmonisation of the powers exercised by Commonwealth regulatory bodies is expected, over time, to facilitate a body of law relevant to the interpretation of the common powers provided by the Bill.

While the AER is a Commonwealth body established under Part IIIA of the *Competition and Consumer Act 2010* (Cth), it performs regulatory functions and powers conferred on it under the national energy laws as applied by both relevant States and Territories and the Commonwealth. The ERA, which performs regulatory functions and powers conferred on it under the NGL in Western Australia, is not a Commonwealth body.

The Regulatory Powers (Standard Provisions) Bill 2012 (Cth) marks a significant reform of Commonwealth legislative design. Drafting of regulatory powers and, to the extent that it is appropriate and useful, this Enforcement Review should have regard to relevant developments and approaches in the Bill so far as they reflect best practice regulation.

## ***Australian Consumer Law***

The ACL is a single, national law concerning consumer protection and fair trading, which applies in the same way nationally and in each State and Territory. It includes a number of national enforcement powers and remedies relating to consumer law. Both regulators and affected persons can seek a variety of penalties and remedies for breaches or suspected breaches of the ACL. The ACL commenced on 1 January 2011.

The NECF was developed mindful of the development of the ACL which was progressing at the same time. The EMRWG is cautious against an assumption that the enforcement mechanisms in the ACL can or should be automatically reproduced in the context of national energy market regulation. The EMRWG nevertheless welcomes the consideration of the best practice

regulation of consumer protection measures provided by the ACL as a relevant input into this Enforcement Review.

## Chapter 2 Policy principles for regulatory design of enforcement regimes

This chapter sets out the policy principles agreed by EMRWG that will guide the Enforcement Review and the potential development of any changes to the enforcement provisions of the national energy laws. It also identifies fundamental regulatory design principles of the existing enforcement regimes that have been established as part of previous rounds of national energy market reform and which will continue to apply to any new enforcement provisions.

### ***Principle 1—the relevant regulator has the primary role in enforcement of energy rules***

A fundamental principle that underpins the current national energy laws is that the AER as the national energy regulator (equivalently the ERA in Western Australia), has responsibility for the main enforcement activity within the energy sector. Under this model, a public body (i.e., the State) is given powers to take enforcement action on behalf of citizens.

The role of the national regulator in the national electricity markets has evolved since the start of the NEM in 1998. Initially, the ACCC was the enforcement body under the (then) *Trade Practices Act 1974* for the National Electricity Code (NEC - the electricity industry code) for the market rules and economic regulation of transmission networks in participating jurisdictions.<sup>7</sup> The history of national regulatory reform of the natural gas sector has followed a similar (although not identical) pattern, but relevantly started with multiple jurisdictional regulators.

In 2002, COAG<sup>8</sup> recommended the replacement of the mixed Federal and State level regulatory structure with a national energy regulator, and the AER was established in 2005. The NEC was remade into statutory Rules under the NEL to be enforced by the newly established AER. Economic regulation of electricity distribution networks was handed over to the AER from 2007 onwards. The regulation of the natural gas sector moved to a national regulator, the AER under the NGL, with the exception of Western Australia, where the ERA is the regulator under the NGL. The Gas Code was similarly remade into statutory rules (the NGR) in 2008.

Most recently, the AER has been granted responsibilities under the NERL for enforcement of the laws and rules relating to the retail markets for electricity and gas in participating jurisdictions, which are being transferred from State and Territory regimes. These rules include a national consumer protection regime for small retail customers.

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<sup>7</sup> See further the discussion by French J of the history, origins and operation of the NEM in *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 317 at 326-355.

<sup>8</sup> See the Energy Market Review 'Towards a Truly National and Efficient Energy Market'. (2002). Chaired by Warwick Parer.

In summary, this Enforcement Review will take as a fundamental principle that the AER is to be the regulatory body for all three of the national energy law regimes in eastern and southern jurisdictions, and the ERA is to be the regulatory body for the NGL in Western Australia, with the relevant regulator having primary responsibility for undertaking enforcement action within the energy sector. The AER and ERA therefore require the necessary powers to support their enforcement roles under the NEL and the NGL regimes as well as the new NERL regime.

### ***Principle 2—consistency of enforcement regimes across energy laws***

One of the guiding principles of the national energy market reform agenda has been the need to achieve consistency in national energy regulation, starting with as much uniformity as possible across all participating jurisdictions.<sup>9</sup> More recently the drive for greater consistency has seen the same legal architecture and governance being applied in the NEL, the NGL and, in 2012, the NERL.

The ALRC<sup>10</sup> lists ‘consistency’ as an element of fairness, noting that consistency leads to predictability and certainty, allowing the particular regulated community to know where it stands and what compliance requires.

The EMRWG considers that the principle of consistency should guide the Enforcement Review and the design of the legal architecture of the enforcement regimes of the NEL, the NGL and the NERL. Changes flowing from this Enforcement Review should therefore:

- provide consistent enforcement arrangements for the electricity and natural gas sectors;
- improve transparency of the enforcement regimes; and
- provide an appropriate level of certainty in relation to enforcement.

The EMRWG notes that achieving consistency for the enforcement regimes does not preclude accommodating differences across the various regulatory environments that together form the energy supply chain. National energy regulation covers industry participants across a diverse range of activities, such as:

- purchasing and selling in the electricity and gas wholesale markets;
- transportation of electricity or gas, requiring compliance with a range of network regulation including the access regimes for electricity and gas transmission and distribution; and

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<sup>9</sup> See clause 14.5 of the Australian Energy Market Agreement, in relation to the initial rules for the NECF.

<sup>10</sup> See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report No 95 (2002), at p 537.

- the retail sale of electricity and gas to retail customers under the NERL and the NERR, including the delivery of consumer protections.

The enforcement options for these differing regulatory environments may differ, but there should be a consistency of approach across the energy sector.

### ***Principle 3—the regulator enforces compliance of industry participants***

The regulated community under the NEL/NER and the NGL/NGR is made up of industry participants who participate in the energy wholesale markets and operate transmission/distribution networks. As retail customers do not participate in wholesale energy markets, the NER and the NGR have been largely silent in relation to end use customers, and in particular, have not placed regulatory obligations on those retail customers.

With the commencement of the NECF, which introduces rights (and in some instances, obligations) in the NERL and the NERR for retail customers (including in the NER and the NGR in relation to connection), there may be a question of principle as to whether the regulatory community is now broader.

The EMRWG considers that as a general principle, the regulatory community that is the subject of enforcement activities of the AER and ERA should continue to be industry participants. Non-compliance of participants with the national energy laws can have systemic repercussions, and it is the prevention of public harms that should continue to be the focus of the regulator.

### ***Principle 4—private enforcement***

In addition to the primary role of the regulator as the enforcement body, the current national energy laws recognise that there are some circumstances where the breach of a regulatory obligation may be more effectively ‘enforced’ on a business to business basis.

Where one industry participant suffers loss as a result of a breach of the energy rules by another industry participant, the best remedy may be for them to seek damages. Here the breach of the rules gives rise to a ‘private’ rather than a public harm. Permitting this type of private enforcement action can allow the regulator to focus its enforcement resources on more structural problems with market wide consequences.

The EMRWG notes that, to date, any statutory private enforcement right has been limited in application to nominated ‘conduct provisions’ in the NEL and the NGL that are business to business obligations between industry participants. There are presently no provisions of the NERL or the NERR nominated as conduct provisions, although the NERL does make provision for conduct provisions to be prescribed under the National Energy Retail Regulations, should that be required at a later stage. The Enforcement Review will consider whether this principle of private enforcement should be expanded.

***Principle 5—an appropriate civil penalty regime***

The NEL, NGL and NERL each include a civil penalty regime. The focus of a civil penalty regime is on promoting compliance with important statutory obligations, through the provision of a serious and enforceable penalty which acts as a deterrent against breach of the obligations, but which does not involve the imposition of a criminal sanction.

***Principle 6—enforcement regimes to reflect current best practice regulation***

EMRWG considers that some aspects of the current enforcement provisions of the national energy laws may not reflect current best practice. A principle for this Enforcement Review is to align the enforcement regimes in the NEL, the NGL and the NERL with the most up to date ‘best practice’ regulatory theory, design and practice.

Simple regulatory design solutions are preferred over more complex arrangements for reasons of transparency for the regulatory community and cost of compliance and administration.

The level at which civil penalties are set should reflect the current regulatory norms and be capable of change via a transparent but cost effective regulatory mechanism.

## Chapter 3 Enforcement functions and powers of the regulator

### 3.1 Introduction

This chapter examines issues relating to the enforcement powers of the AER and ERA.

The AER is responsible for monitoring, investigating, enforcing and reporting on compliance by regulated entities with obligations under the NEL, NGL and NERL (and their respective Rules). The ERA has equivalent responsibilities under the NGL in Western Australia.

The AER and ERA have a range of possible enforcement responses to breaches of obligations under the national Laws and Rules. These may be broadly categorised into administrative responses and statutory enforcement action.

The current operation of each of the regulators' primary enforcement mechanisms and the general issues for review is discussed briefly below, followed by questions for specific consideration as part of the Enforcement Review. For the rest of this section, references to the AER should be read as including the ERA, where relevant.

### 3.2 AER administrative enforcement options

In the first instance, the AER may try to resolve compliance matters administratively, before seeking to initiate court proceedings. This may occur, for example, where a breach is relatively minor and/or the regulated entity has actively sought to stop the conduct and remedy any harm done.<sup>11</sup> For example, in appropriate cases, administrative resolution may involve the AER seeking voluntary cessation of the non-compliant conduct and action to prevent its reoccurrence.

### 3.3 Statutory enforcement action

The AER has certain statutory rights of action that it may take in respect of a purported breach of the NEL, the NGL or the NERL (and their respective Rules) prior to initiating court enforcement proceedings. These rights of action include accepting enforceable undertakings (which are not in the scope of this review) and issuing infringement notices for breaches of civil penalties (described below).

#### ***Infringement notices***

The NEL, NGL and NERL contain a number of provisions which are nominated as civil penalty provisions. Table A2 sets out the relevant provisions of the three Laws that provide for the

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<sup>11</sup> See further *AER statement of approach: compliance with the National Energy Retail Law, Rules and Retail Regulations*, July 2011, Version 1, at paragraph 6.1.1.

AER to issue an infringement notice for breaches of civil penalty provisions, requiring the payment of a civil penalty. The AER may issue an infringement notice where it reasonably believes that a person is in breach of an obligation imposed by a civil penalty provision. Once the AER has issued an infringement notice, it cannot initiate formal proceedings unless the relevant participant fails to comply with the notice. The penalty payable under an infringement notice is discussed further below in Chapter 5.

### ***Issues for review***

The Enforcement Review should consider whether the AER's statutory rights to undertake enforcement action are appropriate and sufficient for its purposes as national regulator for the three national energy laws. In particular, this should include consideration of whether the infringement notice regime is effective.

## **3.4 Civil proceedings**

The AER may institute proceedings in court in relation to an alleged breach of obligations under the NEL, the NGL and NERL and their respective Rules. Table A1 sets out the relevant provisions in the national Laws that deal with civil proceedings and the AER's power to seek orders from a court.

In summary, where the AER considers a participant has breached a civil penalty provision, the AER may apply to the court for a declaration that a person is in breach of a provision or provisions and seeking certain remedies.

### ***What enforcement orders can the AER seek from a court?***

On application by the AER, the court may make a range of orders, including an order to:

- pay a civil penalty;
- cease the activity that is in breach;
- take action to remedy the breach; and
- implement a specified program for compliance.

The court may also grant an injunction, on application by the AER, restraining a person from engaging in conduct in breach of the Law, the Regulations or the Rules, or requiring the person to do something.

### ***Power to seek an order for payment of compensation***

There are limited avenues for an entity to receive the payment of compensation of damages under the existing national energy enforcement regimes. One avenue arising under each of the national Laws, is for a person who suffers loss or damage by conduct of another person

done in breach of a conduct provision to bring an action for damages, against the person in breach, to recover the amount of the loss or damage suffered.<sup>12</sup> Aside from this limited right of action, the right to seek monetary compensation has not traditionally been a feature of the enforcement regimes under the national energy laws.

The NECF regime, however, makes provision for the payment of compensation in two further circumstances:

- under the small compensation claims regime in Part 7 of the NERL<sup>13</sup>, and
- by order of the court further to an action by the AER for breach of an enforceable undertaking.<sup>14</sup>

In respect of the NECF, questions were raised in its development as to whether the AER should have a general power to seek remedies from a court in the nature of compensation or damages on behalf of affected consumers in circumstances where the AER has been successful in its enforcement action.

### ***Issues for review***

The Enforcement Review should consider the extent to which the AER's capacity to institute enforcement proceedings in a court, and the remedies which it may seek, are appropriate and sufficient for its role as national regulator for the three national laws. This should include consideration of whether the AER should be given a general power to seek compensation or damages, including on behalf of affected consumers, following any successful enforcement action.

## **3.5 Specific questions for consideration**

In assessing the adequacy of existing legislation, specific issues for consideration in the Enforcement Review are:

- Q.1 Does the AER have appropriate powers to take administrative level enforcement action where it is appropriate and effective to do so?
- Q.2 Does the current infringement notice regime enabling the AER to impose civil penalties up to a maximum limit accord with current norms?

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<sup>12</sup> See s 61B of the NEL, s 233 of the NGL, and s 293 of the NERL.

<sup>13</sup> Not proposed for review.

<sup>14</sup> See, e.g., s 288(4)(c) of the NERL.

- Q.3 Are the enforcement orders that can be sought by the AER in proceedings before a court adequate against current regulatory norms for equivalent regulatory environments?
- Q.4 Does the AER have appropriate powers to seek remedies from a court? In particular, should the AER be given a general power to seek compensation or damages, including on behalf of affected consumers, following any successful enforcement action?

The Enforcement Review policy principles (set out in Chapter 2 above) relevant to consideration of these issues are:

- Principle 1- the relevant regulator has the primary role in enforcement of energy rules
- Principle 3 – the regulator enforces compliance of industry participants
- Principle 5 – an appropriate civil penalty regime.

## Chapter 4 Private enforcement

### 4.1 Introduction

Chapter 4 considers issues relevant to industry participant and third party enforcement of the national energy laws.

The private enforcement of obligations in the national Laws and Rules is principally provided through the conduct provisions regimes established under each of the national Laws. However, ss 71ZA to 71ZF of the NEL also allow private enforcement of access disputes by the parties to the dispute.

The background to the private enforcement of conduct provisions and the general issues for review are discussed briefly below, followed by questions for specific consideration as part of the Enforcement Review.

### 4.2 The conduct provisions regime

There are currently provisions in each of the energy regulatory regimes which allow 'a person other than the AER' to seek various orders from a court based on a breach of a 'conduct provision', and also to recover the amount of loss or damage that was suffered as a result of any breach of that conduct provision.<sup>15</sup>

#### ***Background to current design of conduct regimes***

The first conduct provision regime in the energy sector originated in the regulatory context of the National Gas Pipelines Access Law (NGPAL) developed in the mid 1990s. Conduct provisions were included as a component of a broader regulatory model of access under which gas pipeline operators and 'users' would negotiate bilaterally and agree commercial terms and conditions within the parameters of an approved regulatory framework. Affected users were able to enforce their commercial interests against monopolist pipeline operators where they suffered damage or loss as a result of a breach of key provisions of the access rules.

Key to the use of conduct provisions in the NGPAL context was that 'users' are a finite group of entities who were given the statutory right to enforce breaches that impact negatively on their own commercial interests. Similarly, gas pipeline operators could exercise any rights where a user breached a conduct provision - there were reciprocal rights for both users and pipeline operators.

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<sup>15</sup>

See Table A3 NEL, NGL and NERL - conduct provisions regimes.

The conduct provisions regime was retained when the NGL was enacted in 2008, and the number of conduct provisions was expanded again in 2011 when the Short Term Trading Market Rules commenced. Again, the underlying view (reflected in the types of provisions identified as conduct provisions) was that conduct provisions are applied to industry participant obligations that affect other industry participants.

In electricity, the regulatory history and design is somewhat different to gas, and a formalised conduct provisions regime did not form part of the early legal framework of the NEM. Only in 2012, as part of the NECF package, was a mirror conduct provisions regime included in the NEL. The nominated conduct provisions in the NEL relate only to retailer-distributor obligations in the areas of credit support and payment of network charges.

Finally, the NERL includes a statutory framework for a conduct provisions regime, but no conduct provisions are presently nominated in the National Energy Retail Regulations.

In summary, the scope and intent of the current conduct provisions regimes to date has focussed on proceedings where the parties are industry players. While the statutory provisions enable 'any person' to bring proceedings for breach of a conduct provision, the current nominated conduct provisions have been limited to very specific obligations that relate largely to industry participants.

### ***Issue for review***

The extent to which the conduct provisions are effective in encouraging compliance with, or otherwise enforcing, bilateral conduct obligations between regulated entities requires consideration as part of the Enforcement Review. Comparison with other comparable regulatory contexts may assist consideration of this issue.

### **4.3 Third party rights to seek monetary compensation**

More recently, as part of the NECF final consultation round, consumer groups raised the potential for the conduct provisions to extend to representative actions on behalf of end use/retail customers.

There may be several ways to achieve such an extension of the conduct provision regime, should that outcome be considered appropriate. For example, one option may be for retail customers to be given an express right to initiate court action against a regulated entity for breach of a conduct provision. Alternatively, the regulator could be given power to bring a representative action on behalf of a group of retail consumers for damages for breach of a conduct provision. Another alternative may be for consumer representative groups (instead of the regulator or individual customers) to be given the right to bring a representative action on behalf of their members.

### ***Issue for review***

The benefits or otherwise of extending the right to bring an action for breach of a conduct provision to end use/retail customers requires consideration as part of the Enforcement Review.

#### **4.4 Specific questions for consideration**

In assessing the adequacy of existing legislation, specific issues for consideration in the Enforcement Review are:

- Q.5 Does the conduct provisions regime continue to have a useful function in relation to 'enforcement' proceedings between industry participants? If so, what modifications should be made to make it more effective?
- Q.6 Is the conduct provisions regime suitable for third parties (such as retail customers) who are adversely affected by a breach of a conduct provision, to seek the types of remedies available in respect of a conduct provision?
- Q.7 Would retail customers benefit if they (rather than the regulator on their behalf) had the power to directly institute proceedings to recover damages or seek compensation?
- Q.8 Which participant obligations (if any) would be appropriate for such third party enforcement action?

The Enforcement Review policy principles relevant to consideration of these issues are:

- Principle 4 – private enforcement
- Principle 5 – a civil penalty regime

## Chapter 5 Civil penalty regime

### 5.1 Introduction

Chapter 5 discusses issues relating to the civil penalty regimes in national energy laws. As noted above, the operation of the civil penalty regime has not been reviewed since its inception in the early to mid 1990s. The background to the imposition of civil penalties under the national energy framework and general issues for review are discussed briefly below, followed by questions for specific consideration as part of the Enforcement Review.

### 5.2 When should a civil penalty apply?

The purpose of a civil penalty is to act as a deterrent. Broadly speaking, those provisions for which a breach will have a significant effect or consequence are appropriate to attract a civil penalty. If payment of a penalty under an infringement notice is sufficiently less, as compared to the cost or difficulty in mounting a legal proceeding, then the penalty will be effective.

If the Court determines that imposition of a civil penalty is warranted, it will be determined having regard to all relevant matters, including:

- the nature and extent of the breach;
- the nature and extent of any loss or damage suffered as a result of the breach;
- the circumstances in which the breach took place;
- whether the person has engaged in any similar conduct and has been previously found to be in breach in respect of that conduct; and
- whether the service provider had in place a compliance program approved by the AER or required under the relevant rules, and if so, whether the service provider has been complying with that program.<sup>16</sup>

### 5.3 Who should have the power to impose a civil penalty?

Presently under the national energy laws a civil penalty may be payable pursuant to an infringement notice issued by the regulator, or where imposed by the court following an action initiated by the regulator.

#### *Issue for review*

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<sup>16</sup> See further, eg, s 64 of the NEL and s 234 of the NGL.

Consideration should be given to whether these avenues for the imposition of a civil penalty remain appropriate for the national framework. For example, is an alternative approach warranted, such as third parties (such as industry participants) having capacity to seek the imposition of a civil penalty by a court.<sup>17</sup>

#### 5.4 Setting the rate of civil penalties subject to infringement notices

Recent amendments to the NEL and NGL saw the former graduated civil penalties scheme phased out and a maximum civil penalty regime brought in with a simplified structure to give courts the discretion to determine the appropriate amount of the civil penalty while having regard to the circumstances of each particular breach. The maximum civil penalties under the national energy framework are set out below.

Table 1: Civil penalty structure

	\$/breach	\$/every day breach continues
Natural persons	20 000	2 000
Body corporate	100 000	10 000

An exception to the civil penalty structure set out in Table 1 applies to rebidding civil penalties under the NEL (see clause 3.8.22A of the NER).<sup>18</sup> The maximum rebidding civil penalty under the NEL is set out in Table 2 below.

Table 2: Civil penalty structure – rebidding civil penalties under the NEL

	\$/breach	\$/every day breach continues
Any persons	1 000 000	50 000

<sup>17</sup> See *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report No 95.

<sup>18</sup> Generator rebidding enables generators to adjust their portfolio positions to accommodate unexpected changes in demand patterns and plant availability, but it could also impact on market efficiency. The obligation in cl 3.8.22A on generators to bid and rebid ‘in good faith’ reflects the importance of reliable forecast information for the market. The higher civil penalty for breach of this obligation is commensurate with the potential benefit to the generator of non-compliance.

As noted above, a key driver for this Enforcement Review, is the issue of whether the penalty level for AER infringement notices is in accord with current norms. Significantly higher penalties apply under other regulatory regimes, for example the ACL provides for civil penalties of up to \$1.1 million for a body corporate and \$220,000 for an individual.<sup>19</sup>

### ***Issue for review***

The Enforcement Review should consider whether the existing penalty rates under national energy laws are set at a level which is sufficient to act as a deterrent against breach of obligations arising under those laws. This will require consideration of comparative civil penalty regimes.

## **5.5 Criminal offences**

Presently, the national energy laws contain only a very limited number of provisions which impose a criminal penalty.<sup>20</sup> However, each of the national Laws also contains relevant interpretative provisions for the purposes of offence provisions<sup>21</sup> and corporate liability provisions,<sup>22</sup> which operate in relation to any offence provisions nominated under those Laws.

When developing the NERL, the assumption was that it was appropriate to rely on the current use of civil penalties for enforcement purposes, rather than introduce criminal sanctions.<sup>23</sup> For this reason, no provisions of the NERL are nominated as offence provisions. Nevertheless, the standard interpretative and corporate liability provisions existing in the NEL and NGL have been replicated in the NERL for consistency and to ensure the future flexibility of the NERL enforcement regime.

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<sup>19</sup> See s 224 of the ACL.

<sup>20</sup> See, for example, s 20B of the NEL and s 31 of the NGL re return of identity cards; s 27 of the NEL and s 41 of the NGL re obstruction of a person exercising a search warrant; s 28(3) of the NEL and 42(3) of the NGL re failing to comply with a notice to provide information or documents to the AER, or knowingly providing false or misleading information in response to such a notice (s 28(4) of the NEL and s 42(4) of the NGL); ss 141-145 of the NEL and ss 200-204 of the NGL concerning the access dispute hearing procedure. See also s 91BC of the NGL concerning AEMO's power of directions.

<sup>21</sup> Part 8 of Schedule 2 of the NEL (Offences under this Law) and Part 10 of Schedule 2 of the NGL (Offences under this Law). Schedule 2 of the NGL also applies for the purposes of the NERL, see s 8 of the NERL.

<sup>22</sup> See Table A5 NEL/NGL/NERL—corporate liability provisions.

<sup>23</sup> See also the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, Australian Government Attorney-General's Department, September 2011 edn, published at link: <http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesCivilPenaltiesandEnforcementPowers.aspx>.

### ***Issue for review***

The Enforcement Review should consider whether a role for criminal offences remains necessary and appropriate for the national energy laws.

## **5.6 Specific questions for consideration**

In assessing the adequacy of existing legislation, specific issues for consideration in the Enforcement Review are:

- Q.9 Who should have the power to impose a civil penalty?
- Q.10 Should industry participants be able to seek the imposition of a civil penalty by a court?
- Q.11 Is the penalty level for regulator infringement notices in accordance with current norms?
- Q.12 How should the quantum of a civil penalty be determined in line with current norms?
- Q.13 Is there a continuing role for criminal offences?
- Q.14 Should third parties be able to seek the imposition of a civil penalty?

The Enforcement Review policy principle relevant to consideration of these issues is:

- Principle 5 – an appropriate civil penalty regime.

## Chapter 6 Legal architecture and procedural matters

### 6.1 Introduction

Chapter 6 examines a range of procedural and architectural provisions that are needed to support a robust enforcement framework. First, this Chapter asks whether the existing arrangements for court proceedings remain appropriate for the effective enforcement of the national Laws. It then notes that there has been significant work done by the Australian Law Reform Commission and the Commonwealth Parliamentary Counsel toward standardising the design and drafting of enforcement related provisions. Questions for specific consideration as part of the Enforcement Review are noted further below.

### 6.2 Court proceedings

Under current arrangements, enforcement proceedings may be brought by the AER in the Federal Court and/or in the Supreme Court of a State or Territory that applies the relevant national Law (NEL/NGL/NERL) as a law of that jurisdiction. Enforcement proceedings may be brought by the ERA in the Supreme Court of Western Australia.

Court proceedings may also be initiated for a range of other purposes under the national Laws. For example, judicial review of certain decisions of the AEMC or AEMO may be brought in the Federal Court for the Commonwealth applied national Laws, or State/Territory Supreme Courts for the State/Territory applied national Laws; whereas proceedings for judicial review of decisions of the regulator may be brought in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, an action for damages by a person other than the AER who suffers loss or damage by breach of a conduct provision may be brought in a 'court of competent jurisdiction'.

The Enforcement Review should consider whether the existing arrangements for court proceedings remains appropriate for enforcement of the national energy framework or whether there is scope for clarification or simplification of these arrangements.

### 6.3 Updating of regulatory design and drafting of key parts of the framework

The Enforcement Review should consider whether, and to what extent, the regulatory design and drafting of key aspects of the enforcement regimes in the national energy laws should be updated so that they are in line with best practice for comparable regulatory regimes.

This aspect of the Enforcement Review should have regard to relevant aspects of the *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) (noting that the ERA is not a Commonwealth body) and the ACL as appropriate. Consideration of the design and

operation of other relevant regulatory frameworks, or contemporary regulatory theory,<sup>24</sup> would also assist in this part of the Review.

## 6.4 Specific questions for consideration

In assessing the adequacy of existing legislation, specific issues for consideration in the Enforcement Review are:

- Q.15 Do the current arrangements for court proceedings remain appropriate for the effective enforcement of the national Laws?
- Q.16 How might the current regulatory design of the civil penalty regime be simplified?
- Q.17 Is the current design of the infringement notice regime in accordance with other comparable regimes?
- Q.18 Do the provisions dealing with corporate liability need to be updated to ensure they are in line with current legal standards?
- Q.19 Do the provisions dealing with evidentiary matters need updating to ensure they are in line with current legal standards?
- Q.20 Should the search warrant provisions be standardised in line with more modern drafting precedents?

The Enforcement Review policy principles relevant to consideration of these issues are:

- Principle 2 – consistency of enforcement regimes across energy laws
- Principle 6 – enforcement regimes to reflect current best practice regulation

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<sup>24</sup> See, eg, Spender, P. *Negotiating the third way: Developing effective process in civil penalty litigation* (2008) 26 C&SLJ 249.