



2 July 2018

COAG Energy Council Secretariat
GPO Box 787
Canberra ACT 2601

Submitted by email: energycouncil@environment.gov.au

AER Powers and Civil Penalty Regime – Consultation Paper

Origin Energy Limited (Origin) welcomes the opportunity to provide comments on the Australian Energy Regulator (AER) Powers and Civil Penalty Regime Consultation Paper.

The overarching objective of an enforcement regime should be to promote a high level of compliance across energy markets for the benefit of customers, while also minimising the associated regulatory burden. In Origin's view, the existing framework has generally performed well against this objective. It has precipitated a strong compliance culture that is underpinned by obligations to self-report breaches when they arise and an open and cooperative relationship between market participants and the AER.

In the absence of any serious or systemic issues, we remain concerned that the proposed changes will provide little additional benefit and ultimately lead to increased compliance risk and operational costs. They may also undermine the culture of self-reporting within energy markets and lessen the likelihood of market participants openly discussing compliance issues with the AER to the detriment of the efficient operation of energy markets.

Origin has provided further comment on aspects of the proposal below. These views should be considered alongside those outlined by the Australia Energy Council (AEC) in its response to the COAG Energy Council Secretariat, which is supported by legal advice prepared by Ashurst lawyers.

AER powers to compel

Powers to compel individuals to provide evidence during an examination have generally been reserved for the courts or regulatory bodies that enforce laws that protect against serious misconduct that is clearly defined. In contrast, the national electricity and gas rules are overwhelmingly functional rather than protective. This means there is scope for inadvertent non-compliance through human error in data entry, miscommunication of complex data, or misunderstanding of the significant of complex information. But detrimental public outcomes are only likely to arise under very specific circumstances and/or where there are widespread breaches by multiple entities.

Given the functional nature of the rules, the role of the AER and the matters it seeks evidence on are also often highly complex and predominantly technical, financial and operational in nature. Individuals and corporations therefore need to carefully consider any information request and resultant response to ensure the information provided is not false or misleading, which often necessitates legal oversight. Where individuals/corporations are compelled to provide such evidence orally and potentially exposed to penalties where information is determined to be incorrect, the information flow between those parties and the AER may be restricted due to a reluctance to provide opinions, forecasts or offer additional information that could be subject to challenge. This is also likely to be the case where evidence is required to be provided under oath or affirmation.

Given the above, it is important the AER's new power is applied in a way that is appropriately targeted and minimises the overall regulatory burden and level of operational risk for both individuals and corporations. We therefore recommend the following policy design features.

1. The AER's new power should be limited to investigating suspected breaches of provisions that may have a significant impact on businesses, consumers and other stakeholders, noting the AER currently prioritises its monitoring of such provisions.¹ The AER should also be required to exhaust alternative avenues to seek information before exercising the new power to compel information.
2. Where the AER uses its new power to collect information, the use of that information should be limited to addressing the specific enforcement matter in question. Coupled with protections for commercially sensitive information, this will ensure procedural fairness for individuals that are compelled to appear before the AER and minimise the risk of confidential information being disclosed to other parties.
3. The AER should be required to produce a guideline on the use of the new power.
4. It is appropriate to extend the provisions outlined under section 2.10 of the consultation paper to the AER's new power, subject to the below changes:
 - the obligation for the AER to protect information given to it from unauthorised use should be strengthened to protect confidential and commercially sensitive information, particularly if a broad new power is adopted;
 - the AER should not be able to exercise its new powers to request further information on a specific enforcement matter after it has made a decision to begin proceedings on that matter. As noted by Ashurst, it would be inappropriate for a regulatory agency to obtain additional evidence without court oversight, given the respondent does not have access to equivalent powers.

Civil penalty regime – application of maximum penalty amounts

The starting point for introducing higher penalties should be to demonstrate that a particular rule or law is not being systemically followed. In this context, Origin does not believe there has been a systemic breach of energy market provisions that would warrant consideration of maximum civil penalties being applied.

It is also important to understand the role and potential implications of civil penalties in the context of functional rules. Origin agrees with Ashurst's advice that functional provisions should ultimately attract lower penalties, as breaches of these provisions in many cases are likely inadvertent, do not attract a strong degree of moral culpability and are not unconscionable. This contrasts with protective provisions, where higher maximum penalties are generally applied as a matter of deterrence, or where the consequences of the offence are particularly dangerous or damaging.

A relevant principle that must therefore be applied when assessing the need for a civil penalty is proportionality. A civil penalty should only be reserved for those circumstances where the consequences warrant a severe penalty in order to act as a disincentive for wrongful action. This aligns with the principles used to establish penalty amounts in other established regimens, including the Guide to Framing Commonwealth Offences, the Australian Consumer Law, and Corporations Act.

Consideration should also be given to the reputational drivers that encourage compliance. The potential for damage to reputation acts an additional and significant deterrent to contraventions of the laws/rules.

¹ AER, *Compliance and Enforcement – Statement of Approach*, April 2014.

As a market participant, Origin considers that any conduct that would undermine its reputation in the market would have direct business impacts, irrespective of any formal penalty that may be imposed for such conduct.

Given the above, Origin does not believe there is a compelling case to introduce maximum civil penalties to better incentivise compliance with the provisions listed in Appendix A of the consultation paper. The application of disproportionate penalties could unduly increase operational risks for both individuals and corporations. It could also lead to additional compliance costs (even for compliant participants), by increasing the amount of resources and time required by each market participant to ensure compliance.

As discussed above with respect to the AER's new power, we are also concerned the imposition of higher penalties could ultimately result in communications between market participants and the AER becoming more legalistic in nature. This could ultimately undermine the cooperative relationship that currently exists between market participants and the AER and reduce the efficacy of the AER to remediate breaches in a collaborative manner prior to moving towards a more judicial response

If you wish to discuss any aspect of this submission further, please contact Shaun Cole at shaun.cole@originenergy.com.au or on 03 8665 7366.

Yours Sincerely,



Steve Reid
Group Manager, Regulatory Policy