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### **Australian Energy Regulator (AER) Powers and Civil Penalty Regime Consultation Paper**

Snowy Hydro Limited welcomes the opportunity to comment on matters raised in the Consultation Paper from the COAG Energy Council (Council) on the Australian Energy Regulator (AER) Powers and Civil Penalty Regime Consultation Paper.

Snowy Hydro Limited is a producer, supplier, trader and retailer of energy in the National Electricity Market ('NEM') and a leading provider of risk management financial hedge contracts.

The AER's power to compel individuals to appear before it and give evidence may improve the AER's ability to investigate breaches of the National Energy Laws. To deploy this new power however without consideration of the complexity of operating in the NEM and the change to risk adverse behaviour of Traders would ultimately not be in the long term interest of consumers. Hence further clarification is needed on numerous components of the consultation paper that need to be resolved prior to the drafting of legislative amendments. Snowy Hydro's views on the consultation paper are as follows:

- The AER should not undermine the current efficient operation of the NEM by driving risk adverse behaviour and undermine the existing co-operative relationship between Market Participants and the AER with respect to compliance to the National Electricity Rules.
- Information obtained under the AER's new power should be treated consistently with the AER's existing powers to collect information.
- There is no evidence that there is a systemic lack of adherence to the Rules that warrant a ten fold increase on existing civil penalty rates. Lifting the civil penalties would increase operational risk and incentivise risk adverse Spot market behaviour. This is counter to the desire of the market to have more responsive and flexible behaviour to cater for an evolving NEM with much higher levels of variable generation and significant regulatory change.
- The AER has developed strong relationships with market participants which encourage transparency in all dealings and therefore an oath or affirmation is not required.
- The AER should be required to produce a guideline in consultation with Market Participants on the use of its new information collection powers.
- There needs to be a consultative process with Market Participants and other Stakeholders to ensure that only appropriate National Electricity Rules are subject to the maximum civil penalty regime.

There are important and expensive questions that still need to be answered to avoid increased costs on businesses and ensure that any changes are in the long term interests of consumers.

### **Justification for AER Powers and Civil Penalty Regime**

The National Energy Laws and their subordinate instruments reflect fundamental and distinct purposes. The Laws often deal with complex technical and operational matters. Rules governing generators are applied in the context of a very closely regulated environment which is characterised by continuous interaction between the generators, market operators and the regulator. Compliance with the rules requires significant skill and judgment based on available information however the possibility for inadvertent non-compliance due to matters such as human error in data entry, miscommunication of complex data, or misunderstanding of the significance of particular technical or operational information can occur.

The Consultation Paper has not demonstrated non-compliance with provisions that might warrant the introduction of higher penalties, or establish the need for higher penalties by reference to an evident failing or inadequacy of the current penalty levels. Since the publication of the Enforcement Review in 2013, there has been only one civil penalty application<sup>1</sup>, and two<sup>2</sup> further civil proceedings instituted by the AER. This does not demonstrate significant non-compliance issues with provisions to warrant significant penalties increases.

It is important that the approach proposed by the AER does not undermine the safe, secure and efficient operation of the NEM. The desire of all market participants to protect their reputation by acting in compliance with the Rules should be considered. That is, there is already a highly complaint industry cultural under existing Regulator practice and existing civil penalty rates. This raises the issue of why there needs to be material changes to the compliance regime.

Snowy Hydro believes the Australian energy market is unique in both its function and purpose. It is important that the Council is aware that any changes to the AER power may likely change the consultative, cooperation and constructive nature of engagement between market participants and the AER. The increase in AER powers may lead to market participants becoming more risk averse due to the implications of making an error. Snowy Hydro believes it is important that any changes are in the long term interests of consumers as the costs of the increased regulatory burden may flow through to customers.

### **Use of information**

The AER recently released its approach to wholesale electricity market monitoring which will guide the first long-term monitoring report of the wholesale markets and help inform advice to the Council on the effectiveness of competition and the efficient operation of the NEM. The AER has decided to

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<sup>1</sup> Australian Energy Regulator v Stanwell Corporation Limited [2011] FCA 991.

<sup>2</sup> Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd [2015] FCA 274. And Australian Energy Regulator v Snowy Hydro Limited (No 2) [2015] FCA 58.

use public data in the first instance for the wholesale market performance reporting; however the AER noted that they can compel confidential data where they identify an issue that requires further examination. Snowy Hydro therefore believes it important that information obtained under the AER's new power be treated consistently with the AER's existing powers to collect information. As noted under s. 18D of the NEL, the AER should only use information obtained in relation to its wholesale market monitoring function for the purposes of this function.

### **Penalties for non-compliance and providing false information**

The Council has considered increasing civil penalties and infringement notice amounts in line with the changing value of money noting that their deterrent effect will decrease over time. Snowy Hydro understand that civil penalty rates are in the process of increasing however believe the current penalties provide enough incentive to comply as there are no systematic serious non-compliance issues. We believe there is no need to continually increase the rates to be equivalent to the value of money because the one-off increase is already adding a further deterrent and increases in operating risk.

Snowy Hydro believes the consultation paper has not demonstrated that existing civil penalty rates are inefficient, and therefore we don't support a general increase beyond their current range. The Council should be mindful that in the current changing regulatory environment increasing the penalties will increase the financial risk, and hence the costs, for a generator and retailer operating in this already highly-regulated industry. These changes in turn increase the costs for an end consumer.

Snowy Hydro has some reservations about the principles included in the proposed position on deciding whether a civil penalty provision should attract a higher or lower civil penalty amount. The consultation paper has identified penalty provisions that may attract a new maximum penalty, increasing from \$20,000 to \$200,000 for individuals and from \$100,000 to \$1 million for corporations. The justification for the penalties for individuals has not been made and we believe \$200,000 is high especially for contraventions that could be repeated every five minutes if multiple penalties are applied in one instance of breach. We believe whether a civil penalty provision should attract a certain penalty amount should be accompanied by the nature of the conduct depending on the seriousness and potential consequences<sup>3</sup>.

### **Provision of evidence to be given on oath or affirmation**

The consultation paper proposes that under the AER power when requiring individuals to give evidence that it be given on oath or affirmation. Snowy Hydro does not believe that without the oath or affirmation the AER's ability to enforce the energy laws lessens. The AER has developed strong relationships with regulated entities and market participants which encourage transparency in all

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<sup>3</sup> Ashurst Memorandum Advice - AER Powers and Civil Penalty Regime Consultation Paper commissioned by the Australian Energy Council.

dealings. These relationships could be adversely affected should the AER's enforcement power be altered in this manner.

Should the AER proceed with the enforcement and investigate powers it is important that it does not significantly expose individuals to increased personal legal risk and significant penalties as a consequence for unintended breaches of law. Snowy Hydro believes that the individual should be protected when implementing the provision of evidence.

### **Infringement notices**

Snowy Hydro is concerned that expanding infringements across penalties will likely change the provisions and how they might be used.

The AEMC's rule change on Bidding in Good Faith was implemented to stop the conduct of concern and to make it easier for the AER to take enforcement action in respect of deliberately late rebidding. The Bidding in Good Faith changes has improved general market behaviour. We are therefore unclear why the AER requires the power to issue infringements notices for breaches of the electricity market provisions. The AEMC's requirements were put in place so as to lead to more efficient wholesale price outcomes in the short term, and create investment signals that better reflect underlying conditions of supply and demand, in the long term interests of consumers.

### **Guidelines and Powers**

If the proposed change is implemented by the Council, Snowy Hydro strongly believes that the AER should be required to produce a guideline in consultation with Market Participants on the use of its new information collection powers and that the AER's grounds for using the new power should be the same as its grounds for using its existing gathering powers which is in relation to any of the AERs functions or powers. The AER's power to compel people to give evidence, should be limited to specific enforcement of a specific National Electricity Rule and should not be used for any other purpose.

### **Comment on Appendix A - Civil penalty provisions which may attract maximum penalty rate**

Snowy Hydro supports the principles outlined in the consultation paper<sup>4</sup> that could be used in deciding which provisions should be prescribed as civil penalty provisions. Using these principles many of the Rules provisions in Appendix A do not meet these principles and therefore should be excluded as provisions subject to the maximum penalty amount. For instance:

- Clause 3.7.2(d) - requirement to submit medium term PASA inputs to AEMO
  - These are updated on a daily basis for availability information out to two (2) years. Failure to provide this information may be due to a system failure or inadvertent human error to follow a procedure. In consequence of this failure it is negligible as

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<sup>4</sup> COAG Energy Council, AER Powers and Civil Penalty Regime Consultation Paper, page 14.



information is updated everyday for the next 2 years. Hence the principle of, “economic benefit or detriment that could be caused by a breach of the provision” is small and therefore should not attract the maximum civil penalty rate.

- Clause 3.7.2(e) - requirement to submit short term PASA inputs to AEMO
  - These are updated every 30 minutes for availability information out to seven (7) days. Failure to provide this information may be due to a system failure or inadvertent human error to follow a procedure. In consequence of this failure it is also negligible as information is updated every 30 minutes. Hence the principle of, “economic benefit or detriment that could be caused by a breach of the provision” is small and therefore should not attract the maximum civil penalty rate.
- Clause 4.9.7(a) - de-commitment by Scheduled Generators - advice to AEMO one hour ahead of de-synchronising.
  - The NEM needs more flexible and dynamic Spot market behaviour to balance increasing intermittent renewable generation. Strict adherence to this provision due to the clause being subjected to the maximum civil penalty amount would deter efficient behaviour in response to the latest market information.

This highlights that there needs to be a consultative process with Market Participants and other Stakeholders to ensure that only appropriate National Electricity Rules are subject to the maximum civil penalty regime.

## Conclusion

The Council should be aware of the cost impact on businesses and on the market that civil penalties could have and in turn the flow on to impact consumers. The aim of the civil penalty regime is to ensure that all parties in the market operate in a manner consistent with the obligations imposed on it, which in every case focuses on the long term interests of consumers. Keeping the long term interests of consumers in mind, it is appropriate that the deterrent exists at the current level, which avoids any increases in costs to consumers.

Snowy Hydro appreciates the opportunity to respond to the Consultation Paper. Any questions about this submission should be addressed to Panos Priftakis, Regulation Manager, by e-mail to [panos.priftakis@snowyhydro.com.au](mailto:panos.priftakis@snowyhydro.com.au).

Yours sincerely,



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