AUSTRALIAN ENERGY REGULATOR

Our Ref: 62825- D18/85496
Contact Officer: Joanna Gall
Contact Phone: 08 8213 3461

GPO Box 520
Melbourne VIC 3001
Telephone: (03) 9290 1444
Facsimile: (03) 9290 1457
www.aer.gov.au

29 June 2018

COAG Energy Council Secretariat
Department of the Environment and Energy
GPO Box 787
CANBERRA ACT 2601

via email: energycouncil@environment.gov.au

Dear Sir/Madam

Re: AER powers and civil penalty regime consultation paper

The Australian Energy Regulator (AER) welcomes the opportunity to comment on the Senior Committee of Officials' consultation paper regarding recommendations arising from the *Review of Enforcement Regimes under the National Energy Laws* with respect to AER powers and the civil penalty regime.

The AER considers that the implementation of a key recommendation of the review, to give the AER the power to compel individuals to appear before it and give evidence, is in the long term interests of consumers and will help the AER to carry out its enforcement functions.

The AER also supports the proposals in the consultation paper with respect to the extension of the highest maximum civil penalty amount to a number of key provisions in national energy laws and subordinate instruments.

The attached paper addresses the specific questions raised in the consultation paper. We would be pleased to provide further input in relation to the proposals set out in the consultation paper. If you would like to discuss any aspect of this submission, please contact Peter Adams, General Manager Wholesale Markets on (03) 9290 1465.

Yours sincerely

Paula Conboy
Chair

Submission on Consultation Paper: AER Powers and Civil Penalty Regime

The AER welcomes this opportunity to comment on the proposed positions in relation to giving the AER a power to compel individuals to appear before it and give evidence, and changing the penalty regime under National Energy Laws.

Section 2: Giving the AER a power to compel individuals to appear before it and give evidence

Question 1 – Do you agree that the AER should be able to use the new power, to compel individuals to appear before it and give evidence, in relation to any of its functions or powers?

We agree that the AER should have the ability to compel individuals to appear before the AER and give evidence in relation to all of the AER's functions or powers. While the key driver for the proposed new power is the AER's compliance and enforcement functions, there is not always a clear distinction between the AER's network regulatory functions, and the AER's network compliance and enforcement functions. For example, functions such as ring-fencing, the regulatory test for new investment, and distributed energy resources primarily involve network economic regulation but also include a compliance role for the AER. If the proposed new power is not available for functions such as the AER's network regulation functions, this may fetter our ability to ensure compliance and could have unintended consequences that impact adversely on both the market and consumers.

We also consider that limiting the new power to the AER's compliance and enforcement roles is likely to cause confusion as it is not always possible or appropriate to categorise the AER's functions or powers. Any such limit is therefore likely to impede the AER's ability to exercise this power in some circumstances. For example, where the AER is granted new roles or functions for which the ability to compel oral evidence would be valuable, it may not be apparent whether this new role or function as characterised would fall within the compliance and enforcement role.

In relation to the AER's network revenue determination functions, while we consider our current information gathering powers are effective we consider that the proposed new power should be available. We envisage that the power would only be used in those exceptional circumstances where other avenues to obtain information have been exhausted.

Questions 2 and 3 – 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? If not, what limitations should be placed on how the AER is allowed to use information obtained through use of the new power?

We agree with the proposed position that information obtained under the proposed new power should be able to be used for any purpose related to the AER's functions or powers.[1] This is consistent with the position in relation to information and documents obtained under section 28 of the National Electricity Law and section 42 of the National Gas Law. We note

[1] The AER notes the exception in section 18D of the National Electricity Law for information obtained in relation to the AER's wholesale market monitoring function.

that section 44AAF of the *Competition and Consumer Act 2010* requires the AER to take all reasonable measures to protect information that is obtained by it by compulsion in the exercise of its powers from unauthorised use or disclosure.[2] Use or disclosure by a person for the purposes of performing or exercising a function or power of the AER is however authorised.[3] For example, if information is obtained under a section 28 notice under the National Electricity Law served in the context of a compliance investigation into a system security matter, that information will be protected from unauthorised use or disclosure. However, should that information reveal a matter that is relevant to an AER economic regulatory function under section 15(1)(f) of the National Electricity Law, then the AER may use that information in the performance of that function.

Limitations on the AER's use of information collected through the power to compel individuals to give verbal evidence, beyond those already contained in section 44AAF of the *Competition and Consumer Act 2010* and Division 6 of Part 3 of the National Electricity Law, Division 6 of Part 1 of the National Gas Law and Division 3 of Part 8 of the National Energy Retail Law would undermine the efficacy of the power. Any restrictions on the ability of the AER to use the information obtained in the performance of its functions or the exercise of its powers could undermine the ability of the AER to properly exercise its functions or powers in relation to another matter. Furthermore, such limitations would result in inefficiencies where the AER has to issue more than one notice in respect of the same information or evidence. The costs to both the AER and the recipient of the notice in such circumstances are likely to be substantial.

Questions 4 and 5 – 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? Do you agree offence provision penalty amounts should be increased in line with changes in the value of money?

We agree that the existing penalties in National Energy Laws for failing to provide information, or providing false or misleading information, should apply to the proposed new AER power. We consider that oral evidence is equally critical to our functions as written evidence, and that the impact of failing to provide information, or of providing false or misleading information under the proposed new power, does not differ according to whether the information was provided under examination or in writing. The approach should therefore be consistent. We also agree that offence provision penalty amounts should be increased in line with changes in the value of money. We note that the penalties for failing to provide information to the AER, or providing false and misleading information to the AER, are relatively low, with a current penalty of $2000 (for a natural person) and $10,000 (for a body corporate). These penalties are significantly lower than the penalties for the equivalent provision under the *Competition and Consumer Act 2010* (section 155).

On 31 March 2015, the Competition Policy Review (Harper Review) recognised the importance of compliance with compulsory powers in facilitating the ACCC's ability to investigate competition concerns. At that time, the sanction for a corporation failing to comply with a section 155 notice was a maximum of 20 penalty units for an individual (or 12

[2] See section 18 of the National Electricity Law, section 30 of the National Gas Law and section 207 of the National Energy Retail Law.
[3] See Division 6 of Part 3 of the National Electricity Law, Division 6 of Part 1 of the National Gas Law and Division 3 of Part 8 of the National Energy Retail Law.

months imprisonment) which, when applied to a corporation, amounted to a fine of up to $17,000.

The Harper Review recommended that sanctions of up to 100 penalty units or two years imprisonment, or both, which translates to a fine of $85,000 for a corporation be adopted. The *Competition and Consumer Act 2010* was amended in 2017 to implement this recommendation. The AER recommends that SCO give close consideration to adopting the same sanctions as those available to the ACCC for all of the AER's compulsory information gathering powers, including the proposed new power.

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

Yes. The AER wishes to optimise the value of any evidence obtained under an examination power given the resourcing and burden implications of exercising this power for both the AER and recipients of notices.

Questions 7 and 8 – 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? Do you agree that individuals or corporations compelled to provide information to the AER under its existing powers, and under the new power, should not be able to exercise a penalty privilege for civil penalties?

The AER does not have any concerns with allowing an individual compelled to appear before the AER under the proposed new power to exercise a privilege against self-incrimination for criminal offences. Retaining the privilege against self-incrimination for criminal offences would be comparable with the arrangements that apply under section 155 of the *Competition and Consumer Act 2010*. We also support the proposed policy position that penalty privilege could not be claimed in respect of the AER's information gathering powers, including the proposed new power to compel persons to appear and give evidence. Being able to claim privilege on the basis that self-incrimination could expose a person to civil penalties would undermine the effectiveness of this evidence gathering power for the AER, including the case against the relevant corporation.

Question 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?

The AER supports the proposal for the AER to produce a guideline on the use of the new information collection powers. We consider it is best practice to produce a guideline, and would do so irrespective of whether it was required by the legislation. The AER strongly agrees with the proposed position that the guideline should not create limits on how the AER exercises its power or uses any information obtained.

Questions 10 and 11 – Do you agree the provisions described above (on reasonable excuse, legal professional privilege, no liability for breach of contract/confidentiality, AER using reasonable measures to protect information and use of information up until proceedings begin) be extended to AER's new power. Are there any other provisions in the national energy laws or similar laws that should be applied to the AER's new power?

The AER agrees that the provisions itemised in section 2.10 of the consultation paper should be extended to the AER's proposed new power.

The AER agrees that, consistent with existing provisions, it should be a reasonable excuse not to provide information if a person is not capable of providing the information (see e.g. section 28(5) of the National Electricity Law). The AER considers that this provision is appropriate. A person who is not capable of appearing before the AER should not be exposed to a criminal penalty for failure to comply with the notice.

The AER is comfortable with the proposal that a person does not have to disclose information that is subject to legal professional privilege (see e.g. 42(8) of the National Gas Law) or was prepared for a Commonwealth, state or territory Cabinet (see e.g. 206(9) of the National Energy Retail Law). Section 155 of the *Competition and Consumer Act 2010* includes similar provisions. The AER considers that this position is consistent with the Australian Competition and Consumer Commission's (ACCC's) powers under the *Competition and Consumer Act 2010* and with the decision of the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; 213 CLR 543; 192 ALR 561; 77 ALJR 40.

The AER agrees that, consistent with existing provisions, a person should not incur liability for breach of contract or confidentiality from having to comply with an AER notice (see e.g. section 28(10) of the National Electricity Law, noting that the *Competition and Consumer Act 2010* does not contain an analogous provision). Persons will be legally compelled to appear before the AER to give evidence and this evidence should be afforded the statutory protections set out in section 44AAF of the *Competition and Consumer Act 2010* and Division 6 of Part 3 of the National Electricity Law, Division 6 of Part 1 of the National Gas Law and Division 3 of Part 8 of the National Energy Retail Law as discussed below.

Information in the possession of the AER is already afforded the statutory protections set out in the *Competition and Consumer Act 2010* and the National Energy Laws. The AER agrees that evidence provided by persons who appear before it for questioning must also be given the same protections. That is, the AER should be required to take all reasonable measures to protect the evidence it acquires in the exercise of the new power from unauthorised use. Section 44AAF of the *Competition and Consumer Act 2010*, Division 6 of Part 3 of the National Electricity Law, Division 6 of Part 1 of the National Gas Law and Division 3 of Part 8 of the National Energy Retail Law govern the confidentiality of information given to the AER, and should be sufficient to protect information obtained under the new power.

The AER agrees that where it requires information for the purposes of investigating a breach of the National Energy Laws or rules, it should be able to request this information up until the point it begins proceedings on the matter. This would replicate section 155(4) of the *Competition and Consumer Act 2010*, under which the ACCC can require that information, documents or verbal evidence be provided until the ACCC begins proceedings. Section 155(4) of the *Competition and Consumer Act 2010* was passed to clarify legal uncertainties about the limits on the ACCC's right to issue section 155 Notices. The AER considers that it is important to clarify the legislative intent in this regard at the outset. The AER notes that this proposed provision should be extended to its existing powers under section 28(1) of the National Electricity Law, section 42(1) of the National Gas Law and section 206(1) of the National Energy Retail Law.

The AER has also identified section 155(8A) of the *Competition and Consumer Act 2010* which allows the ACCC to seek an order requiring a person to comply with a section 155 Notice, as a provision that should be applied to the AER's new power. Section 155(8A) provides:

> If a person refuses or fails to comply with a notice under this section, a court may, on application by the Commission, make an order directing the person to comply with the notice.

Under the National Energy Laws, the AER must take action to enforce a criminal penalty if the recipient of a compulsory notice fails to comply with the notice. The AER is concerned that action to obtain a criminal penalty may not be appropriate in all circumstances, particularly in a civil penalty regime and considers that a provision such as the new section 155(8A) of the *Competition and Consumer Act 2010* should be included in the National Energy Laws in relation to all of its compulsory information gathering powers as well as in relation to the new proposed power.

Questions 12 to 15 – Do you agree these principles can be used to decide whether a civil penalty provision should attract a higher or lower civil penalty amount? Are there other principles that could be used? Are the civil penalty provisions identified in Appendix A appropriate to attract the higher civil penalty amount? Are there additional provisions that could be added to the list in Appendix A?

The AER supports the principles proposed by the Senior Committee of Officials to determine whether a civil penalty provision should attract the highest civil penalty. These principles are aligned with the objectives of National Energy Laws. An additional principle which may be relevant is international best practice – i.e. where higher penalties apply overseas for a particular type of breach.

The civil penalty provisions identified in Appendix A are all provisions that the AER, in consultation with staff at the Australian Energy Market Commission (AEMC) and with operational input from the Australian Energy Market Operator, has identified as having more serious consequences when breached.

Over time, as the market evolves, the impact and/or likelihood of particular breaches may increase. We are concerned to ensure that where the impact of a breach is likely to be significant, sanctions that are proportionate to that impact are available to us. Similarly, where there is a strong likelihood of breach or recurrent breach, higher penalties are likely to have a stronger deterrent effect. We support the use of a flexible mechanism to designate provisions that will be subject to the highest civil penalty, to enable new and existing provisions to be designated as the regulatory framework evolves and as changes in the market affect the impact of non-compliance with particular obligations.

Questions 16 to 18: 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? Do you agree infringement notice amounts for these breaches should be 20 percent of the relevant civil penalty amount? Do you agree the AER should be able to issue infringement notices for breaches of the electricity market rebidding provisions?

The AER strongly supports having the flexibility to issue infringement notices for any provisions which become subject to the higher maximum civil penalty amount. Infringement notices are an important enforcement tool which enhance the AER's ability to undertake

timely and proportional enforcement action in responses to breaches of energy legislation. Should a provision become subject to the higher maximum civil penalty amount, we have reservations about setting the infringement notice amount for breaches of that provision at 20 percent of the civil penalty amount (which would currently equate to an infringement notice penalty of $200,000). As the consultation paper notes, raising penalty levels may result in market participants preferring to test their cases in court, rather than paying the infringement amount, which may reduce the value of infringement notices as an enforcement tool.

While the original rationale for the AER not being able to issue infringement notices for breaches of the electricity market rebidding provisions is unclear, we would support extending our ability to issue infringement notices for such breaches. However, the comments above on the infringement notice amount are equally relevant to the rebidding provisions.

Question 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?

The AER agrees that the description in section 3.6 reflects the changes that would be needed to introduce a two-tier civil penalty regime in the National Energy Laws. We note that, in addition to making recommendations about new or amended provisions that should be civil penalty provisions (whether subject to the higher or lower civil penalty amount), there will be circumstances in which the AEMC may need to make recommendations about pre-existing provisions, that have not been amended, but should be subject to civil penalty provisions. The designation process for civil penalties should provide flexibility for the AEMC to recommend that existing provisions are designated as civil penalty provisions, to accommodate changes in participant behaviour, and changes in the market that affect the impact or likelihood of a particular breach.

Question 20 – Are there any other issues you would like to raise in response to this consultation?

The AER notes that, while civil penalties in energy legislation will be adjusted for inflation, the overall penalties remain low relative to the economic and consumer impact of breach.

In addition we consider that the provisions set out in the Appendix of the consultation paper, and the rebidding civil penalty provision, should be subject to disgorgement ('ill-gotten gain') penalties. Consideration should also be given to increasing the highest civil penalty amount for these provisions to the same levels as is currently being considered by Parliament for the Australian Consumer Law: $10 million or 10 per cent of turnover. It is important that penalties are set at an appropriate value to incentivise deterrence and proper focus on proactive compliance systems and processes.

In addition, the AER recommends that National Energy Laws should be amended to allow the AER to seek community service orders, probation orders, and adverse publicity orders, and to seek that a third party is required to undertake the community service order.

Finally, while we consider that overall penalty levels in National Energy Laws are too low, we note that with respect to some minor breaches, it would be beneficial for the AER to be able to issue a new lower level infringement penalty ($5000) for breaches of certain provisions in the National Energy Retail Law and National Energy Retail Rules. The current

infringement notice penalty of $20,000 may be excessive in relation to the size of some participants.