

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

Our Ref: 52152-D14/144367  
Contact Officer: Peter Adams  
Contact Phone: (03) 9290 1465

24 October 2014

By email: [energycouncil@industry.gov.au](mailto:energycouncil@industry.gov.au)

Dear Manager, COAG Energy Council Secretariat

**Submission on the Review of Enforcement Regimes under the National Energy Laws – recommendations arising from the Final Report**

The Australian Energy Regulator (**AER**) welcomes this opportunity to comment on the further discussion paper regarding recommendations arising from the Review of Enforcement Regimes under the National Energy Laws Final Report. As we have highlighted previously, we consider the proposed amendments to the enforcement regime are in the long term interests of consumers and will help to ensure that the integrity of the energy market is maintained.

The recommendations contained in this Review provide the AER with a more comprehensive and robust set of enforcement powers to support our role. The attached paper addresses the specific question raised in the discussion paper and reflects our earlier submissions to the draft and final reports.

We would be pleased to provide further assistance on this important area of work. If you would like to discuss any aspect of this submission, please contact Peter Adams, General Manager, Wholesale Markets (03) 9290 1465, or Sarah Proudfoot, General Manager, Retail Markets (03) 9290 6965.

Yours sincerely



Michelle Groves  
CEO

## **Submission on Recommendations arising from the Review of Enforcement regimes under the National Energy Laws Final Report**

The Australian Energy Regulator (AER) welcomes this opportunity to provide further comment on a number of specific recommendations of the *Review of Enforcement Regimes under the National Energy Laws*. The comments reflect our earlier submissions to the draft and final reports.

The AER strongly supports recommendations one, four, five, six and 13. The AER notes that recommendation two proposes it be assigned the power to seek compensation on behalf of small customers. The AER notes that the Australian Competition and Consumer Commission (ACCC) and other enforcement agencies under the Australian Consumer Law (ACL) currently have this power. We understand those agencies have not widely exercised those powers, but rather have used other methods to promote compliance and protect consumers from unlawful conduct. On that basis, while the AER sees some merit in recommendation two, we consider more effective outcomes can be achieved by prioritising the implementation of the other report recommendations.

### ***Recommendation 1: Increase the range of orders available by the courts in hearing proceedings brought forward by the Australian Energy Regulator (AER)***

The AER agrees that increased flexibility in the orders that can be made by the courts should result in more efficient and effective resolution of breaches. While we recognise the level of enforcement action taken to date has been limited, we note that many instances of non-compliance or poor practices are addressed administratively and may not be the subject of public focus or announcements.

As our role in retail markets expands (currently the Retail Law has commenced in the Australian Capital Territory, Tasmania, South Australia and New South Wales, with Queensland and Victoria expected in 2015) we are employing a range of tools for monitoring compliance, including the exception reporting framework, market intelligence and customer complaints. While some instances of non-compliance may be addressed administratively, this will not always lead to an appropriate resolution. This is particularly the case where, for example, an issue is found to be widespread (within a specific business or the industry more broadly); or where the business does not agree with the AER's characterisation of its conduct; or where the conduct is being undertaken with deliberate disregard for the requirements of the NERL or NERR.

In such cases, a greater range of orders available to the courts provides a greater range of options for enforcement of the law and for remedying the conduct. The AER agrees that the additional orders may result in more efficient and effective resolution of breaches in those cases it cannot resolve administratively. We also note that businesses are already subject to such remedies under the ACL so do not consider this change represents a significant impost on industry participants.

***Recommendation 4: Review six suggested provisions to be included as conduct provisions***

As stated in our earlier submissions, the AER considers that a number of provisions relating to electricity connections, along with retail support rules, 'B2B' life support equipment rules and pre-contractual obligations under the energy marketing rules would be appropriate conduct provisions. Given the proposed change does not create new obligations, but merely reclassifies a number of existing ones, there would be little additional burden imposed on businesses as a result.

We also agree that the provision relating to life support equipment rules is critical to the protection of a class of particularly vulnerable customers. The AER has been concerned by the number of reported breaches of the life support equipment provisions since the commencement of the NERL and is currently undertaking compliance activity in this area. We welcome any measures that provide additional strength to these provisions.

While we supported the Final Report's recommendations on conduct provisions, we recognise the relative newness of some of the suggested provisions and that their practical application remains somewhat untested. We agree, therefore, with the Officials' proposed timeframe for the expansion of conduct provisions.

***Recommendation 5: Initiate a targeted review of a higher maximum penalty rate for specific provisions and Recommendation 6: Increase the maximum penalty for the rebidding civil penalty provision***

The AER supports the recommendation that Energy Ministers undertake a further review to assess what, if any, provisions of the National Energy Laws, Regulations or Rules that should attract the higher maximum penalty rate of \$1,000,000 for bodies corporate and \$200,000 for individuals. We agree that such an increase will provide an effective deterrent for non-compliance and better reflect the seriousness of certain offences.

While the AER will welcome the opportunity to provide input to a more detailed review, we would note at the outset that we consider the penalties currently available under the NERL and NERR in particular require some focus. The current disparity between the maximum penalty under the NERL and the maximum penalty under the ACL – and the various areas of overlap in those laws – mean that a business could receive a penalty ten times less the potential maximum that could be applied to that conduct depending on whether an action is taken under the NERL or the ACL. We consider this is a highly undesirable outcome and one which undermines the protection of energy customers across the NEM.

We consider now is an appropriate time to review the civil penalty regime, including the possible harm of non-compliance, the consistency between the treatment of current civil penalty provisions and the level of penalties particularly given changes in the value of money since the penalty rates were set.

We consider the Final Report's illustrative examples of the economic benefits of breaching some civil penalty provisions clearly demonstrate the potentially significant financial gains which a business can obtain as a result of non-compliance.

The Draft Report invited submissions on which provisions should be subject to this higher penalty. The AER's submission provided a non-exhaustive list of possible provisions, including provisions for which:

- non-compliance could result in potentially significant financial gains for a regulated entity
- a breach could have significant consequences on energy supply security or consumers
- the entity is required to dedicate resources (directly or indirectly) to the maintenance of systems and processes.

The Final Report also contemplated an increase in civil penalty levels to take account of inflation since the penalty levels were first set in 1998 and the \$1 million maximum penalty was introduced in 2003. It notes that it is usual practice for penalty levels in all legislative and regulatory regimes to be reviewed periodically and adjusted to ensure that the real value of the penalties is maintained over time. Consideration of whether a general increase in civil penalties across the National Energy Laws is now appropriate. We consider a review to be consistent with other enforcement regimes, as well as with similar adjustments which are made under National Energy Laws, such as the annual adjustment to the electricity market price cap.

***Recommendation 13: Give the AER powers to obtain information on oath***

The AER supports this recommendation and considers it essential to ensuring an effective enforcement regime. The power to require the provision of information on oath is common to many other Australian and international regulators (including Energy regulators). Having access to better quality information to guide investigations will allow the AER to make more informed conclusions of whether there has been a breach and therefore avoid costly and resource intensive litigation.

The AER's experiences in the Stanwell case, referred to in the Final Report, is an example of an investigation which could have progressed much more efficiently had the AER been able to obtain the statement of witnesses, including those no longer associated with the party being investigated. The Federal Court in that case noted the differences between the written responses to the AER's compulsory information requests and the oral evidence adduced in court. Had the AER been able to question all relevant parties on oath (prior to the court proceedings) it is likely those inconsistencies could have been clarified.

These powers, within a legislative framework that provides the appropriate protection, assist regulators to carry out effective investigations. We consider the AER's investigation capability would benefit if our current range of investigative tools was expanded to include the power to compel evidence under oath.