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AER Powers and Civil Penalty Regime Consultation Paper

The Australian Energy Council (the AEC) welcomes the opportunity to provide comment on the COAG Energy Council's Consultation Paper *AER Powers and Civil Penalty Regime* (Consultation Paper).

The AEC is supportive of a robust regulatory regime with a regulator that is appropriately empowered to investigate and enforce compliance breaches. The AER's focus on creating a culture of compliance and encouraging cooperation between the industry and the regulator assists the industry to deliver stable and reliable energy to homes and businesses across the national energy market (NEM).

We acknowledge the COAG Energy Council's decision to implement two recommendations arising from the 2013 *Review of Enforcement Regimes under the National Energy Laws (*Enforcement Review*)*, i.e.:

- amending the national energy laws to give the AER the power to compel individuals to appear before it and give evidence; and
- reviewing the national energy laws and subordinate instruments to consider which provisions should attract the highest maximum penalty level.

Throughout the implementation of these recommendations the national energy objectives and the national energy retail objective should remain central considerations.

We believe there are material risks in the implementation of the recommendations, particularly the proposal to increase civil penalties for individuals up to $200,000. We believe this change would have unintended consequences.

To this end, we **attach** an advice from Ashurst which provides guidance on the appropriate implementation of these recommendations and addresses many of the questions raised in the Consultation Paper. The advice points to the risks attaching to an adversarial framework in energy market regulation:

> *A shift to an adversarial approach is likely to result in more conservative behavior by regulated entities, and less collaboration between the regulator, market operator and the regulated as they necessarily move to protect themselves from legal risk.*

We set out our high level comments with a view to minimising these risks while achieving the COAG Energy Council's objectives with this reform.

New coercive information gathering powers for the AER

The Enforcement Review recommended that the AER be given new powers to compel individuals to appear before it and give evidence. The ACCC Retail Electricity Pricing preliminary report echoed this recommendation, stating that the AER should have such powers 'in order for the AER to effectively investigate and deter unlawful conduct in the wholesale market'.

The Administrative Review Council report on *The Coercive Information-Gathering Powers of Government Agencies* (2008) noted that

> *Coercive information-gathering powers are important administrative and regulatory devices. It is essential that, when using them, agencies impinge on the rights of individuals only in a proportionate and justifiable way. Among the individual's rights are those associated with the protection of property and privacy, the right to silence, and statutory rights to the protection of personal information. Related rights are the right to privilege against self-incrimination or self-exposure to penalty and client legal privilege* (p 6).

A power to compel individuals to appear before a regulator and give evidence is a more invasive form of information gathering power than the power to produce documents, and creates considerable risk that an individual's rights will be impinged upon. Being called before a regulator to give evidence also creates considerable stress for the individuals involved – and this stress increases where there is a risk that the individual concerned could face a personal penalty or other sanctions.

From a legal perspective, ensuring the appropriate balance is achieved between the coercive powers of the regulator and the rights of the individual on whom these powers are being exercised requires:

a) setting an appropriate trigger for the exercise of powers;

b) according procedural fairness to the individual compelled; and

c) respecting the right to privilege against self-incrimination and penalty.

Refer to section 3 of the attached advice.

From a policy perspective, the primary issues driving these reforms relate to improving the AER's ability to investigate the conduct of market participants. We are unaware of any evidence in the Enforcement Review or the ACCC preliminary report (or otherwise) pointing to misconduct by individuals in the energy market which should attract individual sanctions – or that the AER's lack of powers in this regard has impacted the AER in pursuing sanctions against market participants.

We note further that the kinds of laws the AER regulates are highly complex, largely technical and operational in nature. The ability of an individual to provide information related to how they (or their body corporate) complied with a technical rule (e.g. rules like compliance with a dispatch instruction (4.9.8(a)); compliance with the Market Ancillary Service Specification and making sure they are <u>always</u> capable of complying with current Ancillary Services' offers (4.9.8(c)), would require checking the facts, data and also obtaining / referencing some technical opinion within the body corporate. It must be remembered that compliance with many of these technical rules is not performed through behaviour, but through settings, systems and data, which require a very high level of technical expertise to set up and manage, yet may still not be perfect at a specific point in time.

In this context, we would contend that the correct balance between appropriately empowering the regulator while recognising individual rights would be achieved by:

- limiting the power to the conduct of certain investigations; and
- providing that information obtained in an examination cannot be used against the individual, only the body corporate.

Review of civil penalties

As noted above, many of the provisions of the national energy laws and the corresponding rules are highly complex, and require technical, financial and operational judgements to be made by multiple people in the course of performing their roles.

We agree with the conclusion in the Ashurst advice that the principles outlined in the Consultation Paper for establishing which provisions should attract higher civil penalties are misguided (refer to section 4.2 of the attached advice). We echo Ashurst's conclusion that

> *the principles used to guide the application of maximum civil penalties should be those that consider the nature of the breach of the provision, including the seriousness of the offence, the harm to consumers and whether the application of a maximum civil penalty would be a successful deterrence...*

The recommendations in the Consultation Paper fail to take into account the functional nature of many of the provisions in the national energy laws. The performance of what are largely administrative obligations is important to the achievement of the national energy objective – and the low levels of existing compliance breaches indicates that the current regulatory and market settings are appropriate to encouraging compliance with these provisions. (Refer to paragraph (b) response to question 14 in the attached advice.)

Functional rules, such as those found in the National Electricity Framework, often deal with complex technical and operational matters. Functional rules governing electricity generators are applied in the context of a very closely regulated environment, characterised by repeated interactions between the generator, market operator and the regulator. Compliance with those rules can require the exercise of scientific, engineering or related skill and judgement based on available information. Accordingly, there is significant scope 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.

Secondly, functional rules are more appropriately enforced by consultative, cooperative and constructive engagement between the AER and Market Participants, rather than through court orders and penalties. Cooperation and the willing supply of information between market participants and the AER is essential to achieve compliance with the functional rules. Reforms to investigations and increasing penalties, particularly when these can be enforced against individuals, must be implemented in a manner which encourages rather than discourages honesty and cooperation. Failure to do so would result in outcomes counter to the objectives of the reforms.

Many of the provisions proposed to attract higher civil penalties require provision of information to AEMO. Due to the nature of AEMO's systems, the information required must be expressed in absolute terms, however there are value judgements inherent in the decision process to provide the required information. Much of the informational requirements are discretionary as to whether and when the information is required, but absolute in the requirement of accuracy (despite the inherent value judgements required). In this context, the application of higher civil penalty amounts risks reducing the information flow to AEMO – a detrimental outcome for the market as a whole.

The recommendations in the Consultation Paper fail to take into account the functional nature of many of the provisions in the national energy laws. The performance of what are largely administrative obligations is important to the achievement of the national energy objective – and the historically low levels of compliance investigations that have resulted infringement notices indicates that the current regulatory and market settings are sufficient to encourage compliance with these provisions. (Refer to paragraph (b) response to question 14 in the attached advice.) It is worth noting that not all of the investigations contained in Table 1 resulted in the issuing of an infringement notice, and a number of the investigations were for breaches of the Rules by AEMO for whom infringement notices and fines have not been historically issued.

The proposed application of higher civil penalties to any particular provision should be closely considered, to ensure that higher penalties do not attach to administrative obligations, and to reduce the risk of unintended adverse market outcomes.

Conclusion

As the energy sector evolves and transforms, maintaining a cooperative and pro-active regulatory relationship is as important to industry as it is to customers. Cooperation between industry and the regulator is critical to deliver efficient competition and good consumer outcomes through the supply of safe, reliable and efficiently-costed energy to customers. Reform to the regulatory regime should seek to promote balance and cooperation, while reducing the risk of inadvertent consequences.

For any questions about our submission please contact Sarah McNamara by email at Sarah.McNamara@energycouncil.com.au or on 03 9205 3114.

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MEMORANDUM
ADVICE – AER POWERS AND CIVIL PENALTY REGIME CONSULTATION PAPER

1. EXECUTIVE SUMMARY

The COAG Energy Council is consulting on a range of issues as set out in the "AER Powers and Civil Penalty Regime Consultation Paper" (**Consultation Paper**) released on 30 May 2018. This document sets out our advice, prepared for the Australian Energy Council (**AEC**), on the legal issues arising from the matters raised in the Consultation Paper. We have sought to limit our advice to legal questions, but the delineation between legal and policy questions is not always clear cut.

It is important to recognise that the Australian Energy Regulator (**AER**) plays a critical role administering, and enforcing, energy laws. The complexity of the industry, and the need to respond quickly to change, mean the rules governing the energy industry are developed by the Australian Energy Market Commission in consultation with Government and industry stakeholders, in addition to traditional legislative processes. This creates greater regulatory flexibility, but also means the rules themselves are subject to greater change than traditional legislation and drafted in a different style to traditional legislation.

Against this backdrop, the COAG Energy Council is considering whether to expand the AER's powers, and the civil penalties for a range of energy laws and rules, to ensure the AER is equipped to be an efficient and effective regulator. There are significant benefits to this consultative approach. As explained in this advice, in our view there is considerable merit in applying that consultative approach to the enforcement and investigative powers of the AER. Shifting to an adversarial framework would expose individuals to increased personal legal risk, and increase the potential consequences for breaches of law that can be very difficult to confidently apply in practice.

A shift to an adversarial approach is likely to result in more conservative behaviour by regulated entities, and less collaboration between the regulator, market operator, and the regulated as they necessarily move to protect themselves from legal risk. This may ironically make it harder, rather than easier, for the AER to achieve its objectives.

2. INTRODUCTION

2.1 Background

In November 2013, Allens Linklaters and NERA Economic Consulting prepared a report titled "Review of Enforcement Regimes under the National Energy Laws – A Report Prepared for the Standing Council on Energy and Resources" (**Enforcement Review**).

The purpose of the Enforcement Review was to set out the findings of the effectiveness of the enforcement regimes operating within the national energy regulatory framework comprising the National Electricity Law (**NEL**), National Gas Law and National Energy Retail Law (**National Energy Laws**).

Two of the recommendations from the Enforcement Review included:

(a) amending the National Energy Laws to give the Australian Energy Regulator (AER) the power to compel individuals to appear before it and give evidence (recommendation 13); and

(b) conducting a targeted review of whether additional provisions of the National Energy Laws or subordinate instruments should attract the highest maximum civil penalty amount (recommendation 5).

In November 2017, the COAG Energy Council agreed to progress these recommendations, and subsequently on 30 May 2018 released the Consultation Paper.

2.2 Instructions for advice

(a) AEC has asked us to provide high level advice on:

(b) the two recommendations which are the subject of the Consultation Paper generally; and

(c) certain specific consultation questions posed in relation to each of the two respective recommendations of particular concern or importance to the AEC and its members.

The AEC has instructed us that its objective is to consider this advice in the context of preparing its written submissions on the Consultation Paper to the COAG Energy Council.

In accordance with our instructions, we have not provided advice in respect of all of the consultation questions, rather we have confined our comments on the legal issues pertaining to specific consultation questions which are of particular concern or importance to the AEC and its members. In particular, we have not commented on consultation Questions 4, 5, 9, 11, 15 or 19.

Our advice is set out below.

3. AER ABILITY TO INTERVIEW WITNESSES (RECOMMENDATION 13)

3.1 Background

The COAG Energy Council has agreed to amend the National Energy Laws to give the AER a power to compel people to appear before it and give evidence (**new power**), following the recommendation in the Enforcement Review that this new power would "*improve the AER's ability to investigate breaches of the national energy laws*".[1]

3.2 The AER's grounds for using the new power

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

We do not agree that a compulsory examination power should be available to the AER "*in relation to any of its functions and powers.*" Our view is that a compulsory examination power should only be available and used where:

- the regulatory agency is investigating a suspected breach of a provision of the law;
- the relevant provision being investigated regulates conduct that is likely to directly cause serious harm to the public; and

[1] Consultation Paper, p 6.

- the regulated conduct is of a kind that is unlikely to be uncovered or proven without a compulsory examination. (Noting, however, that it is arguably inappropriate for a regulatory agency to exercise compulsory powers once a decision to litigate has been made, as it enables the agency to obtain evidence for use in that litigation without the court oversight provided by the subpoena, discovery or similar processes, in circumstances where the respondent does not have access to equivalent powers).

The power to compel a person to answer questions in an examination is the kind of power that historically has been reserved to the courts. While we recognise that some law regulatory agencies have been given those powers, it is not across the board, and is primarily (if not only) to agencies who enforce laws that protect the public against serious misconduct that is clearly defined.

By contrast, the AER is tasked with administering provisions that regulate highly complex conduct, which often calls for fine technical, financial and operational judgements to be made. As a further complication, a number of the provisions require market participants to follow directions of the Australian Energy Market Operator (**AEMO**). While AEMO will make those directions in good faith, it too must exercise its judgement about how to administer the market, including in potentially difficult circumstances (such as where it is acting to resolve a system issue in real time, in circumstances where it cannot know whether the judgements it makes are correct until after the event). This calls for cooperation between the market administrator, regulator and the regulated. There are also incentives to cooperate, as participants have an interest in ensuring there is a safe and reliable system because that underpins the success of those businesses.

Consistently with this, while a breach of those provisions may contribute to detrimental public outcomes, those detrimental outcomes often only arise in very specific circumstances and/or where there are widespread breaches by multiple entities. This means there is rarely a direct connection between an individual entity's conduct and the consequent detriment, and usually ample opportunity to intervene and avoid those outcomes before they arise without resort to court proceedings.

It is also relevant that a breach of many of the provisions do not attract the same "moral opprobrium" as other laws (such as the cartel and misleading conduct provisions administered by the Australian Competition and Consumer Commission (**ACCC**)).

These factors together suggest that taking a legalistic, enforcement approach to the administration of energy laws is not the best way to achieve the best market outcomes.

Against this, it is important to recognise that the power to compel a person to attend a place to answer questions is a powerful and invasive enforcement tool. It impedes on an individual's personal liberties, overrides any right to privacy, and can cause personal stress. It is also imposes costs on an individual (and/or their employer) as the person is taken away from their employment, and will generally need to obtain legal representation. This may be provided by a person's employer, but typically the lawyer will be engaged by and for the employer, and not for the individual required to attend the examination.

We consider that the impact on individuals is potentially greater in the area of energy regulation than other areas (such as competition law) because it is more likely that relatively junior employees, as opposed to officers and senior management, who will be in the best position to provide information relevant to an AER investigation. This is because the AER administers provisions of the law that are highly technical and/or procedural that corporate officers and senior managers are unlikely to be in a position to address at the level of detail required to investigate a breach. Further, in our experience, it is also much less likely that the information given by an individual person could be useful in establishing or explaining an alleged breach.

Consequently, we consider that care should be taken before granting the power to the AER to ensure that there is a public interest benefit from the power that outweighs or overrides the detriment to the individual.

Below we comment on the particular matters identified by the Consultation Paper (citing the Enforcement Review) as supporting the need for a compulsory examination power, which should be weighed against the potential impact on the individual.

Ground	Comments
Information obtained through the current information request process can be highly technical and complex. Giving the AER the ability to question the relevant personnel and require an explanation would assist its understanding of, and ability to interpret, such information. This could avoid the need for several rounds of written exchanges, or bring to light information that would otherwise not be revealed until a trial.[2]	Compulsory examinations are necessarily "one-sided" examinations, conducted individually, in an adversarial environment. In our experience, they do not promote the kind of "free exchange" that is necessary to assist a regulator understand technical and complex information. Further, the technical complexity means that when considering questions from the AER, it is necessary for an individual to consult with documents, notes and colleagues in order to properly and accurately answer questions.
Written responses to information requests may be subject to editorial supervision. For example, where an offence involves a mental element, the response of a decision-maker involved in a potential breach may be edited by others who were not personally involved in the relevant conduct. This has the potential to create inconsistencies between the written responses and the oral evidence that might be given before a court by the decision-maker.[3]	Written responses by a body corporate are necessarily subject to editorial supervision to ensure the information provided is accurate and relevant (particularly in circumstances where the provision of false or misleading information is an offence).
Allowing the AER to question individuals involved in a potential breach would allow it to obtain information from those individuals nearer to the time of the conduct in question. As such, those individuals would have a clearer memory of the relevant events than they would if questioning did not occur until the matter reached trial.[4]	The complexity of the provisions regulated by the AER mean that there is always likely to be a time-lag between the date an alleged breach occurs, and any investigation. It is highly likely that individuals' memories of the highly specific events regulated by the law (such as why a particular bid was made at a particular time) will be unreliable very quickly after the event. Further, it is likely that the same objective could be achieved by seeking written responses quickly.
Further lines of inquiry might develop during oral questioning that can be pursued immediately, thereby expediting the AER's information request process.[5]	We recognise that this is a potential benefit of conducting oral examinations. However, in practice, the AER is likely to require further time to consider the information to develop those lines of inquiry, rather than pursue them while the examination is taking place.

2 Consultation Paper, p. 6.

3 Consultation Paper, pp. 6-7.

4 Consultation Paper, p. 7.

5 Consultation Paper, p. 7.

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3.4 Use of information

Question 2: 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?

We do not agree that the AER should be able to use information collected using compulsory powers for multiple purposes because, for the same reasons outlined above, we consider that compulsory information powers should only be used for clearly defined enforcement purposes. Allowing information to be used more broadly creates the risk that compulsorily obtained information will not be treated properly, and dilutes any limits on the powers relied on to acquire that information.

If the AER were to be granted a power to compulsorily examine individuals in relation to *any* of its powers or function, or use information gained from compulsory examinations in relation to any of its powers or functions, then there would be a heightened need to ensure that individual rights are protected.

While it is principally a policy question, some measures that may assist include:

(a) setting a high objective standard before the power could be exercised (for example, only where the AER is investigating a suspected breach of the law and there is no other reasonable alternative to obtaining the relevant information);

(b) limiting who may conduct an examination and the number of examiners and attendees on behalf of the AER;

(c) requiring the AER to disclose, in its notice to an individual, the details of what is being investigated and the nature of the matters to be considered;

(d) imposing limits on the length and timing of examinations (for example, that they only be conducted during business hours) and not exceed 3 hours in a sitting;

(e) potentially providing that information disclosed by an individual cannot be used as evidence against that individual (even if the individual has not made a claim for privilege against self-incrimination or exposure to a penalty); and

(f) requiring the AER to promptly provide the examinee transcript following the examination and allow privilege claims to be made within a reasonable period following the examination.

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

The Enforcement Review acknowledges that:[6]

> *"there are no express limitations on each regulator's use of information obtained during an interview under oath, in any of the Competition and Consumer Act, ASIC Act or Broadcasting Services Act. It is implicit in each Act that the information provided in an interview will be used for the purposes for which the interview was sought, namely being to assist a regulator in investigating a possible breach of a relevant law and to reach a view as to whether or not a breach has occurred".*
>
> (our emphasis added)

We consider that the use of information collected by the AER "*in relation to any of its powers or functions*" is broad, and the boundaries difficult to identify in practice. Consistently with our response to Question 1, our view is that the use of information

[6] Enforcement Review, p. 118.

collected by the AER should be limited to the purpose for which the interview was sought, being the relevant law that is being investigated in the first instance. Without that limitation:

- regulated entities may need to make broader privilege claims than might otherwise be the case, in order to protect themselves from exposing them to penalties that go beyond the particular matter under investigation;
- confidential and competitively sensitive information may be disclosed to others (and publicly), damaging the competitive advantages arising from an individual's business strategy and plans; and
- any limits on the use of the compulsory powers would be undermined.

While we have suggested some potential protections in our response to Question 2, it is important to recognise that if compulsory powers do not have these limits, then they may detrimentally impact on procedural fairness and natural justice for individuals that are compelled to appear before the AER. In 2015, the High Court succinctly stated that, *"in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions*".[7]

In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-2:

> *It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material: Dixon v Commonwealth (1981) 55 FLR 34 at 41.*
>
> ...
>
> *A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted. On the other hand, if information on some factor personal to that person is obtained from some other source and is likely to have an effect upon the outcome, he or she should be given the opportunity of dealing with it: Kioa v West at 587 (Mason J), 628 (Brennan J).*
>
> ...
>
> *Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. <u>It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.</u> Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. (our <u>emphasis</u>)*

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7 *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ).

In our view, the scope of the AER's new power should be limited to accord with the principles of procedural fairness. For example, if the AER wished to use the information collected using its new power in relation to any of its powers or functions, it should be required to identify to the individual compelled to appear before it whether any adverse conclusion arrived at in relation to any of its powers or functions if that conclusion would not be obvious to the individual. That individual should then be given the opportunity to provide further information or submissions to the AER to rebut or qualify its position.

Further, while providing procedural fairness may assist, it is also important to recognise that these principles, the substantive provisions of the National Energy Law, and questions of privilege dealt with below, raise complex legal questions that are likely to require legal advice. The practical reality is that individuals are, in many instances, unlikely to be in a position to obtain their own legal advice and will instead rely on legal advice obtained by their employer. A legal adviser engaged by the individual's employer will have a duty to advise the employer, not the individual, so there may be a point at which the interests of the employer and the individual diverge. Individual employers may choose to contribute towards the legal costs incurred by the individual, but that will be a decision made by individual employers in the circumstances. This raises the possibility that there may be circumstances where individuals are left to protect their own interests, at their own cost, which are unlikely to be recoverable (and is unlikely to qualify for State legal funding). This should also be taken into account before providing compulsory powers to the AER.

3.5 Requiring evidence on oath or affirmation

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

As indicated within the Consultation Paper, the ACCC can require an individual to give evidence on oath or affirmation. ASIC possesses the same power.

The AER can also compel people to appear and give evidence under oath, but it can only do so for the purpose of conducting access dispute hearings.

In considering whether the AER should be able to require evidence to be given on oath or affirmation when exercising its new information gathering powers, regard should be had to the purpose for which those powers are being exercised.

As we have indicated above, the functions of the AER, and the matters the AER seeks evidence in relation to, are predominantly technical, financial and operational in nature. As such, the type of information that the AER is likely to seek to obtain through use of its new information gathering powers will also predominantly be technical, financial and operational in nature.

Given the nature of the information likely to be sought by the AER, there is a real question as to whether it is necessary or desirable to impose the additional burden and potential stress that may accompany a requirement for individuals to give evidence on oath or affirmation.

In making this observation, we note that state and territory energy regulators generally do not have the power to require an individual to give evidence on oath or affirmation. In addition, the ACCC and ASIC may not be appropriate benchmarks for the AER given that they have significant enforcement authority to govern serious misconduct, which may be seen as justified for requiring evidence to be provided by individuals on oath or affirmation.

3.7 Privilege against self-incrimination

Question 7: 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?

As the Consultation Paper acknowledges, the privilege against self-incrimination is an important legal right that is enshrined in Australia's common law and which should only be overridden in special circumstances, such as when the privilege would undermine the effectiveness of a regulatory scheme.

Having regard to the limited number of criminal penalties in the National Energy Laws, we agree with the Proposed Position set out in the Consultation Paper that individuals' right to claim privilege against self-incrimination should be retained in relation to the AER's information gathering powers.

As mentioned in our response to Question 2, questions of privilege are often complex, and individuals will often require legal advice in order to exercise their rights. It can also be very difficult to understand and claim privilege "in the moment" during an examination.

Consequently, it may be appropriate for the privilege against self-incrimination not only to be preserved, but to remove the need for individuals to make privilege claims during an examination (or, potentially, at all; for example, by providing that information obtained in an examination cannot be used against the individual, only a body corporate).

Question 8: Do you agree that individuals or corporations compelled to provide information to the AER under its existing power (e.g. s. 28 of the NEL), and under the new power, should not be able to exercise a penalty privilege for civil penalties?

Similar to the privilege against self-incrimination, the penalty privilege is an important legal right that should not be overridden except in special circumstances.

Although there may be some uncertainty regarding whether penalty privilege can be claimed in respect of actions by a regulator (as opposed to a court), in our view caution should be exercised in considering whether to clarify the National Energy Laws such that penalty privilege could not be claimed in respect of the AER's information gathering powers. This is particularly so in circumstances where:

(a) the National Energy Laws are focused on the efficient and secure conduct of the energy market and AER is tasked with, among other things, monitoring registered participants in the market to ensure compliance with energy laws and assessing whether there is effective competition within the wholesale electricity market. AER's role is not focused on individual enforcement activities and the imposition of civil penalties; and

(b) preventing individuals from claiming penalty privilege may give rise to serious issues of procedural fairness in circumstances where it is seemingly proposed that the AER's new information gathering powers may be used in a wide range of circumstances and the information that is collected may then be used for purposes other than which it was collected for.

As suggested in our response to Question 7, it may be appropriate for the privilege not only to be preserved, but to remove the need for individuals to make privilege claims during an examination (or, potentially, at all; for example, by providing that information obtained in an examination cannot be used against the individual, only a body corporate).

3.8 Other issues

The Consultation Paper proposes that the following provisions in respect of the AER's and ACCC's information gathering powers should be extended to the AER's new power:

(a) it is a reasonable excuse not to provide information if a person is not capable of providing the information (see e.g. s. 28(5) of the NEL).

(b) a person does not have to disclose information that is subject to legal professional privilege (s. 28(8) of the NEL) or was prepared for a Commonwealth, state or territory Cabinet (s. 28(9) of the NEL). Section 155 of the (Competition and Consumer Act 2010 (Cth)(CCA) includes similar provisions.

(c) a person does not incur a liability for breach of contract or confidentiality from having to comply with an AER notice (s. 28(10) of the NEL) (noting that the CCA does not contain an analogous provision).

(d) the AER must take all reasonable measures to protect information given to it from unauthorised use. (Section 44AAF of the CCA, and Division 6 of Part 3 of the NEL, govern the confidentiality of information given to the AER, and should be sufficient to protect information obtained under the new power).

(e) where the AER 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 s. 155(4) of the CCA, under which the ACCC can require that information, documents or verbal evidence be provided until the ACCC begins proceedings.

Question 10: Do you agree the provisions described [in the Consultation Paper] should be extended to the AER's new power?

If the national energy laws are amended to give the AER the new power, then we consider that it is appropriate that the above provisions should be extended to the AER's new power, with one exception. In respect of the fifth bullet point provision in the Consultation Paper, our view is that the AER should not be able to exercise its powers after it has made a decision to begin proceedings, rather than when it has actually begun proceedings. This is because it is arguably an inappropriate use of process for a regulatory agency to exercise compulsory powers once a **decision** to litigate has been made, as it enables the agency to obtain evidence in that litigation without the court oversight provided by the subpoena and discovery processes, in circumstances where the respondent does not have access to equivalent powers.

4. CIVIL PENALTY REGIME UNDER THE NATIONAL ENERGY LAWS (RECOMMENDATION 5)

4.1 Background

Recommendation 5 seeks submissions on which provisions of the National Energy Laws should be subject to maximum penalties of $1,000,000 for bodies corporate and $200,000 for individuals. The COAG Energy Council have proposed a framework for deciding whether a provision of the National Energy Laws should attract the higher civil penalty amount with regard to certain principles, including:

(a) the efficient investment in, and efficient operation of the energy market;

(b) the reliability, security and safety of supply in the electricity or gas system;

(c) the long term interest of consumers and their ability to reasonably access electricity and gas services; and

(d) consumer harm.

4.2 Principles for determining which provisions could attract the highest penalty rate

Question 12: Do you agree these principles can be used to decide whether a civil penalty provision should attract a higher or lower civil penalty amount?

As an opening comment, we have some reservations about the principles espoused in the Proposed Position of the Consultation Paper, particularly for the purpose of deciding whether a civil penalty provision should attract a higher or lower civil penalty amount.

(a) Emphasis on objectives contrasted with the nature of the rules themselves

The Proposed Position appears to place considerable emphasis on the objects of the National Energy Laws. We consider that such an emphasis is not appropriate when considering the imposition of higher or lower penalty amounts on rules, especially functional rules which are technical, administrative or operational in nature.

Objects clauses of legislation typically outline or indicate the purpose of the legislation and can be used for interpreting the detailed provisions of the legislation and resolve uncertainty and ambiguity.[8] In our view, this proposition is generally supported by the interpretation statutes of the Commonwealth and the states and territories. Even so, we consider that while the purpose of legislation, or put another way, how the legislation was intended to operate, may (though not always) assist in determining the meaning of particular provisions, to extend those statements of objects (which may be generalised, aspirational and/or vague) to interpret or decide whether a civil penalty provision should attract a higher or lower civil penalty amount can be fraught.

Rather, we would encourage consideration of principles which reflect the nature of the rules. To that end, we make the observation that the National Energy Laws comprise rules which are protective in nature on the one hand, and rules which are functional or administrative in nature on the other.

A **protective** rule prohibits or mandates a standard of conduct with the principal purpose of protecting persons or a class of persons from the consequences of that conduct or failure of a standard. A **functional** rule has the principal purpose of establishing a body of transparent and agreed standards or processes in order to promote the public interest through the effective or efficient management of activities.

This distinction is reflected in the legislative architecture governing electricity and gas:

(i) The National Energy Laws establish rules which have the purpose of achieving the safe, secure and efficient operation of the National Electricity Market (**NEM**) and the gas market; these rules are overwhelmingly functional (with an emphasis on technical, operational and administrative matters) rather than protective.

(ii) In contrast, the framework established by the National Electricity Retail Law and the National Electricity Retail Rules, creates rights for, and protects the interests of, electricity consumers. It is specifically concerned with conduct, and is expressly and deliberately protective in nature.

In practice, the functional rules which apply to NEM generators often deal with complex technical and operational matters, and are applied in a very closely regulated environment, characterised by repeated interactions between generator

[8] D Pearce and R Geddes, Statutory Interpretation in Australia (6th ed, 2006), 154; *Office of Parliamentary Counsel, Working with the Office of Parliamentary Counsel: A Guide for Clients* (3rd ed, 2008), [125].

and regulator. Compliance can require the exercise of scientific, engineering or related skill and judgement. Rules concerning bidding and dispatch are applied in a highly dynamic, information-intense environment in which personnel must make decisions on complex operational matters, based on regularly updated information, in real time and in tight timeframes. Accordingly, there is significant scope for inadvertent non-compliance through human error in data entry, miscommunication of complex data, or misunderstanding of the significance of particular information. In contrast, protective rules often establish norms of conduct, are expressed with reference to legal rather than technical concepts, and apply to more strategic and longer term conduct. There is less apparent scope for inadvertent non-compliance with protective rules.

(b) Enforcement Review approach

We also draw attention to the commentary made in the Enforcement Review.

The Enforcement Review illustrated that there are a range of different approaches to setting maximum penalty levels. The Australian Consumer Law (**ACL**) and *Corporations Act 2001* (Cth) (**Corporations Act**) for example, apply tiered penalty levels under which higher maximum penalties are generally reserved for *"offences which attract a strong degree of moral culpability, or could have a significant impact on the market or consumers."*[9] The lower maximum penalties in the ACL and Corporations Act regimes appear to be *"reserved for breaches of an administrative nature, which may be inadvertent or do not necessarily have far-reaching impacts."*[10]

The characteristics of those provisions falling within the highest tier of civil penalty rates under the ACL generally involve a high degree of moral culpability and intent.[11] Relevant examples include:

(i) prohibitions on engaging in unconscionable conduct;

(ii) prohibitions on making false or misleading representations or engaging in false or misleading conduct;

(iii) prohibitions on harassment or coercion; and

(iv) prohibitions on the supply of products that do not comply with safety standards.[12]

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9 Enforcement Review, p. 79.

10 Enforcement Review, p. 79.

11 Enforcement Review, p. 92.

12 Enforcement Review, p. 92.

Further to the Enforcement Review, we support consideration of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers[13] (**Guide**). This Guide discusses the general considerations taken into account when determining an appropriate penalty, and states:

> *A maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme. A higher maximum penalty will be justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging.*
>
> (our emphasis)

While this commentary from the Guide is directed towards offences, the Enforcement Review acknowledges that these principles also provide useful guidance in relation to civil penalties.[14]

Similarly, the *Pecuniary Penalties for Competition Law Infringements in Australia,*[15] published by the Organisation for Economic Co-operation and Development (**OECD**) compares the pecuniary sanctions regime for competition law infringements in Australia to that of a number of other major OECD jurisdictions and also serves as a useful resource in relation to civil penalties. It provides that the primary objective when setting a pecuniary penalty is deterrence, and states that "*a civil penalty is devoted to promoting the public interest in compliance.*"[16]

The Enforcement Review recommended that "*the breaches which can attract the higher level of penalty should be relatively limited in number and be the subject of parliamentary scrutiny.*"[17] It also stated that civil penalties should be determined taking into account:[18]

(i) the economic gains to the individual or firm, or costs imposed on consumers or society, as a consequence of a breach;

(ii) the likelihood of being detected; and

(iii) the implications for prioritisation of enforcement effort.

Civil penalties were recommended to be higher for breaches that lead to large economic benefits to the company or large economic costs to consumers/society, and lower for breaches that lead to small or no economic benefits or costs.[19]

In our view, and consistent with our comments in paragraph (a) above, a breach of provisions which are functional (and predominantly administrative, operational or technical in nature) should attract lower penalties as a breach of these provisions in many cases are likely inadvertent, do not attract a strong degree of moral culpability and are not unconscionable. We consider that the principles used to

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13 Attorney General's Department (2011) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p.38.

14 Enforcement Review, p. 89.

15 OECD (2018) Pecuniary Penalties for Competition Law Infringements in Australia http://www.oecd.org/daf/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm, p. 22.

16 OECD (2018) Pecuniary Penalties for Competition Law Infringements in Australia http://www.oecd.org/daf/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm, p. 22.

17 Enforcement Review, p. 91.

18 Enforcement Review, p. 85.

19 Enforcement Review, p.85.

guide the application of maximum civil penalties should be those that consider the nature of the breach of the provision, including the seriousness of the offence, the harm to consumers and whether the application of a maximum civil penalty would be a successful deterrence (all of which are considerations raised in the Guide).

We query whether the COAG Energy Council's proposed framework (and the Proposed Position) moves away from the original principles offered in the Enforcement Review and places a disproportionally greater emphasis on the efficient operation of the energy market (and the objects of the National Energy Laws). Whilst we acknowledge that this is an important factor and arguably part of the underlying purpose of the National Energy Laws, we consider that greater emphasis should be placed on whether a breach of a provision could cause consumer harm or negatively affect the long term interest of consumers and their ability to reasonably access electricity and gas services.

(c) Suitability of higher penalties as a deterrence mechanism

In circumstances where provisions of an administrative or technical nature are breached inadvertently or with a lack of unconscionable behaviour, we question the effectiveness and suitability of higher maximum civil penalties as a deterrence mechanism. As noted above, deterrence is considered a primary objective when setting a pecuniary penalty. The theory that a 'rational' individual or firm will infringe against its legal obligations when the expected gain from infringement outweighs the expected cost of punishment does not apply in such a scenario.

Further, the Enforcement Review stated that "*corporate responsibility, culture and reputation are also determinants of regulatory compliance, and arguably at least as important as penalty levels.*"[20] We submit that the desire of market participants to protect their reputation should be further considered.

We also note that:

(i) the Enforcement Review acknowledged that the AER had only made one civil penalty application (against Stanwell Corporation), in which it was unsuccessful;[21]

(ii) since the publication of the Enforcement Review in 2013, only two further civil proceedings have been instituted by the AER (against EnergyAustralia Pty Ltd[22] and Snowy Hyrdo Limited[23]).

The Enforcement Review did not otherwise identify any demonstrated non-compliance with provisions such as 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. This was a common criticism contained in the submissions in response to the AER submission to SCER – Review of enforcement regimes under the National Energy Laws dated 9 September 2013 (**Draft Report**).[24]

(d) Concluding remarks

In summary, we would caution against adopting the principles in the Proposed Position for deciding whether a provision of the National Energy Laws should attract the higher civil penalty amount, without further consideration.

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20 Enforcement Review, p. 90.

21 *Australian Energy Regulator v Stanwell Corporation Limited* [2011] FCA 991.

22 *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274.

23 *Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58.

24 Enforcement Review, 92.

In our view, whether a civil penalty provision should attract a higher or lower civil penalty amount should primarily be guided by the nature of the conduct, its seriousness and potential consequences (including opportunity for gain or consumer harm). This view aligns more closely with the principles used to determine penalty amounts in other established approaches including the Guide to Framing Commonwealth Offences, the ACL and Corporations Act.

Question 13: Are there other principles that could be used?

The imposition of pecuniary penalties is ultimately for the purpose of punishment and deterrence. As a result, we consider that increased penalties should only be applied where there is evidence of widespread behaviour that is not subject to effective regulatory control.

While we consider this is ultimately a policy issue, we would encourage that consideration be given to the approaches and comments detailed in response to Question 12 above.

Question 14: Are the civil penalty provisions identified in Appendix A appropriate to attract the higher civil penalty amount?

We refer to our comments regarding Question 12 above.

(a) Functional rules in Appendix A

We consider that a large number of provisions in Appendix A to the Consultation Paper are functional rules (ie administrative, technical or operational in nature) and may not warrant the higher civil penalty provision characterisation.

Some examples are set out in Boxes 1 and 2.

The below examples are not exhaustive. It is beyond the scope of this advice to review each of the provisions listed in Appendix A. We consider that, with the application of more suitable considerations as outlined in response to Question 12 above (including, for example, considerations of deterrence, the seriousness of the breach and consumer harm) will result in a more certain and reasonable application of which provisions should receive the maximum penalty.

Box 1 – Appendix A sample of provisions only, which do not warrant higher penalties

We consider that a higher civil penalty for non-compliance with the below rules is neither necessary nor warranted.

Clause 3.7.2(d) of the NER

Clause 3.7.2(d) of the NER requires relevant *Scheduled Generators* and *Market Participants* to submit certain *medium term PASA inputs* in accordance with the *timetable*. In essence, this clause creates an obligation to transmit certain (forecast) technical data to AEMO in order for AEMO to prepare the *medium term PASA*. This is inherently an administrative obligation.

The *medium term PASA* is a 24-month look ahead that is published by AEMO on a weekly basis (see clause 3.7.2(a)).

In our view, a failure to comply with an administrative obligation to provide the *medium term PASA inputs* for a particular week is unlikely to affect system security or reliability in the short term. We expect that any information in the *medium term PASA inputs* that could affect system security or reliability in the short term would have been included in the relevant *Scheduled Generator's* or *Market Participant's medium term PASA inputs* for several weeks, months or years prior to materialising.

As discussed in our response to Question 12 above, this provision is an example whereby compliance requires the exercise of scientific, engineering or related skill and judgement. The provision relates to a highly dynamic, information-intense environment in which personnel must make a value judgment on complex operational matters. Inadvertent non-compliance of this provision may be likely due to the significant scope for human error.

Any potential risks created by failing to provide the *medium term PASA inputs* for a particular week would likely materialise in a timeframe in the order of two years (being the look-ahead period of the *medium term PASA*). Such risks may also never materialise. During this two year period, the relevant *Scheduled Generator* or *Generator* or *Market Participant* will be have been required to submit further *medium term PASA inputs* that would clearly supersede any one-off non-compliance. The AER has other enforcement options available to it to respond to any systemic breaches of clause 3.7.2(d) during that two year period.

Clause 4.8.12(d) of the NER

Clause 4.8.12(d) of the NER requires *Generators* and *Network Service Providers* to develop *local black system procedures*, and to review and (if appropriate) amend those procedures on request from AEMO or as a result of a significant change in circumstances. The obligation to develop *local black system procedures* is inherently an administrative obligation.

The Consultation Paper raises a particular concern that a failure to develop *local black system procedures* could affect the well-functioning of the system and power system security and reliability, particularly if non-compliance was widespread. However, we respectfully submit that no evidence has been proffered that there is in fact a widespread failure to develop such procedures (in order to justify increasing the penalty).

Clause 4.9.9 of the NER

Clause 4.9.9 of the NER requires *Scheduled Generators* to, without delay, notify AEMO of any event which has changed or is likely to change the operational availability of any of its *scheduled generating units*, whether the relevant *generating unit* is *synchronised* or not, as soon as the

Scheduled Generator becomes aware of the event. This notification is inherently an administrative obligation.

Putting to one side the issue of whether it is desirable to equate notifying the operational availability of synchronised generating units and non-synchronised generating units (which are not connected to the power system), administrative obligations which:

- attach to events which are "likely" to occur; and
- must be complied with both "without delay" and "as soon as the *Scheduled Generator* becomes aware of the event",

raises practical reporting difficulties for generators. It may be difficult for a generator to assess if an event is likely to affect operational availability, and this assessment may take some time.

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Box 2 - Appendix A sample of provisions only, which do not warrant higher penalties cont.

We consider that it is disproportionate to the relatively low harm that may be suffered (ie an information gap) to impose a higher penalty on a participant in these circumstances, even in the event of inadvertent breaches.

Clause 3.7.2(e) of the NER

Clause 3.7.2(e) of the NER requires *Network Service Providers* to provide to *AEMO* an outline of planned *network outages* in accordance with the *timetable* and provide to *AEMO* any other information on planned *network outages* that is reasonably requested by AEMO to assist AEMO to meet its obligations under paragraph (f)(6).

This clause is predominantly a functional rule and, similarly to clause 3.7.2(d) of the NER, is inherently an administrative obligation. Further, there has not been an infringement notice issued for a breach of this provision to date, therefore there is no systematic breach of this provision that would warrant the need for a high civil penalty for deterrence purposes.

Clause 3.8.3A(b) of the NER

Clause 3.8.3A(b) of the NER requires a *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* to provide an up *ramp rate* and a down *ramp rate* to *AEMO* for each *generating unit*, *scheduled network service* and/or *scheduled load*, subject to certain requirements.

This clause is administrative in nature and is predominantly a functional rule which has not been the subject of an infringement notice to date, which may demonstrate the need for deterrence through a higher civil penalty.

The information that generators are required to provide under this provision are deterministic in nature (that is, it is a function of AEMO's systems) and, in our experience, requires generators to make value judgements taking into account a range of complex technical and operational factors which may be difficult to define.

Clause 4.8.1 of the NER

Clause 4.8.1 of the NER requires a R*egistered Participant* to promptly advise AEMO or a relevant *System Operator* at the time that the *Registered Participant* becomes aware, of any circumstance which could be expected to adversely affect the secure operation of the power system or any equipment owned or under the control of the *Registered Participant* of a *Network Service Provider*.

The bare application of the principles proposed in the Consultation Paper resulting in a higher civil penalty for this provision may, in our view, result in an outcome that favours the benefit of hindsight in considering what AEMO should have been appraised of that may pose a risk to the power system. As above, we consider that this may involve participants to make value judgements taking into account a range of complex technical and operational factors which may be difficult to define.

As with clauses 3.7.2(e) and 3.8.3A(b) above, this clause also has not been the subject of an infringement notice to date and therefore no demonstrated need to implement a higher civil penalty for the purpose of deterrence.

Box 3 – Appendix A sample of provisions only, which may warrant higher penalties

The below provisions may warrant a higher civil penalty, subject to further consideration as suggested in response to Question 12.

Clause 4.9.8 of the NER

Clause 4.9.8 of the NER requires that a *Registered Participant* comply with *dispatch instructions* given to it by *AEMO* unless to do so would, in the *Registered Participant's* reasonable opinion, be a hazard to public safety or materially risk damaging equipment. A failure to comply with dispatch instructions may actually place consumers at risk of blackouts or equipment damage, and may warrant increased penalties for non-compliance.

Rule 107(3) of the National Energy Retail Rules

Rule 107(3) of the National Energy Retail Rules requires that a distributor not de-energise a customer's premises except in accordance with Division 3 of Part 6 of the National Energy Retail Rules. A failure to comply with Division 3 may place life-support customers and other vulnerable customers (eg customers who have made a complaint to the distributor) at risk of de-energisation, and in the case of life support customers, death. This may warrant increased penalties for non-compliance.

(b) Limited formal enforcement

We also draw attention to the limited formal enforcement action undertaken by the AER over the last 12 years. In our view, this supports the position that the majority of provisions in Appendix A to the Consultation Paper do not warrant the higher civil penalty provisions.

The AER's compliance activities where formal enforcement action has been taken in relation to alleged breaches in the national energy framework are summarised in Table 1.0 below. The results are sorted in order of frequency of breaches, with the most frequently breached provisions at the top of the table.[25] For a detailed breakdown of the enforcement matters, see **Attachment 1** to this advice.

Table 1.0 – Enforcement matters

Provision	Occurrences
Rule 125(2)(d) of the National Energy Retail Rules	18
Clause 4.9.8(a) of the Electricity Rules	8
Section 38 of the National Energy Retail Law	5
Clause 4.9.8(b) of the Electricity Rules	3
Rule 48 of the National Energy Retail Rules	2
Rule 107(2) of the National Energy Retail Rules	2
Section 88 of the National Energy Retail Law	2
Rule 369 of the National Gas Rules	2

[25] Table 1.0 was populated using information obtained from AER's website at https://www.aer.gov.au/publications/enforcement-matters.

Section 43(2)(c) of the National Energy Retail Law	1
Section 282 of the National Energy Retail Law	1
Section 274(1) of the National Energy Retail Law	1
Rule 125(2)(c) of the National Energy Retail Rules	1
Section 39 of the National Energy Retail Law	1
Section 40 of the National Energy Retail Law	1
Section 41 of the National Energy Retail Law	1
Section 42 of the National Energy Retail Law	1
Section 273 of the National Energy Retail Law	1
Rule 116(1)(d) of the National Energy Retail Rules	1
Rule 125(2)(b) of the National Energy Retail Rules	1
Rule 107(3) of the National Energy Retail Rules	1
Clause 3.19(c) of the Electricity Rules	1
3.8.22A of the National Electricity Rules	1
Clause 7.2.5(d)(2) of the Electricity Rules	1
Clauses 3.9.2 of the National Electricity Rules.	1
Clauses 3.9.3 of the National Electricity Rules.	1
Clauses 4.2.3(f) of the National Electricity Rules.	1
Clauses 4.9.8(d) of the National Electricity Rules.	1
Clauses 4.15 of the National Electricity Rules	1
Clauses 3.8.22(c)(2)(i) of the National Electricity Rules	1

With the exception of rule 125(2)(d) of the National Energy Retail Rules, and clause 4.9.8(a) of the Electricity Rules which are the two most frequently breached provisions of the National Energy Laws for which formal enforcement action was taken, there has been limited occurrences of formal enforcement in relation to any of the other provisions in Appendix A. As discussed in our response to Question 14 above, both rule 125(2)(d) of the National Energy Retail Rules and clause 4.9.8(a) of the Electricity Rules were captured in our views of which provisions may warrant a higher civil penalty.

Otherwise, there are only approximately 40 enforcement matters listed on AER's website for which an infringement notice has been issued since 2006. In our view, these numbers suggest that there are very few (if any) demonstrated examples of systematic non-compliance, particularly given the low total number of infringement notices issued over an almost 12 year period. It follows that this does not support the position that the majority of the provisions in Appendix A should receive higher civil penalty rates.

(c) Other considerations

The Guide provides that industry confidence in an enforcement system directed at industry regulation is undermined where less serious cases do not result in lesser penalties.[26] If the principles in the Proposed Position are adopted, leading to functional rules (which are administrative, operational or technical in nature) receiving the maximum penalty amount, we query whether this will undermine industry confidence in the enforcement system and whether it could result in the imposition of costs on consumers that do not match the harm arising from those breaches.[27]

A further consideration is that enforcement measures which significantly increase the risks market participants face may potentially change the way that market participants conduct their businesses and their dealings with the AER. For example, if enforcement measures increase market participants' financial liability for non-compliance, market participants may rationally conduct their dealings with the AER in a way which reduces the risk that non-compliance will be detected, in order to limit their financial exposure. Similarly, market participants may also rationally respond to that exposure by decreasing the risk of non-compliant conduct in their business. While some level of such deterrence is desirable, in our view, it could potentially be counterproductive to the purposes of the National Energy Laws if enforcement measures introduce financial consequences of non-compliance which discourage efficient and desirable behaviour in the NEM.

We note, however, that these considerations are not strictly speaking legal issues and the focus of this advice, and we only make this observation to provide more fulsome context to our reservation about the principles espoused in the Proposed Position.

4.3 Infringement notices

Question 16: 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?

An infringement notice regime can be effective for dealing with provisions where there is a clear bright line between what is lawful and unlawful, in circumstances where there is a sufficient need for deterrence and/or evidence that the threat of court proceedings is insufficient deterrence (eg because the costs of litigation exceed the benefit). In those limited circumstances, the infringement notice regime can be a simple and cost-effective way to promote compliance.

Question 17: Do you agree infringement notice amounts for these breaches should be 20 percent of the relevant civil penalty amount?

It is not clear to us what policy rationale sits behind the current approach to set all penalty amounts for infringement notices at 20 percent of the applicable maximum civil penalty. To our knowledge, this is not an approach which is commonly adopted in respect of other infringement notice regimes, such as that administered by the ACCC under the CCA. We consider that further explanation of this approach is required.

Nevertheless, in our view, there is a risk that infringement notice penalties will not be set at a level that best promotes the purposes of the infringement notice regime if those penalties are invariably set at 20 percent of the maximum civil penalty. Instead, in setting each infringement notice penalty, regard should be had to the particular nature of

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[26] Attorney General's Department (2011) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p.38.

[27] Enforcement Review, p. 84.

the contravened provision in order to ensure that the infringement notice penalty is set at an appropriate level.

Whether continuing the current practice of adopting 20 percent of the maximum civil penalty is appropriate will depend in part on which (if any) civil penalty provisions attract a higher maximum civil penalty amount as discussed in response to the preceding question.

Question 18: Do you agree the AER should be able to issue infringement notices for breaches of the electricity market rebidding provisions?

We refer you to our response to Question 16.

4.4 Other issues

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

In our view, COAG Energy Council should be cautious about granting enforcement powers to the AER that match, and in some cases would exceed, the enforcement powers of the ACCC (of which the AER is a constituent part). The ACCC is a peak enforcement body that regulates an area of law that is well established, and regulates conduct that would clearly and materially cause damage to the public. Further, the ACCC operates authorisation processes that enable businesses to engage in conduct that might otherwise breach the law.

By contrast, the AER regulates energy markets. These are highly complex, and there is benefit in an open dialogue between the regulator and the regulated. Increasing pecuniary penalties and compulsory powers risks undermining that dialogue, as the regulated become necessarily more defensive (both at an organisational, and individual level) as they seek to mitigate regulatory risk. It may also undermine market outcomes to the extent it means regulated bodies take a more conservative, and potentially less competitive, approach to their operations and activities.

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ATTACHMENT 1 – SUMMARY OF ENFORCEMENT MATTERS

#	Title	Category	Related Provisions	Summary[1]	Release Date
1.	Infringement notice issued to Evoenergy for alleged breaches of the life support rules	Infringement notice	Rule 125(2)(d) of the *National Energy Retail Rules*	Evoenergy (previously ActewAGL Distribution) has paid penalties of $20,000 after the Australian Energy Regulator (**AER**) alleged three life support customers did not receive the required four business days' notice, in writing, of a planned interruption to their electricity supply.	13 Jun 2018
2.	Infringement notices issued to Energex for alleged breaches of the life support rules	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Energex has paid penalties totalling $60,000 following the issue of infringement notices by the AER in relation to three incidents where customers known to require life support equipment unexpectedly lost electricity supply.	16 Mar 2018
3.	Infringement notices issued to Taplin for allegedly selling energy without appropriate authorisation or exemption	Infringement notice	Section 88 of the National Energy Retail Law	Taplin Management Pty Ltd, Taplin Properties Pty Ltd and Taplin Realty Pty Ltd have paid penalties totalling $60,000 in response to infringement notices issued by the AER. The AER issued the infringement notices alleging that, between 2013 and 2017, Taplin sold energy at three shopping centres in SA without holding either a retailer authorisation or an exemption.	7 Mar 2018
4.	Infringement notices issued to AGL for failing to inform customers of contract end	Infringement notice	Rule 48 of the National Energy Retail Rules	AGL South Australia Pty Limited (**AGL SA**), AGL Sales Pty Limited (**AGL Sales**) and AGL Retail Energy Limited have paid penalties totalling $60,000 in response to infringement notices issued by the AER. The AER issued the infringement notices alleging that, between 2013 and 2017, AGL failed to notify more than 1000 customers across NSW, SA and QLD that their fixed term retail contracts were due to end.	14 Dec 2017
5.	Infringement notices issued to Origin Energy for alleged failure to offer hardship assistance and wrongful disconnection	Infringement notice	Rule 107(2) of the National Energy Retail Rules Section 43(2)(c) of the	Origin Energy Electricity Limited has paid penalties of $40,000 following the issue of two infringement notices by the AER. The AER alleged that Origin Energy wrongfully de-energised the premises of a vulnerable customer after failing to offer him	17 Nov 2017

[1] The information contained in this table is extracted from the AER enforcement matters publications available at https://www.aer.gov.au/publications/enforcement-matters, current at 25 June 2018.

#	Title	Category	Related Provisions	Summary[1]	Release Date
			National Energy Retail Law	hardship assistance.	
6.	Administrative undertakings provided by Energex and TasNetworks and infringement notices issued for alleged breaches of life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Electricity distribution businesses TasNetworks and Energex have paid penalties of $60,000 and $40,000 respectively, following the issue of a total of five infringement notices by the AER in relation to incidents where customers known to require life support equipment unexpectedly lost electricity supply during planned works. The AER also accepted administrative undertakings offered separately by TasNetworks and Energex, with each of the electricity distribution businesses committing to improving its systems and processes for managing its life support obligations.	3 Oct 2017
7.	Infringement notice issued to Ausgrid for a reported breach of the life support rules	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Electricity distribution business Ausgrid has paid a penalty of $20,000 following the issue of an infringement notice by the AER in relation to an incident where customers known to require life support equipment unexpectedly lost electricity supply.	8 Sep 2017
8.	Infringement notice issued to ActewAGL Distribution for a reported breach of the life support rules	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Electricity distribution business ActewAGL Distribution, has paid a penalty of $20,000 following the issue of an infringement notice by the AER in relation to an incident where a customer known to require life support equipment unexpectedly lost electricity supply.	8 Sep 2017
9.	Court enforceable undertaking provided by Ausgrid and infringement notices issued for alleged breaches of life support obligations	Enforceable undertaking, Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Ausgrid, an electricity distribution business in NSW, has paid penalties of $100,000 following the issue of five infringement notices by the AER in relation to incidents where customers known to require life support equipment unexpectedly lost electricity supply during planned works. The AER also accepted a court enforceable undertaking offered by Ausgrid, with Ausgrid committing to improving its systems and processes for managing its life support obligations.	7 Jun 2017
10.	Infringement notice issued to Origin Energy LPG for alleged	Infringement notice	Sections 282 and 274(1) of the National	Energy retailer, Origin Energy LPG Limited, has paid a penalty of $20,000 following the issue of an infringement notice by the	4 Apr 2017

#	Title	Category	Related Provisions	Summary[1]	Release Date
	failure to submit accurate data on its market performance		Energy Retail Law	AER in relation to alleged inaccurate information and data submitted to the AER relating to the total number of residential customers on standard retail contracts for the supply of gas.	
11.	Infringement notices issued to Simply Energy for failure to obtain explicit informed consent - 2017	Infringement notice	Section 38(b) of the National Energy Retail Law	IPower Pty Limited and IPower 2 Pty Limited, trading as Simply Energy, have paid penalties totalling $60,000 following the issue of three infringement notices by the AER. The AER alleged that telemarketers acting for Simply Energy had failed on three separate occasions to obtain the explicit informed consent of customers before switching them onto Simply Energy contracts.	24 Jan 2017
12.	Infringement notice issued to AGL Hydro Partnership for failure to comply at all times with latest generation dispatch offer	Infringement notice	Clause 4.9.8(b) of the Electricity Rules	The Electricity Rules require that a scheduled generator must ensure that each of its scheduled generating units is at all times able to comply with its last generation dispatch offer for that generating unit. The AER issued one infringement notice to AGL Hydro Partnership (**AGL**), the owner and operator of the scheduled generating unit at Somerton Power Station in VIC, because it had reason to believe that the scheduled generating unit at Somerton Power Station was not able to comply with its latest generation dispatch offer at all times during the 3.30 pm trading interval on 13 January 2016. AGL paid the infringement penalty of $20,000 on 3 January 2017.	13 Jan 2017
13.	Infringement notices issued to EnergyAustralia and EnergyAustralia Yallourn for failure to follow dispatch instructions	Infringement notice	Clause 4.9.8(a) of the Electricity Rules	The Electricity Rules require registered participants to follow dispatch instructions issued by the Australian Energy Market Operator (**AEMO**) unless to do so would, in the participant's reasonable opinion, be a hazard to public safety or materially risk damaging equipment. The AER issued two infringement notices to entities within the EnergyAustralia group, because it had reason to believe that those entities failed to follow dispatch instructions on the 13 January 2016. Specifically, the AER had reason to believe that:	13 Jan 2017

#	Title	Category	Related Provisions	Summary[1]	Release Date
				• EnergyAustralia Pty Ltd, the owner and operator of Hallett Power Station in SA, failed to follow dispatch instructions for the generating unit at Hallett Power Station during a dispatch interval on 13 January 2016, and • EnergyAustralia Yallourn Pty Ltd, the owner and operator of Yallourn Power Station in VIC, failed to follow dispatch instructions for one of the generating units at Yallourn Power Station during a dispatch interval on 13 January 2016. EnergyAustralia paid the total $40,000 infringement penalties on 22 December 2016.	
14.	Infringement notices issued to Endeavour Energy and Ergon Energy for alleged breaches of life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Electricity distribution businesses, Endeavour Energy and Ergon Energy, have each paid a penalty of $20,000 following the issue of infringement notices by the AER in relation to incidents where customers known to require life support equipment unexpectedly lost electricity supply during planned works.	19 Dec 2016
15.	Property company Stockland pays five infringement notices for selling electricity without an exemption	Infringement notice	Section 88 of the National Energy Retail Law	Property company Stockland Corporation Ltd (**Stockland**) has paid penalties totalling $100,000 after the AER issued it with five infringement notices for allegedly selling electricity at a shopping centre in NSW and four other sites in QLD, including two retirement villages without holding a retail authorisation or exemption. Stockland also provided the AER with an undertaking that it will not sell energy without a valid authorisation or exemption and that it will implement a Retail Law compliance program. The company which provided Stockland with energy management for one of the properties, Energy Intelligence, provided the AER with a court enforceable undertaking to ensure it complies with the Retail Law.	13 Sep 2016

#	Title	Category	Related Provisions	Summary[1]	Release Date
16.	Infringement notices issued to SA Power Networks, Energex and Ausgrid for reported breaches of the life support rules	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Electricity distribution businesses SA Power Networks, Energex and Ausgrid have paid penalties totaling $120,000 following the issue of infringement notices by the AER in relation to incidents where customers known to require life support equipment unexpectedly lost electricity supply. Infringement notice penalties are $20,000 per notice. The AER issued one infringement notice to Energex, two to SA Power Networks and three to Ausgrid.	19 Jul 2016
17.	Infringement notices issued to CS Energy and enforceable undertaking - failure to follow dispatch instructions and offer obligations	Enforceable undertaking, Infringement notice	Clauses 4.9.8(a) and (b) of the National Electricity Rules	Clause 4.9.8 of the National Electricity Rules (NER) requires registered participants to follow dispatch instructions issued by the AEMO unless to do so would, in the participant's reasonable opinion, be a hazard to public safety or materially risk damaging equipment. It also requires scheduled generators to ensure that the dispatch offers they submit to AEMO reflect, at all times, the capability of their generating units generate power. The AER issued four infringement notices to CS Energy, the registered participant responsible for the Wivenhoe and Gladstone Power Stations in QLD, because it had reason to believe that CS Energy failed to comply with clauses 4.9.8(a) and (b) by: • not following dispatch instructions issued to the Wivenhoe generating units, which over-generated by more than 200 MW, on two occasions in February 2014 (clause 4.9.8(a)); and • not ensuring that, on 13 February 2014, certain scheduled generating units at the Gladstone Power Station could comply at all times with their dispatch offers (clause 4.9.8(b)). CS Energy paid a total infringement penalty of $80 000 on 27 June 2016. CS Energy has also put in place various measures to improve its compliance in this area and has offered court-enforceable undertakings to continue to do so. These	4 Jul 2016

#	Title	Category	Related Provisions	Summary[1]	Release Date
				measures include implementing alerts to traders when the generating units are away from target, and ongoing training for staff regarding NER obligations.	
18.	Infringement notices issued to ERM Power for failure to follow dispatch instructions	Infringement notice	Clause 4.9.8(a) of the Electricity Rules	The Electricity Rules requires registered participants to follow dispatch instructions issued by the AEMO unless to do so would, in the participant's reasonable opinion, be a hazard to public safety or materially risk damaging equipment. The AER issued two infringement notices to ERM Power Retail Pty Ltd (ERM Power), the owner and operator of Oakey Power Station in QLD, because it had reason to believe that ERM Power failed to follow dispatch instructions for a generating unit at Oakey Power Station during a dispatch interval on 23 March 2015 and two dispatch intervals on 21 September 2015. ERM Power paid the total $40,000 infringement penalties on 9 May 2016.	11 May 2016
19.	Infringement notices issued to Red Energy for failing to inform customers of their options and obtain explicit informed consent	Infringement notice	Section 38(b) of the National Energy Retail Law Rule 48 of the National Energy Retail Rules	Energy retailer Red Energy Pty Ltd has paid penalties totaling $40 000 following the issue of two infringement notices by the AER in respect of alleged breaches of the National Energy Retail Law and National Energy Retail Rules. The AER issued one infringement notice to Red Energy as it had reason to believe that it had breached the Retail Rules, between at least 2013 and 2015, as the notices Red Energy sent to its customers did not contain the necessary information about a customer's end of contract options. The second infringement notice was issued as the AER had reason to believe that between February 2013 and August 2015, Red Energy breached the Retail Law by placing customers who took no action after receiving the notice onto a new Red Energy contract without the explicit informed consent of those customers.	22 Mar 2016
20.	Infringement notice issued to Origin Energy Uranquinty Power for failure to follow dispatch	Infringement notice	Clause 4.9.8(a) of the Electricity Rules	The Electricity Rules requires registered participants to follow dispatch instructions issued by the AEMO unless to do so would, in the participant's reasonable opinion, be a hazard to	10 Mar 2016

#	Title	Category	Related Provisions	Summary[1]	Release Date
	instructions			public safety or materially risk damaging equipment. The AER issued an infringement notice to Origin Energy Uranquinty Power Pty Ltd (OEU), a wholly owned subsidiary of Origin Energy Limited (Origin Energy), because it had reason to believe that OEU failed to follow dispatch instructions from AEMO for its four generators at the Uranquinty Power Station in NSW during a dispatch interval on 23 September 2015. OEU paid the $20,000 infringement penalty on 26 February 2016.	
21.	Infringement notices issued to SA Power Networks, Energex and ActewAGL for alleged breaches of life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules Rule 125(2)(c) of the National Energy Retail Rules	Electricity distribution businesses, SA Power Networks, Energex and ActewAGL Distribution, have paid penalties totalling $160,000 following the issue of infringement notices by the AER in relation to incidents where customers known to require life support equipment unexpectedly lost electricity supply or where the distributor failed to provide information to registered life support customers to assist them in planning for the loss of energy supply.	11 Feb 2016
22.	Infringement Notice issued to TasNetworks regarding life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	TasNetworks has paid a penalty of $20,000 following the issue of an infringement notice by the AER in relation to an incident where a customer known to require life support equipment unexpectedly lost electricity supply. TasNetworks has also committed to implement measures to improve its compliance with the life support rules.	2 Dec 2015
23.	Infringement Notice issued to Essential Energy regarding life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Essential Energy has paid a penalty of $20,000 following the issue of an infringement notice by the AER in relation to an incident where a customer known to require life support equipment unexpectedly lost electricity supply. Essential Energy has also provided the AER with an administrative undertaking to improve procedures aimed at improving compliance with the life support rules.	2 Dec 2015
24.	Infringement notice issued to Ausgrid for reported breaches of	Infringement notice	Rule 125(2)(d) of the National Energy Retail	Electricity distribution business, Ausgrid has paid a penalty of $20,000 following the issue of an infringement notice by the	30 Nov 2015

#	Title	Category	Related Provisions	Summary[1]	Release Date
	the life support rules		Rules	AER in relation to an incident where a customer known to require life support equipment unexpectedly lost electricity supply.	
25.	Infringement notices issued to Ergon Energy regarding life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Electricity distribution business, Ergon Energy Corporation Ltd (Ergon Energy), has paid penalties totalling $40,000 following the issue of infringement notices by the AER in relation to two incidents where customers known to require life support equipment unexpectedly lost electricity supply.	13 Nov 2015
26.	Infringement notices issued to Simply Energy for failure to obtain explicit informed consent - 2015	Infringement notice	Sections 38 to 42 and 273 of the National Energy Retail Law	IPower Pty Limited (IPower), trading as Simply Energy, has paid penalties of $80,000, following the issue of four infringement notices by the AER in relation to four instances where the AER has reason to believe that Simply Energy has failed to obtain customers' explicit informed consent before entering them into gas and electricity contracts.	9 Nov 2015
27.	Infringement notice issued to Endeavour Energy regarding life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Endeavour Energy has paid a penalty of $20,000 following the issue of an infringement notice by the AER in relation to an incident where a customer known to require life support equipment unexpectedly lost electricity supply.	11 Aug 2015
28.	Infringement notices issued to Ausgrid and TasNetworks regarding life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Electicity distribution businesses, Ausgrid and TasNetworks, have paid penalties totalling $60,000 following the issue of infringement notices by the AER in relation to three incidents where customers known to require life support equipment unexpectedly lost electricity supply.	5 Aug 2015
29.	Infringement notices issued to AGL for disconnection of customers in hardship or on payment plans	Infringement notice	Rule 107(2) of the National Energy Retail Rules Rule 116(1)(d) of the National Energy Retail Rules	AGL SA and AGL Sales have paid penalties of $20,000 each, following the issuing of infringement notices by the AER in relation to incidents in which nine hardship customers or customers on payment plans were disconnected from their electricity supply.	11 May 2015
30.	Federal Court declares	Instituted civil	Section 38 of the	On 27 March 2015, in the first court action taken by the AER	27 Mar 2015

#	Title	Category	Related Provisions	Summary[1]	Release Date
	EnergyAustralia breached National Energy Retail Law	proceedings	National Energy Retail Law	under the National Energy Retail Law, the Federal Court found that EnergyAustralia Pty Ltd had breached the Retail Law by failing to obtain explicit informed consent of customers in SA and the ACT before entering them into contracts or transferring them from another retailer.	
31.	NSW and TAS electricity distributors pay $60 000 in penalties regarding their life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	Three electricity distribution businesses, Essential Energy, Ausgrid, and TasNetworks, have paid penalties of $20,000 each, following the issuing of infringement notices by the AER in relation to incidents in which customers known to require life support equipment unexpectedly lost electricity supply.	23 Mar 2015
32.	Federal Court declares Snowy Hydro Limited breached National Electricity Rules	Enforceable undertaking, Instituted civil proceedings	Clause 4.9.8(a) of the National Electricity Rules	On 2 July 2014 the AER instituted proceedings in the Federal Court of Australia against Snowy Hydro Limited (Snowy Hydro) for alleged contraventions of the National Electricity Rules. On the 12 February 2015 the Federal Court of Australia declared by consent that Snowy Hydro had breached clause 4.9.8(a) the National Electricity Rules on nine occasions in 2012 and 2013, by failing to comply with dispatch instructions issued by the AEMO. On each occasion, Snowy Hydro generated more power than the dispatch instruction required.	3 Mar 2015
33.	NSW electricity distributors pay infringement notice penalties regarding life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules Rule 125(2)(b) of the NERR Rule 107(3) of the NERR	Three NSW distribution businesses - Essential Energy, Endeavour Energy, and Ausgrid - have paid penalties totaling $100,000 following the issue of infringement notices by the AER in relation to incidents in which customers known to require life support equipment lost electricity supply unexpectedly. Infringement notice penalties are $20,000 per notice. The AER issued one infringement notice to Ausgrid, two infringement notices to Endeavour Energy and two infringement notices to Essential Energy.	2 Feb 2015
34.	AER takes action against EnergyAustralia	Instituted civil proceedings	Section 38 National Energy Retail Law	The AER has instituted proceedings in the Federal Court against EnergyAustralia Pty Ltd for allegedly contravening the National Energy Retail Law by failing to obtain the explicit informed consent of customers before transferring them to new	21 Nov 2014

#	Title	Category	Related Provisions	Summary[1]	Release Date
				energy plans. EnergyAustralia contracted Bright Choice Australia Pty Ltd to provide its telemarketing services during 2012 and 2013. Bright Choice contacted prospective customers on EnergyAustralia's behalf to sell electricity and gas plans. The AER alleged that, in a number of instances, Bright Choice sales agents signed up some customers residing in SA and the ACT to EnergyAustralia plans over the telephone without the customer's knowledge or consent. A number of these customers were subsequently transferred to EnergyAustralia from their existing retailer.	
35.	Investigation report - Lumo Energy's failure to meet information system security requirements	Infringement notice	Clause 3.19(c) of the Electricity Rules	The AER has published an investigation report regarding Lumo Energy's failure to meet information system security requirements in accordance with the National Electricity Rules. The Electricity Rules requires registered participants to comply with AEMO's Market Management System Access Procedures when accessing AEMO's Electricity Market Management System. The relevant rule, 3.19(c), is a civil penalty provision, meaning the AER may serve an infringement notice. The AER issued an infringement notice to Lumo Energy in response to the conduct, which Lumo Energy paid on 21 May 2014.	28 May 2014
36.	Investigation report - Red Energy's failure to test metering equipment	Infringement notice	Clause 7.2.5(d)(2) of the Electricity Rules	The AER has published an investigation report regarding Red Energy's failure to test metering equipment in accordance with the National Electricity Rules. The Electricity Rules stipulate that unless the responsible person has developed an asset management strategy that defines practices to meet the inspection and testing requirements of the Rules and is approved by AEMO, the maximum period between tests is ten years. The relevant rule is a civil penalty provision, meaning the AER may serve an infringement notice. The AER issued an infringement notice to Red Energy in response to the conduct, which Red Energy paid on 21 March	31 Mar 2014

#	Title	Category	Related Provisions	Summary[1]	Release Date
				2014. The infringement notice was issued in relation to one metering installation but the AER considers this failure to be an example of broader compliance issues that exist for Red Energy in relation to the relevant requirements.	
37.	Investigation report - Epic Energy's submission of incorrect allocation data - 2013	Infringement notice	Rule 369 of the National Gas Rules	One infringement notice issued with infringement penalty of $20,000.	20 Jan 2014
38.	AER takes enforcement action on life support obligations	Infringement notice	Rule 125(2)(d) of the National Energy Retail Rules	The AER has taken enforcement action over incidents in which customers known to require life support equipment have unexpectedly lost energy supply due to errors on the part of their distributor. Both Aurora and ActewAGL have reported such incidents to the AER. The businesses are now working on programs reviewing and strengthening internal processes to meet their obligations to life support customers. Aurora has also paid penalties totalling $40 000 in relation to conduct the AER considers was in breach of those obligations. The National Energy Retail Law and Rules, which commenced in TAS and the ACT on 1 July 2012, establish a framework for the protection of customers with medical life support equipment.	19 Dec 2012
39.	Investigation report - Epic Energy incorrect STTM allocation data - 2010-11	Infringement notice	Rule 369 of the National Gas Rules	The AER has published an investigation report into the compliance of Epic Energy (Epic) with rule 369 of the National Gas Rules (the Gas Rules). Rule 369 requires information and data to be provided to the AEMO in accordance with good gas industry practice. Rule 369 is a civil penalty provision, meaning the AER may serve an infringement notice. The report details Epic's submission of incorrect allocation data to AEMO on 90 occasions between November 2010 and October 2011. The incorrect data related to quantities of gas delivered along the Moomba to Adelaide Pipeline (MAP) to the Adelaide hub of the Short Term Trading Market (STTM). The error was caused by the formula used by Epic to calculate gas deliveries. On days when backhaul gas was scheduled from	21 Jun 2012

#	Title	Category	Related Provisions	Summary[1]	Release Date
				Adelaide on MAP, the formula incorrectly calculated the amount of gas delivered to Adelaide. The formula error resulted from failures in Epic's IT governance, review and testing processes. Following its investigation, the AER had reason to believe Epic's conduct was not in accordance with good gas industry practice. On 1 June 2012, the AER served an infringement notice for Epic's submission of incorrect allocation data for the 24 October 2011 gas day. Epic paid the $20,000 penalty on 18 June 2012. The payment of the infringement notice is not an admission by Epic of the breach or an admission of liability.	
40.	Babcock and Brown Power - Failure to follow dispatch instructions - 11 February 2009	Infringement notice	Clause 4.9.8 (a) of the National Electricity Rules	The AER has published an investigation report into the compliance of Babcock and Brown Power (BBP) with two provisions of the National Electricity Rules, relating to the operation of two of its power stations – Playford in SA and Braemar in QLD. The report details the events of 11 February 2009, when Playford Power Station allegedly failed to follow dispatch targets issued by the AEMO. In addition to this, the AER alleged that on this day, BBP also failed to notify AEMO of an event that was likely to change the operational availability of Playford. The report also covers the events of 17 March 2009, when Braemar power station began producing electricity without first receiving a dispatch target from AEMO. This completes the AER's investigation into these events and follows a decision of the AER in September 2009, to issue two infringement notices totalling $40,000. The penalties relate to the alleged failure of Playford and Braemar power stations to follow dispatch instructions issued by AEMO. While an infringement notice was not issued in respect of BBP failing to notify AEMO of a change in Playford's operational availability, the AER obtained a commitment from BBP regarding the improvements it will make to its compliance systems in this area.	10 Dec 2009

#	Title	Category	Related Provisions	Summary[1]	Release Date
41.	AER institutes proceedings against QLD generator Stanwell	Instituted civil proceedings	The AER has alleged that Stanwell did not make several of its offers to generate electricity on 22 and 23 February 2008 in 'good faith' contrary to clause 3.8.22A of the National Electricity Rules	On 30 August 2011, the Federal Court dismissed the AER's case regarding QLD generator Stanwell Corporation Limited in relation to alleged breaches of the National Electricity Rules.	28 Jul 2009
42.	Braemar Power Projects - Failure to follow dispatch instructions - 4 November 2007	Infringement notice	Clauses 4.9.8(a) and 4.9.8(b) of the National Electricity Rules	The AER has issued an investigation report into compliance with dispatch instructions by Braemar Power Project and the impacts of network congestion in QLD on 4 November 2007. This report completes the AER's investigation into these events and follows from the AER imposing infringement penalties totalling $60,000 on Braemar Power Project Pty Ltd in November 2008. The penalties related to the alleged failure of Braemar's power station to ensure its offers to supply generation capacity into the National Electricity Market accurately reflected its capability and its alleged failure to follow dispatch instructions issued by the market operator. The report sets out the detailed results of the AER's investigation, including why the AER alleged Braemar failed to follow dispatch instructions during the morning of 4 November 2007. The report also examines whether the conduct of other relevant generators affected by those events was in accordance with the National Electricity Rules.	28 Jan 2009

#	Title	Category	Related Provisions	Summary[1]	Release Date
43.	Investigation into the power system events in VIC - 16 January 2007	Infringement notice	Clauses 3.9.2, 3.9.3, 4.2.3(f), 4.9.8(d), 4.15 of the National Electricity Rules	The AER made a number of recommendations related to: Reclassification of non-credible contingency events • AER to propose Rule change to clause 4.2.3(f) Load shedding • AER recommends formalising communication obligation in arrangements between NEMMCO, JSSCs and NSPs regarding load shedding • AER to undertake compliance auditing of SP AusNet's protection and control systems Load restoration • NEMMCO to report to the market by end 2007 on improved load restoration procedures and training AER to propose Rule change to clause 3.9.2 Setting dispatch price to VoLL • NEMMCO to provide an undertaking regarding compliance with clause 3.9.3 Intervention pricing • NEMMCO to provide an undertaking regarding compliance with clause 3.9.3 Compliance with technical performance standards • AER will recommend to the VIC and QLD governments that technical standards derogations be removed from the NER • AER to undertake auditing of technical performance	26 Nov 2007

#	Title	Category	Related Provisions	Summary[1]	Release Date
				compliance programs Provision of FCAS • AER to follow–up with participant • AER to undertake auditing of generators' FCAS performance Infringement notices • The AER issued 3 infringement notices on SECV with infringement penalties totalling $60,000.	
44.	AGL - Failing to provide a verifiable and specific reason - 22 March 2006	Infringement notice	Clauses 3.8.22 (c)(2)(i) of the National Electricity Rules	The AER imposed a civil penalty of $20,000 on AGL Hydro Partnership over its use of the inflexibility and rebidding provisions of the National Electricity Rules with respect to its MCKAY1 generating unit on 22 March 2006. The AER issued an infringement notice alleging that AGL Hydro breached clause 3.8.22(c)(2)(i) of the rules by failing to provide a verifiable and specific reason for declaring the MCKAY1 generating unit as inflexible. As AGL Hydro has paid the infringement penalty, the AER's investigation of this matter is now closed.	31 Aug 2006