AUSTRALIAN ENERGY COUNCIL

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Proposed Classification of Tiers for the reform of the Australian Energy Regulator Civil Penalty Regime

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the COAG Energy Council's consultation on the *Proposed Classification of Tiers for the reform of the Australian Energy Regulator Civil Penalty Regime* ('AER Civil Penalty Regime').

The AEC is the industry body representing 22 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

Civil penalties are an important facet of every legal system, serving as a deterrent for poor behaviour and incentivising people and businesses to adopt good practices. It is expected that the setting and enforcement of civil penalties are proportionate to the offence, and do not pose an unnecessary regulatory burden. The AEC has concerns that the proposed increases to civil penalty amounts are not properly justified and do not align with these principles. This is likely to have unintended consequences, particularly with respect to how the Australian Energy Regulator (AER) issues infringement notices.

Rationale for increasing penalties

The stated purpose for increasing penalties is to align the AER's civil penalty regime with that of the ACCC's under the Australian Consumer Law. The AEC has some concerns that in aligning the two civil penalty regimes, the COAG Energy Council has not given proper regard to the specialised role of the AER as an industry specific regulator. The unique regulatory framework in the energy industry, which is regularly revised and updated, requires the AER to have a deep technical understanding of the sector, and a cooperative relationship with its participants. The independent 2013 *Review of Enforcement Regimes under the National Energy Laws* ('Review of NEL Civil Penalties') gave particular regard to these features in reaching its conclusion that 'the current structure and level of penalty rates (is) largely appropriate for the purpose of the National Energy Laws'.[1] There is a risk then that taking a more punitive approach to imposing penalties will hurt this cooperative relationship and result in poorer outcomes for customers. Although the direct cost of breaches would not be passed on to customers, the increased penalties will increase businesses' risks, which will be reflected in their cost of operations, administration and compliance, and those additional costs will ultimately increase customers' bills.

Of course, this added regulatory burden would be justifiable if it were in response to evidence of low levels of compliance from market participants. However, the absence of court action from the AER against market participants indicates a strong degree of compliance. It is not clear then what deterrent effect these changes are intended to bring about in the absence of any suggestion that electricity

[1] NERA Economic Consulting, 'Review of Enforcement Regimes under the National Energy Laws', Allens Linklaters, November 2013, p9 http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Review-of-Enforcement-Regimes-under-the-National-Energy-Laws-Final-Report.pdf.

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businesses are disregarding obligations due to insufficient penalties, and by extension, whether the increase can be considered proportionate to the offence when the current penalty levels already sufficiently deter poor market behaviour. The 2013 Review of NEL Civil Penalties was clear in its view that the 'current maximum civil penalty rates should be retained' for the majority of provisions and that 'it would be detrimental to the civil penalty regime as a whole to apply a general increase to the higher tier to all provisions'.[2]

Infringement notices will become disproportionate

The increase in maximum civil penalties means the penalty amount for infringement notices increases comparably. This is problematic because infringement notices do not receive the same level of discretion as a court judgment. Put differently, the Consultation Guide justifies the high maximum penalty amounts by noting that the court will exercise discretion when determining the final penalty. But the AER has not applied this discretion historically when issuing infringement notices, meaning their punitive value will increase sizeably yet without proportionality.

This outcome risks incentivising the allegedly guilty party to take the matter to court, contrary to the purpose of infringement notices to be a more efficient enforcement route.[3] The increase in penalty amount, alongside the new tier classification system, also creates some problems for the issuing of infringement notices. For example, the AER recently issued an infringement notice against a distributor for allegedly breaching the rules. If this same alleged breach were to occur under the proposed new regime, it would fall under Tier 1 and attract a fine of $203,400 (for comparison, it received a $60,000 fine under the current regime).[4] Such an outcome would suggest that the alleged breach is not a 'relatively minor offence', which is what the Commonwealth Government has said infringement notices are designed to respond to.[5]

Bearing these discrepancies in mind, it should be highlighted that the ACCC has published a detailed guideline on its use of infringement notices.[6] This guideline provides businesses with some certainty and transparency about the circumstances that might cause the ACCC to issue, or not issue, an infringement notice. The AER does not have a similar guideline, which would appear to be inconsistent with the stated aim to align the AER's regime with that of the Australian Consumer Law. The AEC recommends the AER develop a corresponding guideline to maintain alignment with the practices of its parent organisation, the ACCC.

Impact on the wellbeing of workers

Under the proposed regime, workers will now face a maximum penalty of $500,000 for Tier 1 offences. The AEC does not believe the public interest benefit in imposing such severe penalties outweighs the negative impact it will have on the wellbeing of workers. The maximum penalty is well beyond the average annual salary of a worker and, even after court discretion, is likely to be a disproportionately harsh response to breaches that often result from human error.

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[2] Id at 93, 96.

[3] Australian Government, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers', Attorney General's Department, September 2011.

[4] Australian Energy Regulator, 'TasNetworks: breaches of life support obligations', Australian Government, 20 Feburary 2020, https://www.aer.gov.au/retail-markets/compliance/enforcement-matters/tasnetworks-breaches-of-life-support-obligations.

[5] Australian Government, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers', Attorney General's Department, September 2011, p58.

[6] ACCC', Infringement notices: Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission', July 2020, https://www.accc.gov.au/system/files/Infringement%20notices%20-%20Guidelines%20on%20the%20use%20of%20infringement%20notices%20-%20July%202020.pdf.

Furthermore, the prospect of facing the maximum penalty will compel workers to engage in court action that is increasingly adversarial and elongated. This is not in the interest of any party. We encourage the Council to consider revising the maximum penalties for workers so it more appropriately balances the public interest benefit in deterring worker misconduct, the physical and mental wellbeing of workers, and the recognition that human error can occur.

Any questions about this submission should be addressed to Rhys Thomas, by email to Rhys.Thomas@energycouncil.com.au or by telephone on (03) 9205 3111.

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