AUSTRALIAN ENERGY COUNCIL

Chris Archer
Director - Regulation Policy and Local Government
Department of Treasury and Finance
Level 10, 1 MacArthur St

MELBOURNE VIC 3002

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Essential Services Commission Amendment Bill

The Australian Energy Council (the '***AEC'***) welcomes the opportunity to make a submission to the Department of Treasury and Finance (**'DTF'**) on its proposed Essential Services Commission ('**ESC**') Amendment Bill.

The AEC is the industry body representing 20 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.

DTF notes that the ESC Amendment Bill stems from reforms announced by the Victorian Government in the days leading up to the 2018 state election. The reforms taken to the election as commitments included doubling the civil penalty notice amount to $250,000, beefing up the regulators enforcement powers by introducing powers to compel the provision of documents, and allowing the ESC to order witnesses to answer questions verbally.

However, the ESC Amendment Bill goes significantly beyond implementing those election commitments. The AEC is extremely concerned that the Government would seek to progress a Bill of this magnitude without undertaking any assessment of its merits, or genuine consultation with impacted industries. To date, nobody outside of the Government has seen a draft of a Bill that intends to empower a regulator to seek civil penalties of close to $11 million dollars for yet to be determined breaches of what is currently subordinate regulation.

Development of competition policy

The AEC understands DTF has modelled the development of the new enforcement powers on those held by other regulators, in particular, the Australian Competition and Consumer Commission (ACCC), and the Australian Energy Regulator (AER). Despite the ESC regulating a range of industries, these reforms are intended to be industry-specific and only impact energy businesses. This intent is highly concerning and is analogous to the widespread condemnation of the Federal Government's approach to provide additional sector-specific powers to the ACCC in implementing its 'Big Stick' reforms in 2019. At the time, Professor and Dean of the Melbourne Business School, Ian Harper, noted in his submission to the Senate Economics Committee investigating the reforms that "Amending the CCA as proposed in this Bill to single out the energy industry for more severe penalties and more intrusive regulation unbalances the Act. Analogous requests of the Competition Policy Review to single out supermarkets and fuel retailers for special treatment were rejected by the Panel."[1]

Developing an extremely onerous penalty regime solely for the purpose of taking action against energy businesses in Victoria does not come without risk of unintended outcomes. As providers of an essential service, energy retailers and distributors should operate within a strict compliance regime that ensures

[1] https://www.aph.gov.au/DocumentStore.ashx?id=d87063eb-e0e4-40f9-9b80-c5bf34f8995b&subId=666442

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

P +61 3 9205 3100
E info@energycouncil.com.au
W energycouncil.com.au

ABN 926 084 953 07

consumers are well protected from prohibited conduct. However, there is no evidence presented by the Government or DTF that the existing penalty regime in Victoria is inadequate, nor to suggest that any inadequacy in energy is not relevant to other sectors.

Unreasonable or unwarranted penalty regimes impacting only a subset of the economy further risk energy businesses in Victoria withdrawing from the market so as to seek to mitigate these risks. Where businesses are able to invest their capital in other sectors without such unreasonable compliance regimes, a rational business would likely do so, further decreasing investment in the energy market.

In addition to the competition policy risks of regulating specific industries, the AEC considers the ESC Amendment Bill fails to meet Victoria's own guides to regulation. The Office of Best Practice Regulation's Guide to Regulation states that:

> *Given these potential effects, the Competition Principles Agreement requires that the analysis of all regulatory proposals consider whether the preferred option will restrict competition. If so, the analysis must demonstrate that the Government's objectives can be only achieved by restricting competition and that the benefits of the restriction outweigh the costs.*[2]

No evidence has been provided by DTF that this threshold has been met.

Genuine consultation

As noted above, the AEC does not consider that the Government has undertaken adequate consultation prior to introducing this Bill into Parliament. To date, DTF has undertaken a stakeholder briefing webinar that provided an overview of the changes, and the AEC has separately participated in a meeting with DTF to seek to better understand the reforms and their potential impact.

Unfortunately, the COVID pandemic and the resulting limitations on meeting in person have meant that no consultation on the draft Bill has been possible. While the AEC acknowledges these limitations are outside the control of DTF, they are not insurmountable. Exposure drafts of Bills are regularly published to enable public consultation, as are formal consultation papers and approach papers designed to illicit broad stakeholder feedback. Neither of these approaches would be impacted by the COVID pandemic.

Given that the ESC Amendment Bill is not limited to implementing the Government's election commitments, the AEC strongly encourages the Government to delay progress on these critically important reforms until such time that proper consultation can occur.

Appropriate regulatory guidance and implementation timeframes

The AEC encourages DTF to place an obligation on the ESC to develop regulatory guidance to enable compliance with the changes proposed in this Bill. Significant changes such as this need to be accompanied by appropriate regulatory guidance about what they mean in practice and what the ESC's procedures and approach will be when exercising its investigative powers and taking enforcement action. This is particularly important in relation to powers, such as search and seizure powers, that DTF have noted are intended to be used as a last resort in instances where licensed businesses are not otherwise forthcoming.

Similarly, as will be clear from the comments in the annexure, such a significant overhaul of the ESC's investigative powers and penalty regime requires careful consideration to ensure the drafting is simple, easy to understand, and compliant with existing legislation. Yet, the proposed timeframes for the introduction

[2] Commissioner for Better Regulation, Victorian Guide to Regulation, 2016

Level 14, 50 Market Street
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E info@energycouncil.com.au
W energycouncil.com.au

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and passage of this Bill appear to reflect a desire to implement this with haste, rather than care. In circumstances where limited consultation has been undertaken, the AEC encourages the Government to reconsider the need to rush the development of these reforms and allow energy businesses adequate time to understand the impact of these reforms on their compliance procedures.

Inappropriate incentives and lack of procedural fairness

The AEC is concerned that the development of an 'Enforcement Fund' as foreshadowed in the Energy Fairness Plan raises issues of procedural fairness and gives unreasonable financial power to the ESC against an energy business acting in good faith. The proposed regime described by DTF would see the ESC able to levy penalty notices on licensees where it considers an obligation has been breached. In the usual course of action such as this, an energy business would be able to accept this penalty or dispute it in court.

In this scenario, the presence of an enforcement fund means an energy business is faced with paying a penalty notice it does not agree with, or challenge the notice in court, against an ESC that does not have any financial limitations in its ability to act. While this may seem beneficial, it is critical that regulators such as the ESC are required to prioritise litigation to provide confidence to industry that it will not act unless the benefits outweigh the costs.

Drafting concerns with the ESC Amendment Bill

Given the AEC has not been able to cite the draft Bill, it is limited in its ability to provide detailed consideration of the impacts of the reforms and propose approaches that might mitigate any unintended outcomes arising from the changes. However, the AEC raises a number of concerns in the attached annexure that must be considered prior to progressing this Bill in Parliament. Of notable concern is the lack of ability for a licensed energy company to rely on reasonable searches, inadequate limitations on the ability of the ESC to use particular investigatory powers unless it is reasonably necessary to perform its functions, and the appropriateness of implementing significant civil penalties of more than $10 million in circumstances where it is unclear what types of breaches these penalties would apply to.

The AEC urges DTF to consider these suggested reforms should it insist on progressing the Bill at this time. For any questions about our submission please contact me by email at ben.barnes@energycouncil.com.au or on (03) 9205 3115.

Yours sincerely,

Ben Barnes
General Manager, Retail Policy

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

P +61 3 9205 3100
E info@energycouncil.com.au
W energycouncil.com.au

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Annexure 1:

Topic	AEC comments
Reasonable searches	The ACCC's exercise of its compulsory information gathering powers under s 155 of the *Competition and Consumer Act 2010 (Cth)* (***CCA***) is subject to the 'reasonable searches defence' in s 155(5B). The defence applies where the s 155 notice relates to the provision of documents and the notice recipient proves that, after a reasonable search, they are not aware of the documents. The AEC considers an equivalent defence should be recognised in the *Essential Services Commission Act 2001* (Vic) (***ESC Act***) and that the existing 'reasonable excuse defence' is inadequate for this purpose. This 'reasonable searches defence' was introduced in the CCA following recommendations made in the Harper Review in recognition that in a digital age, the obligation to search for documents should be subject to a requirement of reasonableness, having regard to factors such as the number of documents involved and the ease and cost of retrieving the document. This principle is also recognised in the Federal Court Rules 2011 (see rule 20.14). It is appropriate that the ESC include a similar defence, having regard to the lessons learnt in other comparable investigatory contexts.
Search and seizure	Under the proposed reforms, the ESC may obtain information by entering premises under a search warrant in connection with the investigation of suspected contraventions of 'essential services requirements'. The AEC understands that this term is defined broadly to include any breach of the ESC Act, Codes of Practice and other relevant legislation. The term therefore includes a wide spectrum of requirements from prescriptive obligations of an administrative nature to more serious overarching obligations on energy licensees. The AEC submits that powers of search and seizure should be limited to assist in the investigation of serious contraventions. The grant of such powers must be proportionate to the seriousness of the matters being investigated and the corresponding benefit gained from exercising such powers. In the ACCC context, these powers are only used to investigate serious cartel offences which by their nature involve covert activities which are difficult to investigate and where there is a higher risk of evidence being destroyed.
Penalty notices	Given the nature of the regulatory framework enforced by the ESC, the AEC submits that ESC's power to issue penalty notices should be limited to circumstances where the ESC considers that the contravention or likely contravention is 'not of a trivial nature'. Under the current regime, the ESC's power to serve enforcement orders and civil penalty notices is limited in this manner in recognition of the scope for inadvertent trivial non-compliance with highly prescriptive and technical industry requirements.
Civil penalties	Under the proposed civil penalty regime, the AEC understands that the maximum civil penalties for energy licensees will be increased to: • 60,000 penalty units ($10,904,400) (unless set lower), three times the benefit received, or 10% of annual turnover in the preceding 12 months for corporations; and

Level 14, 50 Market Street
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P +61 3 9205 3100
E info@energycouncil.com.au
W energycouncil.com.au

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	• 3,000 penalty units ($545,220) for individuals. The AEC understands that: • as an interim measure, requirements prescribed as 'energy industry contraventions' and 'wrongful disconnection contraventions' under the existing framework will be converted to 'civil penalty requirements' and will carry a maximum penalty for energy licensees of 1200 penalty units for corporations ($218,088) and 240 penalty units for individuals ($43,618); and • further requirements will be designated as 'civil penalty requirements' and higher maximum civil penalties set following further consultation between the ESC and Department of Environment, Land, Water and Planning. The AEC submits that careful consideration must be given to the appropriateness of any maximum penalty set during this consultation. The legislation and Codes of Practice enforced by the ESC are fundamentally different from the competition and consumer protections under the CCA which for the most part create broad, economy-wide norms of conduct. The same substantial penalties are not appropriate for many of the requirements enforced by the ESC which are highly prescriptive in nature, can arise from inadvertent system errors and do not have the potential to result in as significant harms to consumers or the economy. While compliance with all requirements is important, the AEC welcomes the implementation of a tiered penalty structure to ensure that penalties are proportionate to the harm caused by the contravention and the need for specific and general deterrence. Only the most serious contraventions which risk the safety of members of the public should attract the highest maximum penalty. Further, the designation of requirements as 'civil penalty requirements' and setting of maximum penalties should occur by way of legislation rather than subsidiary legislation to ensure proper parliamentary oversight over this process. Finally, it is undesirable to make broad obligations, capable of differing interpretations, 'civil penalty requirements'. Requirements which carry a penalty should be identified in specific terms to enable individuals and corporations to know with certainty what conduct will expose them to a financial penalty. This issue also requires careful consideration in determining which provisions become civil penalty requirements.
Conduct in breach of more than one civil penalty requirement	Under the National Energy Retail Law (***NERL***), the maximum penalty for contraventions of a civil penalty provision is subject to s 297(2) of the NERL which provides that a person is not liable to more than one civil penalty under the NERL in respect of the same conduct. Given the potential for overlapping 'civil penalty requirements', the AEC considers that an equivalent provision should be contained in the ESC Act to prevent double punishment.
Individuals acting honestly and fairly who ought	Under section 226 of the CCA, it is a defence in civil penalty proceedings against individuals for contraventions of the Australian Consumer Law if it appears that the individual acted honestly and reasonably and, having regard to all the

Level 14, 50 Market Street
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E info@energycouncil.com.au
W energycouncil.com.au

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reasonably to be excused	circumstances of the case, ought fairly to be excused. The court has discretion whether to relieve the individual from liability wholly or in part. In circumstances where the proposed reforms expand liability to accessories and corporate officers who knowingly authorise or permit contraventions, the AEC considers an equivalent defence should be recognised in the ESC Act.
Compensation orders	Under the new proposed remedies, the ESC may seek compensation orders for injured persons. It is unclear why the ESC should possess the power to seek such an order in circumstances where the ESC's counterpart in NECF jurisdictions, the AER, cannot do so. Where appropriate, applications for such orders can be made by injured persons themselves.
Monetary benefit orders	In circumstances where a civil penalty may be calculated by reference to benefits received from a contravention, the AEC does not consider it appropriate to have a mechanism enabling the ESC to seek a separate monetary benefit order as this would essentially constitute double punishment.
Enforcement fund	In the AEC's view, it is not appropriate for the proposed ESC enforcement fund to receive revenue from the ESC's enforcement activities. Enforcement activities should not be a means of revenue raising. This would appear to create inappropriate incentives for the ESC when issuing penalty notices and/or making submissions to the court in a penalty hearing regarding the appropriate penalty for the contravention. This is particularly so in context of a higher penalty regime, with the ESC's enforcement program standing to directly benefit from higher penalties. Regulators responsible for enforcement of comparable penalty regimes such as the AER and the ACCC do not benefit from their enforcement activities in this matter.
Codes of Practice	The AEC understands that, under the proposed amendments, existing Codes of Practice will be transferred to Part 6 of the ESC Act and deemed to have been made under this Part. Each of these Codes will then be reviewed by the ESC over a three to four year period to ensure compliance with regulatory best practice and sunset in 2024 unless remade prior. In the AEC's view, it is not appropriate to transfer existing Codes of Practice to Part 6 in circumstances where a number of these Codes have not been reviewed for some time and are not currently fit for purpose. The AEC welcomes the review of each Code but submits that such review should occur prior to their transfer to Part 6 as this transfer would have the effect of raising the status of obligations under these Codes to 'essential services requirements' under the ESC Act. The AEC also submits that industry consultation should occur in relation to the review of each Code to ensure that feedback can be provided regarding the operation of the provisions in practice and any refinements which might be made to ensure that they are sufficiently clear.

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