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Dear Secretariat

AER Powers Civil Penalty Regime Consultation Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *Australian Energy Regulator (**AER**) Powers and Civil Penalty Regime* Consultation Paper, published by the Standing Committee of Officials (**SCO**).

Energy regulators must have the ability to implement stringent enforcement work programs to ensure that energy laws are applied in the long-term interests of consumers. We strongly support the Council of Australian Government (**COAG**) Energy Council decision to give the AER powers to compel individuals to appear and provide oral evidence. We also generally support increasing that maximum civil penalty amounts payable for breaches of the National Energy Laws (**NEL**) but continue to advocate that these should be aligned with those applied to breaches of the Australian Consumer Law (**ACL**) and indexed as the value of money changes.

An effective enforcement work program at the AER will demonstrate the benefits of such work to decision makers in Victoria. Although outside the scope of this consultation, we note that enforcement action in response to breaches of the Victorian Payment Difficulty Framework that occur after the framework's implementation in 2019 will be essential to ensure that all Victorians have consistent access to entitlements.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

Align maximum penalties with the ACL

In 2016, COAG Energy Council officials consulted on a general increase in civil penalty and infringement notice penalty amounts.[1] Our submission to that consultation noted that a review of enforcement regimes for National Energy Laws had been on foot since 2010, including a number of rounds of consultation, and that a significant

[1] Energy Working Group (2016). Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation

increase to maximum civil penalties was warranted.[2] Consequently, we welcome the COAG Energy Council now acting—enhancement of the enforcement regime for energy laws is long overdue.

We urge the COAG Energy Council to increase the maximum civil penalties for breaches of the National Energy Laws, particularly those related to consumers. Maximum penalties should be aligned with those applied to breaches of the ACL. Legislation currently before the Federal Parliament seeks to increase the maximum penalties for breaches of the ACL to the greater of $10 million, or three times the value of the benefit obtained from the offence (if this can be determined), or 10 per cent of the annual turnover (if the value of the benefit cannot be determined).[3] This increase is designed to ensure that maximum civil penalties are sufficient to deter non-compliance, particularly for larger ASX-listed companies. These proposed maximums are much higher than the maximum $100,000 for the National Energy Retail Law currently or the $1,000,000 proposed for some provisions in this consultation paper.

We also note and support the position articulated in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers developed by the Australian Government Attorney-General's Department, which notes that the amount payable under an infringement notice should be set at one fifth of the maximum civil penalty rate.[4] Should the proposed ACL penalties be enacted and aligned with breaches of the National Energy Retail Law (NERL) (which we note are similar consumer protections), then infringement notices in the range of $200,000 would be more appropriate.

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

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 agree that the AER should be able to utilise this power in relation to any of its functions. As outlined in the consultation paper, the power to compel individuals may greatly improve the quality of the regulatory work the AER undertakes. It may be a useful but rarely used power to improve the quality of network pricing decisions where greater accuracy in most jurisdictions could result in significant savings for households. Although this information gathering method might be rarely used outside of enforcement action it should be available to improve outcomes in the long-term interests of consumers. Further, such a power would send a strong message of intent and may have a positive impact on the compliance culture within energy businesses, even if rarely used.

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?*

Yes, sharing this information internally will lead to better outcomes in the long-term interests of consumers.

4. *Do you agree that the existing penalties in the national energy laws for failing to provide information to the AER, or providing false or misleading information, should apply to the AER's new power?*

Yes. As outlined in the consultation paper, it makes sense that refusing to provide information or giving false or misleading information should be discouraged consistently across AER's regulatory work.

5. *Do you agree offence provision penalty amounts should be increased in line with changes in the value of money?*

Yes. Beyond the adjustment for the changing value of money these amounts should also be reviewed to ensure that maximum amounts are a sufficient deterrent for refusing or providing false or misleading information to the AER. For comparison, the failure to comply with an ACCC section 155 notice by the due date can currently result in a fine of

[2] Consumer Action Law Centre (2016). Submission: Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation. Available at: https://consumeraction.org.au/review-enforcement-regimes-national-energy-laws-proposed-policy-positions-consultation/
[3] Treasury Laws Amendment (2018 Measures No. 3) Bill 2018, Schedule 1. Available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6053
[4] Australian Government Attorney-General's Department (2011). A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers

up to $21,000 for individuals and $105,000 for companies[5] whereas the current penalties under the NEL are less than a tenth of these amounts.

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

Yes, for the reasons outlined in the consultation paper.

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?*

Yes, we do not object to individuals having this right.

The consultation paper notes that unlike the national energy laws, under the *Competition & Consumer Act*, an individual is not excused from providing information or producing a document on the grounds that it could incriminate them. However, any information gained by the ACCC cannot be used as evidence in a criminal proceeding.

We also note that in respect of examinations by the Australian Securities & Investments Commission (**ASIC**) pursuant to section 19 of the *ASIC Act*, officers responsible for the conduct of criminal proceedings can have access to transcripts and the privilege against self-incrimination can only be exercised at trial if the examinee claimed privilege in respect of their answer before answering the question.[6]

We consider that this is a sensible approach as it effectively balances the ability of the regulator to obtain he information to formulate any case, against the rights of the individual.

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

Yes. Clarifying that penalty privileges do not apply will ensure the AER can use these regulatory tools to obtain the information they need to act in the long-term interests of consumers.

9. *Do you agree with the proposal for the AER to be required to produce a guideline on the use of its new information collection powers?*

Yes, we also agree that the AER powers should not be constrained by guideline. A guideline would be useful for the public or consumer advocates as well as energy businesses in understanding the process AER generally follows when investigating identified or reported breaches.

10. *Do you agree the provisions described above should be extended to the AER's new power?*

    In general, we support alignment with similar provisions of the *Competition and Consumer Act* as described in this section of the consultation paper. We also agree that a person should not incur a liability for breach of contract or confidentiality from having to comply with an AER order as this will increase the likelihood of the AER accessing essential information needed to achieve positive regulatory outcomes in the long-term interests of consumers.

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[5] Australian Competition and Consumer Commission (2018) ACCC Guidelines – Use of section 155 powers, p.7. Available at www.accc.gov.au/publications/accc-guidelines-use-of-s-155-powers

[6] The NSW Court of Appeal held that the time to determine whether an answer will incriminate a person is at the trial: see *R v OC* (2015) 298 FLR 203, [111] and [119] (Bathurst CJ).

Proposed changes to the civil penalty regime under the National Energy Laws

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

A single higher maximum civil penalty amount aligned with the ACL for all the civil penalty provisions is a preferable approach. This would set a sufficient deterrent for the largest businesses in this space who are large ASX-listed companies.

If the COAG Energy Council does proceed with a less preferable two-tiered model, then the broad principles guiding decision makers will need to be bolstered with further detail. Specific examples will need to be given. For example, the principal "*particularly significant with regards to consumer harm*" is very high level and open to interpretation—it needs clarifying commentary.

12. Are there other principles that could be used?

As high-level principles these are sufficient. However, we are concerned some common areas of consumer harm have not been captured in the list of provision in Appendix A due to interpretation. These are discussed more in comments on the next three consultation questions.

13. Are the civil penalty provisions identified in Appendix A appropriate to attract the higher civil penalty amount?

We agree that all the provisions listed in Appendix A should have a higher maximum civil penalty amount. As commented above, all civil penalty amounts should be raised to align with the ACL. There are some gaps in terms of areas of consumer harm that have not been included such as retailer's misleading marketing practices.

The list of provisions being included in Appendix A appear to predominantly focus on the smooth operation of the market and we agree that these should be subject to higher penalties. However, our focus is on provisions addressing consumer protections especially for vulnerable households.

We especially endorse the inclusion of the National Energy Retail Rules 124(1), 125(2), 107(2), 107(3) and National Energy Retail Law Section 43(2) and Section 38. Disconnections of people requiring life support equipment are extremely serious given the risk of fatality.[7] Wrongful disconnections are unacceptable—the practice of disconnection from an essential service is fundamentally inappropriate given the significant harm caused.[8] Retailers having hardship policies in place and obtaining explicit informed consent are important consumer protections requiring serious deterrents to prevent breaches.

14. Are there additional provisions that could be added to the list in Appendix A?

Yes. As mentioned above, misleading marketing practices are not currently included, but should be. Multiple recent reports[9] have highlighted the consumer harm caused by such practices and the negative impact this has on the efficient operation of the market and the ability of consumers to reasonably access energy services—three of the principles recommended in the consultation paper.

The failure of retailers to comply with their customer hardship policies has resulted in recent enforcement action by the AER[10] and breaches should also be subject to higher penalty amounts to prevent consumer harm. The penalty

[7] This case study from New Zealand is a grim reminder of the worst consequences of disconnection: NZPA and Fairfax Media (2009). Cutting power 'a factor in Muliaga death.' Available at: http://www.stuff.co.nz/national/640942/Cutting-power-a-factor-in-Muliaga-death

[8] Consumer Action (2015). *Heat or Eat: Households should not be forced to decide whether they heat or eat.* Available at: https://policy.consumeraction.org.au/2015/08/28/the-real-stories-of-victorians-forced-to-choose-to-heat-or-eat/

[9] These include the ACCC Retail Pricing Inquiry preliminary report, AEMC 2018 Retail Energy Competition Review Final Report. ESC's Victorian Energy Market Report 2016-17 and the 2017 Independent Review of the Electricity and Gas Retail Markets in Victoria

[10] AER (2017). *Infringement notices issued to Origin Energy for alleged failure to offer hardship assistance and wrongful disconnection.* Available at: https://www.aer.gov.au/retail-markets/compliance/enforcement-

currently charged for this infringement is miniscule when compared to the revenue of a tier one retailer. How many customers may have been denied hardship assistance to maintain access to their essential service, owing to the inadequacy of the penalty?

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?*

Yes, it is important that infringement notices are available to the AER. As noted in the consultation paper the notices can result in efficiencies for both businesses and the AER and will likely enable more enforcement action in the long-term interests of consumers.

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

We agree with this methodology which is established as best practice.

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

We support the AER who have requested the ability to improve enforcement work in this area. As above we view infringement notices as useful enforcement tools and agree that the maximum amount be set at one fifth of the maximum civil penalty.

19. *Do you agree that this description reflects the changes that would be needed to introduce a two-tier civil penalty regime in the national energy laws?*

As stated above, a preferable model would be to raise the civil penalty amounts across all provisions to align with the penalty amounts relevant to the ACL. The process of deciding which tier of penalty should apply to each provision would be unnecessary and burdensome. As described in the consultation paper, the AEMC would have to make recommendations around new or amended provisions and where they would sit in a two-tiered system. This would then have to be considered in each instance by the COAG Energy Council. These organisations currently have busy work programs and thought should be given to reducing administrative burdens.

Universal maximum penalty amounts at rates aligned with the ACL would not be utilised in their maximum amounts in all instances as the AER and Courts would be able to follow guidelines or make decisions to ensure infringement notices and civil penalty amounts are proportionate to the breach. Taking this alternative approach of aligning all provisions to one penalty rate aligned with ACL levels instead of creating a two-tiered system would improve enforcement tools for the AER more quickly, and save significant amounts for the AEMC, COAG Energy Council and stakeholder's time and resources.

Other Issues

20. *Are there other issues you would like to raise in response to this consultation?*

The COAG Energy Council should remain vigilant of the current and future enforcement needs for new energy businesses as the market transforms. These businesses may currently fall under other areas of the law but also have an impact which brings them into the ambit of the principles suggested for considering higher penalty amounts in the consultation paper. For instance, the provision of energy products and services that are not fit for purpose, (examples may include faulty home power control systems that can impact on a consumer's reasonable access to energy, or faulty residential solar power installation which impact the wider grid's performance). Our *Power Transformed*[11] report outlines principles that can be used to ensure the market transforms in the interests of all consumers.

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matters/infringement-notices-issued-to-origin-energy-for-alleged-failure-to-offer-hardship-assistance-and-wrongful-disconnection

[11] Consumer Action (2016). *Power Transformed: Unlocking effective competition and trust in the transforming energy market.* Available at: https://policy.consumeraction.org.au/2016/07/31/power-transformed/

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Yours Sincerely,
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