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AER Powers and Civil Penalty Regime Consultation

Energy Consumers Australia is the national voice for residential and small business energy consumers. Established by the Council of Australian Governments Energy Council (the Energy Council) in 2015, our objective is to promote the long-term interests of energy consumers with respect to price, quality, reliability, safety and security of supply.

We appreciate the opportunity to comment on the Energy Council's Senior Committee of Officials (SCO) consultation paper of June 2018 (the Paper)[1] seeking stakeholder views on two recommendations of the 2013 Review of Enforcement Regimes under the National Energy Laws[2], namely:

- 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
- 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).

This letter sets out our general comments regarding the Paper. Our specific responses to the questions in the Paper are included in the **Appendix**.

Energy Consumers Australia supports the AER being given a power to compel individuals to appear before it to give evidence. This extension of the AER's powers, which is currently restricted to written information and documents, is analogous (but broader than) the Australian Competition and Consumer Commission's (the ACCC) powers under section 155 of the *Competition and Consumer Act (Cth)* 2010. They will allow the AER to:

- obtain unedited evidence directly from individuals;
- remove the need to rely on documentation for answers, particularly for technically complex questions which may require additional explanation; and
- enable timelier collection of information.

The extension of the AER's powers for enforcement purposes was specifically endorsed by the ACCC in the Preliminary Report of its Retail Electricity Price Inquiry (the ACCC Inquiry).[3]

We also support the proposed changes to the civil penalty regime under the National Energy Laws set out in the Paper. Currently, civil penalties are low (for a natural person up to $20,000 and a corporation

[1] http://www.coagenergycouncil.gov.au/publications/energy-market-reform-bulletin-no44-aer-powers-and-civil-penalty-regime-consultation.

[2] http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Review-of-Enforcement-Regimes-under-the-National-Energy-Laws-Final-Report.pdf

[3] http://energyconsumersaustralia.com.au/publication/accc-electricity-supply-pricing-inquiry-preliminary-report-response-submission/

up to $100,000) with the exception of electricity wholesale market rebidding. In our view, these penalties do not sufficiently encourage better consumer outcomes through compliance with National Energy Laws.

Of course, civil penalty regimes alone will never be adequate to ensure the best possible outcomes for consumers. There remains a need for a bigger, systematic package of market reforms as we have proposed in our submissions to the ACCC Inquiry.[4] After a 10-year period where electricity prices have doubled, households and small businesses are doing everything they can to bring their bills down. These small consumers are telling us they want better information and tools and advice to get control over their costs.[5]

In addition to the proposals in this Paper, more holistically the culture of the energy sector needs also to be focused on better consumer outcomes. In our view the essence of the Australian Prudential Regulator Authority's report into the Commonwealth Bank of Australia (CBA) applies equally in the energy sector.[6] In particular we note the relevance of the following comments.

> *CBA's focus on financial risks was not matched by a strong 'risk champion' for operational, compliance and conduct risks. Risk management in these areas was dominated by a 'tick the box', process-driven mentality, which meant that potentially serious non-financial risk issues were not identified early and addressed. CBA's compliance function was under-developed, as was its framework to manage conduct risk.*
>
> *The treatment of customers is critical for CBA's reputation and public standing. CBA's focus on aggregate customer satisfaction survey results reinforced a 'good news' story that the Board and management were predisposed to hear. Alarm bells from the treatment of aggrieved customers, which should have alerted CBA to serious shortcomings in customer outcomes, did not sound loudly.*
>
> *These various failings have culminated in a dilution of the 'voice of risk' and the 'customer voice', which did not provide a sufficient counterweight to a strong and mature 'voice of finance' in ensuring sound risk and compliance outcomes.*

If you have any questions regarding our submission, please contact Energy Consumers Australia on 02 9220 5500 or sabiene.heindl@energyconsumersaustralia.com.au.

Yours sincerely,

Sabiene Heindl

Director, Strategic Engagement

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[4] http://energyconsumersaustralia.com.au/publication/accc-electricity-supply-pricing-inquiry-preliminary-report-response-submission/.
[5] http://energyconsumersaustralia.com.au/publication/energy-consumer-sentiment-survey-findings-december-2017/
[6] http://www.apra.gov.au/AboutAPRA/Documents/CBA-Prudential-Inquiry_Final-Report_30042018.pdf.

Appendix - Issues Raised

The Paper discusses a number of specific issues. We have responded to these below.

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?**

The AER should be able to use its new power across all of its functions and powers as this will ensure that the benefits of compelling individuals to appear before it and give evidence can be used extensively, including in enforcement and economic regulation. In addition, this creates consistency with the current national energy laws.

The focus of the ACCC's recommendation was wholesale market monitoring. However, the evidence presented in the Preliminary Report of the ACCC Inquiry reveals that all elements of the supply chain are experiencing unacceptable sustained cost increases. Accordingly, the regulator needs full powers to inquire into the conduct of all market participants, even those subject to economic regulation.

Consideration could also be given as to how the new power is exercised and whether it is only appropriate to exercise the power where it has "reasonable grounds". For example, the ACCC's Guidelines state the following.[7]

> *The ACCC does not use its powers under s. 155 to conduct a 'fishing expedition' for information, documents or evidence. It does not, and cannot, issue a s.155 notice unless the ACCC, its chairperson or deputy chairperson has a 'reason to believe' that a person is capable of furnishing relevant information, producing relevant documents or giving relevant evidence that relates to the subject matter of the notice. This is distinct from a belief that a person is capable of providing information, documents or evidence that will establish or is likely to establish a contravention.*

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?**
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 AER should be able to use information collected in relation to any of its powers and functions. This will be consistent with its powers to collect the information and will overcome any confusion about the use of the information.

[7] https://www.accc.gov.au/system/files/1119_ACCC%20Guidelines-use%20of%20section%20155%20powers_FA4_January%202018-2.pdf.

We understand that the carve out in Question 2 relates specifically to the limitation of the AER only using information obtained in relation to its wholesale market monitoring powers to only be used for the purposes of that function. We suggest that good regulatory practice should make this restriction apply to all information obtained, that is, use should be restricted to the function of the AER under which it was obtained.

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

The existing penalties in national energy laws for failing to provide information to the AER should apply to the AER's new power if granted. This creates a consistency of approach that is appropriate for powers of this kind. Therefore, legislative amendments should include that a natural person who refuses to appear before the AER, refuses to provide information, or provides false or misleading information, commits such an offence.

We also agree that the offence provision penalty amounts (currently $2,000 and $10,000 for individuals and corporations respectively) should be increased in line with changes in the value of money (CPI indexation).

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

We agree that the AER should be able to require evidence to be given on oath or affirmation. This is consistent with most powers to compel and give evidence and reinforces the importance of the candour of the information that is being provided.

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?**
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?**

Individuals compelled to provide oral evidence should be able to exercise privilege against self-incrimination for criminal offences. As the Paper notes "…the privilege against self-incrimination is enshrined in common law in Australia."

That said, we also agree that the national energy laws should be clarified such that a penalty privilege cannot be claimed in respect of the AER's information gathering powers, including the new power to compel people to appear and give evidence. There is a level of uncertainty in current law as to whether this is generally the case.

We note the Paper's contention that the ability to claim a penalty privilege for civil penalties could significantly undermine the AER's ability to use the proposed new powers and existing information gathering powers.

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?

The AER should be required to produce guidelines on the use of its new information collection powers. This is important as it will inform parties about the scope of the new powers, how they will apply in a practical sense, and their implications. We note that the ACCC has guidelines available on its website for its s155 powers[8] which usefully include the procedures to be followed by the ACCC taking into consideration the value of the information to the ACCC's investigation and the burden of the notice on the recipient.

Ideally, the AER's guidelines should contain high level principles that focus on achieving optimal outcomes and allow flexibility, rather than being highly prescriptive. The guidelines should not create limits on how the AER exercises its power and uses any information obtained. We would also encourage the AER to review the guidelines through the metrics of outcomes to ensure that the guidelines and the practice of the AER in relation to its new information collection powers are consistent with their intended purpose.

10. Do you agree the provisions described above should be extended to the AER's new power?
11. Are there other provisions in the national energy laws or similar laws that should be applied to the AER's new power?

The extension of the existing provisions as set out in the Paper appears reasonable and appropriate. Particularly, if a person is not capable of providing that information then it would constitute a reasonable excuse.

As this is a new power, we recommend that the Energy Council conduct a review of the operation of the powers no less than three years after they are first exercised by the AER, or six years after coming into force, whichever is the earlier.

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

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?
13. Are there other principles that could be used?
14. Are the civil penalty provisions identified in Appendix A appropriate to attract the higher civil penalty amount?
15. Are there additional provisions that could be added to the list in Appendix A?

The proposed framework for deciding whether a provision of the National Energy Laws should attract the higher civil penalty amount ($1,000,000) is framed as whether a breach would be particularly significant having regard to the following:

- the efficient investment in, and efficient operation of the energy market;
- the reliability, security and safety of supply in the electricity or gas system;
- the long-term interest of consumers and their ability to reasonably access electricity and gas services; and
- consumer harm.

[8] https://www.accc.gov.au/system/files/1119_ACCC%20Guidelines-use%20of%20section%20155%20powers_FA4_January%202018-2.pdf.

We understand that these will be utilised as guiding principles by the Australian Energy Market Commission.

We support an approach where the size of the penalty is proportional to the harm suffered. While we agree with the overall framework for decision making, we would suggest that the long-term interests of consumers and consumer harm should be at the top of the list.

In terms of the civil penalty provisions proposed in Appendix A of the Paper, these appear broadly appropriate. Under the NERL it is proposed these relate to:

- retailer and distributor obligations regarding life support;
- retailer and distributor obligations regarding the de-energisation of small customer premises;
- customer hardship policies; and
- explicit informed consent.

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?

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

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

Infringement notices are critical tools for the AER to encourage compliance and provide a lower cost deterrent. These are beneficial for consumers as ultimately all costs in the market will be borne by them.

Therefore, if additional civil penalty provisions attract the higher maximum penalty amount (up to $1,000,000), then it is appropriate that the AER should have the ability to issue infringement notices for breaches of those provisions (up to $200,000). We are supportive of increasing infringement notice amounts in line with other regimes at 20 per cent of the relevant civil penalty amount.

Finally, in circumstances where the AER is of the view that the application of infringement notices to rebidding provisions would assist its enforcement, we agree with this proposition. This would remove the need for the AER to take court proceedings for breach of these provisions.

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?

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

We think it prudent that the National Energy Laws should be amended to create a two-tier civil penalty regime, with the regulations setting out the clauses that attract the higher and lower civil penalty amounts. This will provide ongoing flexibility for the civil penalty regime to ensure that it remains fit for purpose into the future.

Finally, we note that it should be clear that any civil penalties sought against networks should not be able to be passed through to consumers as part of a network's regulated revenue cap.