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Via email: GPTSecretariat@industry.gov.au

Re: Proposed Classification of Tiers for the reform of the AER Civil Penalty Regime

The Australian Pipelines and Gas Association (APGA) welcomes the opportunity to comment on the COAG Energy Council consultation Proposed Classification of Tiers for the reform of the AER Civil Penalty Regime.

APGA is the peak body representing Australasia's pipeline infrastructure, with a focus on gas transmission, but also including transportation of other products. Our members include owners, operators, constructors, advisers, engineering companies and suppliers of pipeline products and services. APGA's members build, own and operate the gas transmission infrastructure connecting the disparate gas supply basins and demand centres of Australia, offering a wide range of services to gas producers, retailers and users. The replacement value of Australia's gas transmission infrastructure is estimated to be \$50 billion.

A stable, predictable regulatory framework is vital to maintaining the attractiveness of the Australian energy sector as a destination for investment. It is in this context that APGA wishes to make a few brief comments, as the powers the AER has at its disposal have significant implications for the perceived stability, consistency and fairness of the regulatory framework.

In this submission, APGA will limit its comments to one key issue in the consultation: the classification of particular civil penalty provisions.

Classification of particular civil penalty provisions

APGA's key concern with the proposed classification of particular civil penalty provisions is the move away from the views expressed by policy makers in the Explanatory Note for the AER National Energy Laws Enforcement and Penalties Framework Consultation Package in November 2019, which stated:

"At this stage, the default position is that all existing penalty provisions, other than the rebidding provisions, and the RRO provisions, will be subject to the new tier 3 penalty rates. ... This is reflected in the draft regulations." (p.7).

APGA continues to hold the view that all existing penalty provisions (other than the rebidding provisions) should be subject to the new tier 3 penalty rates. No evidence

has been presented to suggest that there has been any pattern of deliberate or widespread breaches of the current civil penalty provisions that would warrant their assignment to a higher tier.

Accordingly, APGA would welcome additional information demonstrating not only what has changed in the period since November 2019 that warrants the inclusion of such breaches in the higher tiers, but also additional information on what behaviour policy makers are seeking to deter with such high penalties.

By way of illustration (not exhaustive) civil penalties proposed for tier 2 that would be more appropriately included in tier 3 include: the civil penalty provision under Section 56 of the NGL “Compliance with Regulatory Information Notice” (RIN); and the civil penalty provision under Rule 112 of the NGR “Responses for requests for access to pipelines”.

Under tier 2, the maximum proposed penalty for a corporation is \$1.435 million (up from \$1m currently); with the possibility of an additional \$71,800 (up from \$50k currently) for every day during which the breach continues. For an administrative breach such as being overdue in responding to a RIN, such penalties seem excessive and APGA would like to see more information on how these figures were determined. We are not aware of failure to comply with a RIN by the prescribed deadline being something that occurs very often, if ever.

We again note that the impact of such a breach would be very low if it did occur, and easily remedied. RINs are used by the regulator (and other government entities) to collect information when it is making a regulatory determination about a business and annually throughout the regulatory period. This is information for which – although important – there is no immediate time urgency relative to daily market operations such as specific commercial transactions or end of day settlements.

Also, even a relatively minor systems failure could lead to the provision of the requested information being delayed – potentially triggering the suite of penalties.

A similar point holds in the case of responding to requests for access to pipelines. While missing the deadline for a response is undesirable, this is information for which there is no immediate time urgency relative to daily market operations, so the direct market impact will be small.

In making this point, APGA is not downplaying the importance of ensuring that market participants comply with such provisions. A clear and enforceable civil penalty regime is important for the proper functioning of the market and the underlying regulatory framework. We also support updating the current levels of civil penalties to account for inflation since they were first enacted, and to provide for ongoing inflation adjustments going forward. However, we point out that the penalties under tier 3 are themselves significant, and are proposed to be increased quite significantly (from \$100k to \$170k for corporations; and the possibility of an additional \$17k per day – up from \$10k – for every day during which the breach continues).

Similar questions arise in relation to the recommended assignment of penalties to tier 1. The proposed maximum penalty under tier 1 is \$10m for a corporation; under which a large number of breaches have been recommended for inclusion.

For example, the civil penalty provision under Rule 137 of the NGR “Maintenance of confidentiality”. This is assigned to Tier 1 but ‘consumer harm’ and, specifically ‘inappropriate disclosure of consumer data’ is allocated to Tier 2 in the draft concepts table. It is not clear why this type of breach requires a penalty of \$10m and cannot be assigned to Tier 2.

APGA would welcome the opportunity to engage further on this matter. If you would like to discuss any of these issues, please contact APGA’s National Policy Manager, Andrew Robertson on 02 6273 0577 or at arobertson@apga.org.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Steve Davies', with a stylized flourish at the end.

STEVE DAVIES
Chief Executive Officer