

Level 17, Casselden
2 Lonsdale Street
Melbourne Vic 3000
GPO Box 520
Melbourne Vic 3001
tel: (03) 9290 1800
www.aer.gov.au

Our Ref: AER200996
Contact Officer: Libby Darwin
Contact Phone: 0408 696 164

4 August 2020

Governance Project Team Secretariat
Department of Industry, Science, Energy and Resources
GPO 2013
CANBERRA ACT 2601

By email: GPTSecretariat@industry.gov.au

Dear Sir/Madam

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

The Australian Energy Regulator (AER) welcomes the opportunity to make public comment on the Governance Project Team consultation paper on the proposed classification of civil penalty provisions under the National Energy Laws.

The AER makes this submission to provide support to the concepts featured in the Decision Matrix and Concepts Table, which were used in reaching the proposed classifications now made public. These concepts reflect the National Energy Objectives set out in, and which underpin, the National Electricity Law, National Energy Retail Law and National Gas Law respectively.

We also wish to note that many provisions were classified so as to give effect to the recommendations of the ACCC Retail Electricity Pricing Inquiry and Gas Inquiry respectively.

If you would like to discuss this submission, please contact Libby Darwin on 0408 696 164 or libby.darwin@er.gov.au.

Yours sincerely



Clare Savage
Chair

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

The AER welcomes the opportunity to publicly comment on the proposed classification of the civil penalty provisions. The AER strongly supports the proposed position as being necessary to achieve specific and general deterrence of breaches of the National Energy Laws.

The AER has been involved in the development of the proposed tiers, along with the Australian Energy Market Commission, Australian Energy Market Operator and Energy Consumers Australia.

The proposed classification of the civil penalty provisions will align Australia's energy laws more closely with other legislation for the regulation of markets and business conduct. Prescribing consequences that are consistent with other laws for business and market regulation is essential for achieving effective deterrence in energy markets.

It should be noted that the maximum penalty for each tier will reflect the penalty for the worst possible conduct in breach of provisions in that tier. The appropriate penalty in an individual litigation is a matter for judicial discretion.

Decision Matrix and Concepts Table

The Decision Matrix reflects the broad categories of conduct that are intended to fall within each Tier. Those concepts are appropriately placed:

Tier 1

Consumer Harm Type 1

This type of conduct draws strong parallels to the conduct proscribed by the Australian Consumer Law, and has an equivalent penalty attached accordingly. This includes conduct that may endanger injury or death to consumers or cause significant loss.

Adverse Market Impact

This type of conduct draws strong parallels with the provisions of Part IV of the *Competition and Consumer Act 2010*, and has an equivalent penalty attached accordingly. Most provisions concern unilateral conduct that are likely to compromise the supply of energy to consumers, and the price paid for that supply.

Supply Security and Reliability

At its most serious, this type of conduct can result in catastrophic consequences such as black system events, which fundamentally threaten the integrity of the energy system. The highest penalty level is therefore appropriate for this category of conduct.

Unacceptable Market Participant Behaviour:

Conduct that may result in financial gain must have consequences reflective of that gain, such that the penalty is not merely a cost of doing business. The ability to penalise a corporation up to three times the value of the benefit, or 10% of its annual turnover, for this type of conduct is essential to achieving specific and general deterrence.

Tier 2

Consumer Harm Type 2

Conduct that adversely affects consumers, but that is likely to be less serious than having detrimental effects on supply or health, is placed within Tier 2. The AER is mindful of the likely harm caused by each provision in apportioning the appropriate maximum penalty.

Market Administration

This conduct relates to the keeping of information that may be necessary for regulators to access from time to time, but is less fundamental to decisions affecting the security of the system and supply.

Inappropriate Market Participant Behaviour

This conduct relates to the provision of information to regulators that is of a more routine nature than the specific requests referred to under 'unacceptable market participant behaviour'. The importance of this type of information is reflected in the maximum penalty for Tier 2 breaches.

Tier 3

In classifying the civil penalty provisions, the AER took a top-down approach in accordance with the method proposed by the Decision Matrix. Provisions that did not fall within the concepts set out in Tier 1 or 2 will not be specified as such in the Regulations, and will remain at the Tier 3 level of penalty. These provisions are largely administrative.

Retail Electricity Pricing Inquiry (REPI)

The AER also wishes to highlight that the proposed classification gives effect to recommendation 42 of the Australian Competition and Consumer Commission (ACCC)'s REPI final report in 2018.

Recommendation 42 noted that certain civil penalty provisions across the NEL, NER, NERL and NERR attract the highest category of penalties. These provisions relate to:

- information required for projected assessment of system adequacy
- limitations on generators' technical parameters—requirements only apply in certain circumstances
- key requirements that generators must meet, regardless of the circumstances of their plant
- the requirement to advise AEMO if a situation changes, and keep AEMO continuously informed
- obligations with respect to life support customers
- wrongful disconnection by a retailer or network service provider
- requirement to implement hardship policy
- explicit informed consent requirements for certain transactions

The full list of those provisions can be found in the COAG Energy Council's *AER Powers and Civil Penalty Regime Consultation Paper* — Appendix A¹, and are referenced in the REPI final report.

Gas Inquiry

A recommendation of the ACCC's Gas Inquiry in 2018 was also reflected in the proposed classification of provisions relating to the transparency of Bulletin Board information to be supplied to AEMO.² Provisions relating to the Bulletin Board reporting obligations were categorised in Tier 1 or 2 accordingly.

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

² ACCC and Gas Market Reform Group Joint Recommendations – Measures to improve the transparency of the gas market – 2018 - p8 <http://www.coagenergycouncil.gov.au/publications/measures-improve-transparency-gas-market-consultation>