10 August 2020

COAG Energy Council
Governance Project Team Secretariat

Submitted via email: GPTSecretariat@industry.gov.au

Dear Governance Project Team

Re: Reform of the Australian Energy Regulator Civil Penalty Regime

CitiPower, Powercor and United Energy appreciate the opportunity to comment on the draft Concepts Table and Decision Matrix and proposed classification of civil penalties published by the Council of Australian Governments (COAG) Energy Council on 13 July 2020.

Under the National Electricity Law (NEL) and National Electricity Rules (NER), a large number of provisions applying to Victorian electricity distributors are currently civil penalty provisions, and the way in which these provisions are classified following the reforms to the civil penalty regime will have a significant bearing on the enforcement regime applying to the businesses.

We have significant concerns with the COAG Energy Council's proposed approach to classifying civil penalties into the three penalty tiers following the amendments to the NEL. In particular, the nature of civil penalty provisions in the NEL and NER varies considerably in terms of the seriousness and potential consequences of breaching them, as well as the level of specificity and precision with which the relevant obligations are set out. We consider that the proposed approach fails to adequately take this into account, contrary to both accepted principles relevant to developing an enforcement regime and prior views set out by the COAG Energy Council Standing Committee of Officials (SCO), resulting in a disproportionate application of civil penalties to distributors under the NEL and NER.

We consider that only a small number of the civil penalty provisions in the NEL and NER currently applicable to us warrant a Tier 1 classification, with the most being more appropriately classified as Tier 2 or 3.

Principles for determining maximum civil penalty amounts

The principles relevant to developing an enforcement regime are summarised in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2013 developed by the Criminal Justice Division of the Attorney-General's Department (Enforcement Guide). The Enforcement Guide states (at p. 36):

> *A maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme. A higher maximum penalty will be justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging.*

This is the approach accepted by the SCO in its 2018 consultation paper on the civil penalty regime:

> *To warrant a higher civil penalty amount for breaches of some provisions, the consequences of a breach should be quantitatively or qualitatively more serious than a breach of provisions attracting a lower penalty.*

The Enforcement Guide also provides (p. 38, footnotes excluded):

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General penalty provisions should be avoided. For example, a provision stating that 'a contravention of this Part is punishable by a fine of 50 penalty units' would generally be unacceptable. These provisions make it more difficult for the reader to identify the relevant penalty and may make it difficult to convey the relative seriousness of the particular contravention.

As discussed below, these principles are not reflected in the draft Concepts Table and Decision Matrix or the proposed classification of civil penalty provisions published by the COAG Energy Council.

Draft Concepts Table

There are a number of ways in which the draft Concepts Table could be clarified and improved to better reflect the NEL and NER, and the policy objectives of the civil penalty regime.

First, there should be more express links to the seriousness of breach drawn in each of the 'concepts', with only the most serious breaches (i.e. those with significant consequences) being classified as Tier 1, and some consideration given to the incentives to breach. Some specific instances where these issues arise in the Concepts Table are outlined in the table below, together with some examples of disproportionate maximum penalties being applied as a consequence.

Concept	**Concern**	**Examples of resulting issues with draft classifications**
Consumer Harm (Type 1)	This concept is intended to capture the 'most severe' types of consumer harm. However, the consequences of 'reduction in consumers' fundamental right to access' and 'financial harm or economic loss', which are provided as examples of Consumer Harm (Type 1), do not have a link to the severity of consequence that should be required for a Tier 1 classification. They should be amended to capture, for example, a 'significant' reduction in consumers' fundamental right to access and 'serious' or 'significant' financial harm or economic loss.	Many of the obligations on distributors (as 'Metering Coordinators') under Chapter 7 and the transitional provisions in Chapter 11 related to metering are classified as Tier 1 on the basis breach would cause financial harm or economic loss. However, the financial harm or economic loss that might arise cannot be said to be serious or significant and we therefore consider the provisions should be classified as Tier 2 or 3. This is consistent with the views of the SCO set out in its consultation on the civil penalty regime in June 2018,[1] where these provisions were not identified as provisions to which it may be appropriate to apply the highest maximum penalty amount.
Consumer Harm (Type 2)	The draft Concepts Table indicates that Consumer Harm (Type 2) will capture all provisions where breach may cause harm to consumers, other than those provisions considered to be Consumer Harm (Type 1). The application of a higher maximum penalty amount than that for Tier 3 should reflect that there has to be a certain level of materiality associated with the consequence of breach. For instance, the consequence of 'consumers not being informed or incorrectly informed of their rights', 'failure to comply with pre-contractual duties' and 'failure to comply with requirements regarding estimation, content and issuing of bills' may capture provisions that would more appropriately fall within Tier 3 (e.g. because the provision relates to the giving of notices, and a breach would not result in material consumer harm and can be easily remedied). There should	These issues do not raise any particular issues for distributors under the provisions of the NEL/NER that are currently prescribed as civil penalty provisions, but remain a concern in the event the Concepts Table is applied going forward.

1 SCO, *AER Powers and Civil Penalty Regime, Consultation Paper*, June 2018, Appendix A.

Concept	Concern	Examples of resulting issues with draft classifications
	be a threshold requirement for all Consumer Harm (Type 2) provisions that a breach would give rise to consumers suffering 'material' harm.	
Supply Security and Reliability	All civil penalty provisions relating to 'Supply Security and Reliability' have been classified as Tier 1, without any recognition of the incentives to contravene the provision and the relative significance of compliance with the obligations for the ability of AEMO to maintain system security and reliability. Generators are likely to have significantly greater incentives than distributors to contravene provisions designed to ensure supply security and reliability, and compliance with these provisions by generators is more important for maintaining security and reliability of supply. The Concepts Table should distinguish between the provisions with which compliance is essential to ensuring security and reliability of supply and provisions that are less important.	Whereas the SCO identified only seven of the security provisions of the NER applying to distributors as provisions that ought to be subject to the maximum penalty (specifically, clauses 3.7.2(e), 3.7.3(g), 4.8.1, 4.8.2, 4.8.9(c), 4.8.12(d). 4.8.14(b) and (d), 5.2.3(b)), the draft classification proposes almost 30 civil penalty provision applicable to us pertaining to 'Supply Security and Reliability' be classified as Tier 1. These provisions should be classified as Tier 2 or 3, with the exception only of those seven identified by SCO as warranting the maximum penalty.

Secondly, there should be a recognition in the Concepts Table that the application of significant civil penalties to general obligations the content of which are defined by reference to instruments that are not of a legislative character should be avoided. In particular, it is not clear that it is appropriate to apply a civil penalty, or at least not the highest maximum penalty, to obligations requiring compliance with a number of requirements specified in the decisions of administrative bodies such as the Australian Energy Regulator (AER) and Australian Energy Market Operator (AEMO). These include, for example, the requirements to comply with: a distribution determination (NEL, s 14B); regulatory information notices and general regulatory information orders (NEL, ss 28N and 28O); Market Management Systems Access Procedures (NER, cl 3.19(c)); the requirements of relevant power system operating procedures (cl 4.10.2(b)); applicable regulatory instruments (NER, cl 5.2.3(f)); and the electricity distribution ring-fencing guidelines. The suite of requirements imposed on us by such provisions:

- Are determined by administrative bodies, and not by the legislature. This can be contrasted with the requirements in the Australian Consumer Law (ACL) (on which regime the proposed reforms, including in particular the maximum penalty for Tier 1 civil penalty provisions, are based). All provisions of the ACL were passed into law by the Parliament, and not by the body responsible for administering the ACL (being the Australian Competition and Consumer Commission (ACCC)).
- Are typically not prepared with the level of specificity or precision desirable for obligations to which significant civil penalties attach, resulting in uncertainty about what is legally required for compliance. For example:
  - The obligation to comply with a distribution determination (NEL, s 14B) is proposed to be classified as Tier 1. What is required in order to achieve compliance with a distribution determination can be somewhat unclear given the way in which the AER currently presents its determinations. Specifically, the AER does not include a clear articulation, separate from the AER's reasons for decision, of the obligations that a distribution determination imposes. Rather, each 'determination' includes an overview with several lengthy attachments (in the last round of determinations applying to us there were 18 attachments), each of which

include reasoning and conclusions, often without any clear delineation of the relevant determination that is to have legal force and effect.

- The NER obligation requiring compliance with the electricity distribution ring-fencing guidelines prepared by the AER (NER, clause 6.17.1) is proposed to be classified as Tier 1. These guidelines are not precisely drafted, which leaves open a range of possible interpretations. In initiating its current review of these guidelines, the AER has acknowledged there have been differing interpretations of the guidelines and they could be clarified.

- The regulatory information notices issued by the AER (compliance with which is required by NEL, s 28N) are extensive and often open to a range of plausible interpretations.

Again, this is in contrast to the requirements of the ACL, which were prepared by parliamentary counsel – that is, lawyers experienced in the preparation of exact and watertight legislation for passage by the Parliament, and subordinate legislation such as regulations and proclamations – and the penalties applicable to a corporation for failure to comply with a compulsory information gathering notice issued by the ACCC under s 155 of the Competition and Consumer Act 2010 (Cth).

- Have the effect of applying the same maximum civil penalty to literally hundreds of obligations across dozens of regulator-created rules, guidelines and determinations, many of which are administrative in nature and not appropriate to subject to a civil penalty at all (let alone the highest maximum penalty), contrary to the accepted approach to applying civil penalties as outlined in the Enforcement Guideline.

It is also relevant to note that the provisions requiring compliance with a set of requirements determined by the AER, results in the body responsible for enforcement of breaches of the requirement and the issuance of infringement notices (i.e. the AER), also specifying the requirement. In moving to a national framework for the regulation of electricity and gas, the relevant State and Territory and Commonwealth governments agreed the institutional framework would include:

- the Australian Energy Market Commission (AEMC) as the body responsible for rule-making; and
- the AER as the body responsible for regulation and compliance with the rules.

This separation of functions is consistent with the approach taken to law enforcement more generally. For example, in the case of the ACL, the Parliament has made the ACL, and the ACCC is the body responsible for enforcing it; the ACCC has no ability to define the obligations. In these circumstances, it is highly inappropriate to classify provisions that require distributors to comply with requirements specified by the AER as Tier 1 civil penalty provisions.

Thirdly, the Concepts Table seeks to apply the national electricity objective (NEO) in a manner that is difficult to reconcile with the text of the NEO and its interpretation by the Australian Competition Tribunal and the Federal Court. The Contents Table makes a number of references to 'national energy objectives' in the plural and to what it identifies as the 'five' aspects of the consumer interests referred to in these 'objectives' , as though each of these aspects of consumer interests referred to in the NEO operate as discrete and separate objectives of the NEL and NER.

This is confusing in circumstances where there is single overarching NEO (being to promote the efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity).

It is also contrary to the proper interpretation of the NEO.

The Australian Competition Tribunal has concluded that, while the ultimate objective of the NEO is the long term interests of consumers in the identified aspects, the legislative premise is that these interests are served through regulation that promotes economic efficiency. The Tribunal has relevantly stated:

> *The ultimate objective reflected in the NEO and NGO is to direct the manner in which the national electricity market and the national natural gas market are regulated, that is, in the long term interests of consumers of electricity and natural gas respectively with respect to the matters specified. The provisions proceed on the legislative premise that their long term interests are served through the promotion of efficient investment in, and efficient operation and use of, electricity and natural gas services. This promotion is to be done "for" the long term interests of consumers. It does not involve a balance as between efficient investment, operation and use on the one hand and the long term interest of consumers on the other. Rather, the necessary legislative premise is that the long term interests of consumers will be served by regulation that advances economic efficiency.*

This construction is confirmed by the extrinsic material and has been affirmed by the Federal Court, which observed that '[t]he statutory phrase "for the long term interests of consumers" was a purposive expression; it qualified the preceding purpose of promoting efficiency'.

The NEO does not, therefore, encompass the pursuit of the long terms interests of consumers or any of the identified aspects thereof otherwise than by means of the promotion of economic efficiency.

Against this background, applying the NEO for the purposes of classifying civil penalty provisions would result in the classification of provisions to one of the three tiers on the basis of the significance of the impact of breach on economic efficiency and, by reason of that, on the long term interests of consumers. It is far from clear that this is what is contemplated by the Concepts Table. The Concepts Table appears to suggest that the NEO is to be used in some way to classify civil penalty provisions to one of the three tiers on the basis of whether or not a breach would directly affect one or more of the aspects of consumer interest identified in the NEO (i.e. price, quality, reliability and security of supply of electricity, and the safety, reliability and security of the national electricity system).

The Concepts Table could be simplified by identifying up front the promotion of the NEO as the objective of the NEL and NER and thus the civil penalty regime, then setting out for each 'concept':

- the high level summary of the kinds of provisions it is intended to capture; and
- the consequences of breach, or objectives of achieving compliance, that are relevant to classifying a provision as falling within the 'concept' (and thus the associated tier).

Finally, we note that the reference to 'supplementary services' in the 'Consumer Harm (Type 2)' concept is unclear and could be clarified.

Draft Decision Matrix

The draft Decision Matrix is deeply flawed and we do not consider it should be used to allocate civil penalties to Tier 1, 2 or 3 under the new civil penalty regime.

Specifically, the Decision Matrix does not contemplate a discretion to classify a civil penalty provision to a lower order tier based on the seriousness of the contravention or consequences of breach. Under the Decision Matrix, if a provision is found to fall within Tier 1 based on the Concepts Table, the provision is allocated to Tier 1, without any regard to the concepts set out for Tiers 2 and 3. This may lead to unintended and inappropriate outcomes, in circumstances where (as explained above) the Concepts Table provides for civil penalty provisions to be Tier 1 where they have identified

consequences that are not characterised by any particular quality or quantum of seriousness, with provisions that are less significant and where a breach has less serious consequences, being prescribed as Tier 1 civil penalty provisions.

The Concepts Table can be applied without regard to the Decision Matrix, with the ministers determining the tier to which a civil penalty provision should be allocated based on the matters set out in the Concepts Table.

Draft classification of civil penalties

As a result of applying the draft Concepts Table and Decision Matrix, the draft classification published by the COAG Energy Council classifies a significant number of civil penalty provisions as Tier 1 provisions where this classification is not warranted based on the seriousness of contravention, the incentives to breach the provision or the consequences of doing so. Some of the provisions where a Tier 1 classification is disproportionate are highlighted in the table above.

The flaws in the approach are evident in that the number of NEL/NER provisions applicable to distributors proposed to be classified as Tier 1 civil penalty provisions is almost five times higher than the number of provisions that to which the SCO contemplated that it may be appropriate to apply the highest maximum penalty in its June 2018 consultation paper. The AEMC and AEMO were consulted in respect of this list, and the AER expressly agreed with the provisions identified by the SCO.

In addition to the issues with the draft classification emerging as a result of the matters raised above, we have identified the following issues with the draft classification proposed by the COAG Energy Council (based on the proposed Concepts Table):

- We disagree with the classification of s 28O of the NEL as a Tier 1 provision. Section 28O requires compliance with general regulatory information orders. These can apply to regulated network service providers of a specified class and are thus 'general' such that, in accordance with the Concepts Table (which provides for 'failure to comply with general reporting obligations to a regulator' to be classified as Tier 2), section 28O should be classified as Tier 2 rather than Tier 1.
- There are a number of civil penalty provisions applying to us that do not appear to have been included in the draft classification. These are set out in Attachment A to this submission. We assume this is because all of these provisions are intended to be classified as Tier 3. If this assumption is incorrect, we ask that COAG Energy Council consult on the proposed classification of any civil penalty provisions where the classification is proposed to be a tier other than Tier 3, prior to the Regulations being amended.
- There are a number of NER provisions in respect of which a rule change determination has been made by the AEMC, but the new rule is not yet in force (for example, rule changes resulting from the National Electricity Amendment (Five Minute Settlement) Rule 2017 No. 15). It would be useful if the COAG Energy Council could provide an indication of whether:
  - any resultant new obligations will be civil penalty provisions and if so, provide an indication of the proposed classification; and/or
  - any of the amended obligations will (if they are not currently) become civil penalty provisions, and/or be classified to a different tier as a result of the amendments,

  and provide an opportunity to comment on that proposed classification in advance of the Regulations being amended.

If you have any queries regarding the above, or would be assisted by any further information, please contact Elizabeth Carlile on 0419 878 852 or ecarlile@powercor.com.au.

Yours sincerely

Brent Cleeve
Head of Regulation
CitiPower, Powercor and United Energy

Attachment A:
Civil penalty provisions applying to distributors that do not appear in the draft classification

	Provision	Obligation
1	NER, cl 3.6.3 (b1)	Calculation of site-specific distribution loss factor
2	NER, cl 4.3.3 (c)	Communications to AEMO agents, delegates, service providers
3	NER, cl 5.13.1 (a)(2)	Distribution annual planning review - scope
4	NER, cl 5.13.1 (d)	Distribution annual planning review – requirements
5	NER, cl 5.14.1 (a)(1) – (a)(2) & (b)	DNSP to conduct joint planning with TNSP
6	NER, cl 5.14.1 (d)	Joint planning obligations of DNSP and TNSP
7	NER, cl 5.15.2 (b)	RIT-T proponent to consider credible options in applying regulatory investment test
8	NER, cl 5.15.2 (c) & (d)	RIT-D proponent to consider credible options in applying regulatory investment test
9	NER, cl 5.16.3 (a)	Investments subject to the regulatory investment test for transmission - exceptions
10	NER, cl 5.16.4 (a)	Regulatory investment test for transmission procedures
11	NER, cl 5.7.4	Routine testing of protection equipment
12	NER, cl 5.7.5 (a) & (b)	Notification of testing on own plant requiring changes to normal operation
13	NER, cl 5.7.5 (c) & (d)	Review and AEMO approval of proposed test
14	NER, cl 5.7.5 (h)	Notification of completion of test and report on test
15	NER, cl 5.8.1	Requirement to inspect and test equipment
16	NER, cl 5.8.3(b)	Control and protection settings - consultation with AEMO and other Registered Participants
17	NER, cl 5.9.1	Voluntary disconnection
18	NER, cl 5.9.2	Decommissioning procedures
19	NER, cl 5.9.3(c)	NSP must comply with AEMO
20	NER, cl 5.9.4 (d)	Compliance with directions from AEMO to disconnect facilities
21	NER, cl 5.9.5 (b)	Compliance with directions from AEMO to disconnect facilities during emergency
22	NER, cl 5.9.6	Obligation to reconnect