



10 August 2020

COAG Energy Council
Governance Project Team Secretariat
GPO Box 2013
Canberra ACT 2601

Submitted by email: GPTSecretariat@industry.gov.au

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

Origin Energy Limited (Origin) welcomes the opportunity to provide comments on the COAG Energy Council's Proposed Classification of Tiers for the reform of the Australian Energy Regulator (AER) Civil Penalty Regime.

Origin understands the overarching purpose of the reform is to strengthen the existing enforcement regime while also providing flexibility around the application of maximum penalty rates. In particular, the three-tier structure is intended to ensure penalties are applied in a manner that is proportionate to the potential harm arising from contraventions of different civil penalty provisions. However, Origin is concerned the framework may not achieve the principle of proportionality in practice given the proposal to classify most civil penalty provisions as either Tier 1 or 2.

The national electricity and gas rules are overwhelmingly functional rather than protective. This means there is scope for inadvertent non-compliance due to human error in data entry, miscommunication of complex data, misunderstanding of the complex information and/or technical limitations. But detrimental outcomes such as those described under the Tier 1 and 2 classifications are only likely to arise under very specific circumstances or where there are widespread breaches by multiple entities.

The scope for enforcing penalties proportionate to the nature of a breach will be markedly reduced where Tier 1 or 2 classifications are applied to such rules. This is largely due to the fact that infringement notice penalty rates will increase significantly under the new classifications (from \$20k to \$67.8k), commensurate with the increase in maximum civil penalty rates.

Under the AER's existing Compliance and Enforcement Policy, infringement notices are an enforcement tool that can be used in circumstances where conduct may be less serious, isolated and/or levels of harm/detriment are low.¹ Applying infringement notices for civil penalty provisions classified as Tier 1 or 2 under the new framework is now unlikely to be a proportionate response for equivalent low grade breaches (given the higher penalty rate), and when considering the reputational damage that accompanies such notices.

To address this, Origin considers Tier 1 and 2 classifications should only be applied to civil penalty provisions where there is evidence of serious or systemic issues and severe penalties are necessary to act as a disincentive for wrongful conduct. This approach is consistent with our view that the existing framework has generally promoted a high level of compliance across energy markets for the benefit of consumers, while also minimising the associated regulatory burden for market participants.

¹ AER, "Compliance and Enforcement Policy", 10 July 2019, pg. 10.

Where Tier 1 and 2 classifications are applied to a broader suite of civil penalty provisions, it will be important to ensure the enforcement framework continues to provide the AER with the flexibility to remediate breaches in a collaborative manner with participants prior to moving towards a more judicial response. We also recommend a subsequent review of the AER's Compliance and Enforcement Policy to reflect that the use of infringement notices may now need to be associated with higher order breaches relative to the existing framework.

If you wish to discuss any aspect of this submission further, please contact Shaun Cole at shaun.cole@originenergy.com.au or on 03 8665 7366.

Yours Sincerely,

A handwritten signature in blue ink, consisting of a series of connected loops and a vertical line at the end, resembling the name 'Steve Reid'.

Steve Reid
Group Manager, Regulatory Policy