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COAG Energy Council Secretariat
Department of Environment and Energy
GPO Box 787
CANBERRA ACT 2601

By email: energycouncil@environment.gov.au

Dear Sir/Madam

**AER National Energy Laws Enforcement and Penalties Framework –
Consultation Package**

The Australian Energy Regulator (AER) welcomes the opportunity to comment on the Senior Committee of Officials' (SCO) consultation paper on the *National Energy Laws enforcement and penalties framework reforms* with respect to AER powers and the civil penalty regime.

The AER strongly supports the implementation of the tiered penalty framework, allowing for appropriate maximum penalties to be attached to various civil penalty provisions in the National Energy Laws in order to effectively achieve deterrence.

The AER also continues its strong support for the introduction of provisions giving the AER the power to compel individuals to appear before it and compel evidence, as an essential tool for the efficient conduct of investigations of potential breaches.

We consider early finalisation of a revised penalty framework as critical and note the SCO's commitment to bringing the allocation of civil penalty provisions of the National Energy Laws to the appropriate tiers for discussion at the first SCO meeting in 2020.

The attached submission addresses each of the items raised in the consultation paper in turn. If you would like to discuss any aspect of this submission, please contact Jacqui Thorpe, General Manager Compliance and Enforcement, on (03) 9290 1994.

Yours sincerely


Clare Savage
Chair

Submission on Consultation Paper: AER National Energy Laws Enforcement and Penalties Framework

The AER welcomes the opportunity to comment on the National Energy Laws enforcement and penalties framework reforms, as set out in the *Statutes Amendment (National Energy Laws) (Penalties and Enforcement) Bill 2019* (the Bill). These comments are in addition to those made in its earlier submission to the AER Powers and Civil Penalty Regime Consultation dated 29 June 2018.

Adopting a three-tier civil penalty regime in the laws

The AER strongly supports the adoption of a three-tier civil penalty regime in the laws.

The proposed regime recognises the differing levels of actual or potential harm caused by various contraventions. They are also reflective of the main objective of civil penalties, being to achieve specific and general deterrence.¹

The proposed maximum penalties for Tier 1 are in line with those for the most serious contraventions of the *Competition and Consumer Act 2010*.² It is generally accepted that effective sanctions are where the expected loss for violating the law exceeds the gain.

Infringement notice penalties, also to be categorised into tiers, will allow the AER to efficiently resolve matters where appropriate, whilst still allowing for a substantial penalty to be paid by a regulated entity whom the AER has a reasonable belief has contravened a civil penalty provision. The infringement notice penalties proposed have been set at a level that will ensure their effectiveness as an enforcement tool.

Increasing civil and offence penalty levels

The AER supports the proposed increase to civil and offence penalty levels, for the same reasons as outlined above. It also supports the indexation of these penalties in line with CPI to ensure that the penalties for each contravention achieve deterrence over time.³

The increase to other offence penalty levels relating to the AER's new and existing information gathering powers are necessary in order to give effect to those powers. It is essential that a notice recipient is compelled to comply, with the consequence of not complying, to be a significant criminal and financial measure.

Enhancing the AER's existing information gathering powers

The AER strongly supports the enhancement of its existing information gathering powers to include the ability to compel a person to appear before the AER to provide oral or written evidence.⁴ The AER will be able to use this power, in conjunction with its existing compulsory powers, in order to efficiently conduct investigations. The information gained using these powers will expedite AER decisions on the appropriate resolution of investigations, including the progression of matters to more formal enforcement outcomes such as litigation.

The information gathering powers will be strengthened by the AER's proposed ability to seek a court order requiring compliance with a compulsory notice (in addition to the criminal sanctions for non-compliance). The AER supports this provision and notes that it is in line with orders available to other regulators such as the ACCC.

¹ Section 17 of the Bill; s 73 of the NEL

² Section 6 of the Bill; s 2AB of the NEL

³ Section 32 of the Bill; s 37B of the NEL

⁴ Section 9(4) of the Bill; s 28(2)(c) of the NEL

The AER supports the inclusion of the provisions surrounding the use of information obtained through oral examinations, being for the purpose of proceedings where the information is relevant to those proceedings.⁵

Non-punitive orders

The AER supports the introduction of further non-punitive orders available against persons who have contravened the relevant provisions, and notes that the amendments are in line with recommendation 44 of the ACCC's Retail Electricity Pricing Inquiry report.⁶

Liability amendments

The AER supports the amendments in line with principles of corporate liability for acts of officers and employees common in federal legislation⁷.

Practical considerations

The AER has considered the text of the draft Bill and regulations and has not detected any drafting errors, nor does it have any concerns with practical implementation or transitional issues.

⁵ Section 9(15) of the Bill, s 28(15) of the NEL

⁶ Clause 13 of the Bill, s 62(2) of the NEL

⁷ Clause 25 of the Bill, s 86 of the NEL