

9 June 2016

COAG Energy Council Secretariat
GPO Box 9839
Canberra ACT 2601

Via email: energycouncil@industry.gov.au

Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation

Dear Secretariat

The Energy Networks Association (ENA) welcomes the opportunity to make a submission to the COAG Energy Council in response to the *Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation* published by the COAG Energy Council Secretariat on 29 May 2016.

The ENA is the national industry association representing the businesses operating Australia's electricity transmission and distribution and gas distribution networks. Member businesses provide energy to almost every household and business in Australia.

The ENA recognises that the publication of these proposed policy positions comes following an extensive prior process. In 2010, the Energy Council agreed:

"to a comprehensive review of the enforcement regimes across all the national energy laws to ensure that the interests of customers continue to be protected, and the integrity of the energy market is maintained."¹

The "national energy laws" include the National Electricity Law (NEL), the National Gas Law (NGL), the National Energy Retail Law (NERL), and associated rules and regulations².

In 2013, Allens NERA presented the Energy Council with The Review of Enforcement Regimes under the National Energy Laws. While Allens NERA found the enforcement regimes were generally effective, it recommended some areas where the regimes could be enhanced. In December 2014, the Council agreed to 11 of the recommendations from the Report and tasked officials from the state, territory and Commonwealth agencies with responsibility for energy policy with implementation. It was agreed by the Energy Council, that a staged implementation is appropriate.

Recommendation 1

With regards to Recommendation 1, officials ask:

¹ Ministerial Council on Energy Communique, 11 June 2010.

² The NEL, NGL and NERL are Commonwealth-State-Territory cooperative legislative schemes. Each national Law is set out in a statute of South Australia and applied as a law in force in each jurisdiction that participates in each cooperative scheme through legislation known as an 'application Act'. See *National Electricity (South Australia) Act 1996 (SA)*; *National Gas (South Australia) Act 2008 (SA)*; *National Energy Retail Law (South Australia) Act 2011 (SA)*.

Do stakeholders agree that the recommended definitions are appropriate for the national energy laws? If not, how should they be amended?

ENA position

The ENA has previously submitted that the need for any additional enforcement orders has not been established. In addition, the ENA position remains that community service orders, probation orders and adverse publicity orders should only be able to be issued to the corporate industry participants and not to “any person”. Officials propose that orders that can be made by a court on application by the AER should be expanded to include orders similar to those available to the ACCC under Sections 86C and 86D of the *Competition and Consumer Act*.

If a decision is made that the orders should potentially extend to individuals, then the ENA considers it essential that guidance should be provided to the courts as to the circumstances in which the orders should be so issued.

The ENA also notes that these orders will potentially apply to the relationship between a network service provider (NSP) and domestic or small business customers. These orders should not apply to transmission NSPs, who do not have a direct service arrangement with domestic or small business customers. This should be made explicit

Recommendation 7, 8 & Penalty rates into the future

Officials propose to increase the maximum civil penalty and infringement notice levels to reflect the change in the value of money since the current penalty rates were set. Officials ask:

Changes to penalty levels under comparable legislative regimes have been introduced through a single increase, however, stakeholder views are sought on what, if any, issues a single increase may present.

ENA position

The ENA does not support a proposal for an immediate increase in penalties by 57 per cent. If any increases are contemplated, then transitional arrangements should apply whereby increased penalty levels are gradually phased in over a number of years.

Further Ministerial Decision

In July 2015 the Energy Council also agreed to officials considering “how to manage penalty levels [both civil penalties and infringement notices] into the future, to ensure they maintain their real value, reflecting changes in the value of money.”

Officials are considering the frequency of future increases in penalty levels and would like stakeholders’ feedback on whether a yearly or three-yearly process would be appropriate. What are the risks or benefits of each approach?

The ENA is of the view that if penalty levels are to be increased then this should increase annually in the future, however the ENA does not have a strong preference for either annual or three-yearly increases.

Recommendation 9

Officials propose the following Ministerial Principles:

In considering whether the breach of a particular provision of the national energy laws and rules should be subject to a civil penalty, officials consider that Ministers should be guided by the following principles:

1. Will a breach of the provision materially affect the efficient investment in, and/or efficient operation and use, of the relevant energy system or market?
2. Will a breach of the provision materially affect the reliability, security and/or safety of supply of relevant energy system?
3. Noting that energy is considered an essential service, will a breach of the provision materially affect the long term interest of consumers and their ability to reasonably access electricity and gas services, or have the foreseeable potential to cause detriment to consumers?

Officials ask:

Do stakeholders agree with the coverage of the Ministerial Principles? If not, how should they be amended?

ENA position

The ENA supports the coverage of the Ministerial principles.

Officials state that the Ministerial Principles:

- will reflect the statutory objectives of the NEL, NGL and NERL with each principle including additional guidance on how the principle should be interpreted;
- will be a policy document and is not expected to appear in legislation or regulatory instruments;
- may change from time to time, through the COAG Energy Council, to ensure they remain current and reflect changes in the market.

Do stakeholders agree with the proposed form and use of the Ministerial Principles?

ENA position

The ENA agrees with the proposed form and use of the Ministerial Principles.

If further information is sought on this matter, please contact Ms. Kate Healey, Director Regulation, on 02 6272 1516 or by email on khealey@ena.asn.au.

Yours sincerely,



John Bradley
Chief Executive Officer