



10 August 2020

CoAG Energy Council Secretariat
Department of Industry, Science Energy and Resources
GP Box 787
Canberra ACT 2601

via email to GPTSecretariat@industry.gov.au

**APA Group submission to CoAG Energy Council consultation
Proposed Classification of Tiers for the reform of the Australian Energy Regulator Civil Penalty Regime**

APA Group welcomes the opportunity to comment on the CoAG Energy Council consultation *Proposed Classification of Tiers for the reform of the Australian Energy Regulator Civil Penalty Regime*.

The consultation guide addresses three themes on which APA values the opportunity to comment:

- updating the current provisions for inflation since they were first enacted, and ongoing indexation consistent with other penalty provisions;
- a system for assigning difference breaches of civil penalty provisions to different tiers based on the significance of the relevant provision; and
- the current proposal to assign existing National Gas Law and National Gas Rule civil penalty provisions to tiers.

APA supports updating the current levels of civil penalties to account for inflation since they were first enacted, and also supports ongoing adjustment for inflation over time.

APA supports the principle of the thought process that is reflected in the Civil Penalty Provisions Concepts Table and Decision Matrix. These documents, correctly in APA's view, advance the promotion of the National Gas Objective.

However, APA is concerned with an unexplained shift in policy, and the implications of that unexplained shift.

At the last opportunity for consultation,¹ The CoAG Energy Council indicated:

With some exceptions, existing civil penalty provisions will be subject to the bottom tier (tier 3).

The only exceptions identified at that time were related to the electricity market rebidding rules.

However, the current draft classification attachment to this consultation² reflects the widespread application of existing civil penalty provisions to the Tier 1 and Tier 2 categories.

The justification for this classification appears to be a view that there is a greater need for deterrence of the harmful conduct addressed by the civil penalty provisions, and that the current level of penalty is insufficient to act as an adequate deterrent.

¹ COAG Energy Council Senior Committee of Officials, National Energy Laws enforcement and penalties framework reforms - Explanatory note for stakeholder consultation, November 2019, p5.

² National Energy Laws - Civil Penalties - Draft Classification.

APA Group comprises two registered investment schemes, Australian Pipeline Trust (ARSN 091 678 778) and APT Investment Trust (ARSN 115 585 441), the securities in which are stapled together. Australian Pipeline Limited (ACN 091 344 704) is the responsible entity of those trusts. The registered office is Level 25, 580 George Street, Sydney NSW 2000.

The ACCC considers that the current civil penalty amounts are insufficient to impose a credible level of deterrence and provide meaningful consequences to businesses. Therefore, the ACCC considers that the penalties should be increased to provide the Australian Energy Regulator (AER) with a greater level of flexibility in its response to address breaches of the national energy laws.³

The concepts also reflect the objective of civil penalties, as articulated by the courts, being to provide specific and general deterrence of certain harmful conduct.⁴

Overall, the proposed changes detailed in the draft Bill and regulations will strengthen the AER's enforcement powers and the penalty regime under the national energy laws and provide a stronger deterrent against breaches of the law and rules, particularly in the case of significant breaches, or breaches that impact the integrity of energy markets.⁵

However, no evidence has been presented, including in the *ACCC Retail Electricity Pricing Inquiry Report* or the *NERA/Allens Review of Enforcement Regimes under the National Energy Laws*⁶ to suggest that there has been any pattern of deliberate or widespread breaches of the current civil penalty provisions to suggest that a greater deterrent is either required or appropriate.

In this light, APA submits that all current civil penalty provisions (save for the rebidding provisions) should be classified as Tier 3, in line with the original policy signal, until such time as ongoing monitoring demonstrates that the current level of penalty is insufficient of serve as an adequate deterrent against breaches of those provisions.

APA would support an ongoing compliance monitoring regime in this regard, combined with a regular review of compliance behaviour to support any future reclassification of civil penalty provisions, applying the classification system proposed in this consultation, as may be shown to be appropriate in the future.

APA would be pleased to discuss this submission with you at your convenience. Please contact Scott Young, Manager Regulatory, at (02) 9275 0031 or at scott.young@apa.com.au in the first instance.

Yours faithfully



Peter Bolding
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³ Australian Competition and Consumer Commission, *Retail Electricity Pricing Inquiry Report*, July 2018, p324

⁴ Civil Penalties Regime – *Consultation Guide* – Reform of the AER Civil Penalty Regime, s3.

⁵ COAG Energy Council Senior Committee of Officials, *National Energy Laws enforcement and penalties framework reforms - Explanatory note for stakeholder consultation*, November 2019, p2.

⁶ NERA Economic Consulting and Allens Linklaters, *Review of Enforcement Regimes under the National Energy Laws A Report Prepared for the Standing Council on Energy and Resources*, November 2013.