

1. OVERVIEW

The [Statutes Amendment \(National Energy Laws\) \(Penalties and Enforcement\) Bill 2020](#) (the Bill), agreed to by the Energy Ministers on 20 March 2020, is an important step in the reform of energy policy. The Bill is currently with the South Australian Parliament awaiting passage.

The Bill will amend the National Electricity Law, National Gas Law and National Energy Retail Law to provide for increased civil penalties through the implementation of a three tier penalty structure.

Through reforming the Australian Energy Regulator's civil penalty regime and powers, the Commonwealth, State and Territory Governments are sending a clear message to all Australian households, businesses and industries. That is, as the energy industry continues to evolve so too will the enforcement regime that underpins it.¹

A more flexible and sophisticated penalty regime akin to that of the Australian Consumer Law, is being established. Increasing the maximum penalties and providing for periodic indexation of those penalties, will strengthen and expand the legal tools available to the Australian Energy Regulator to carry out its role.

Courts have consistently indicated that the overarching purpose of a civil penalty regime is to promote the public interest in compliance with the law. This is achieved through the imposition of penalties which are sufficient to deter contravening behaviour. The three tier penalty structure is designed to achieve this purpose by making available maximum penalties for civil penalty provisions. These are sufficient to promote compliance with the law, and strike a balance between the following:

- (a) the National Energy Objectives;
- (b) the key objective of civil penalty regimes, being to promote the public interest in compliance with the law; and
- (c) acknowledging there is a hierarchy of potential harm arising from contraventions of different civil penalty provisions, which is reflected in the three different maximum penalty amounts.

Once the Bill is enacted, Section 2AB of the National Electricity Law (NEL), section 4A of the National Energy Retail Law (NERL) and section 3A of the National Gas Law (NGL) will provide that the relevant Regulations may prescribe each civil penalty provision into one of three tiers.² These sections prescribe the maximum civil penalty that can be imposed for a contravention of a provision in each tier.

The maximum civil penalties are as follows:

Tier 1

- (i) If the breach is by a natural person—an amount not exceeding \$500 000.

¹ *Statutes Amendment (National Energy Laws) (Penalties and Enforcement) Bill 2020*, Second Reading Speech, 3 June 2020

² If a civil penalty provision is not proscribed as a Tier 1 or Tier 2 provision by a Regulation, it will be in Tier 3.

- (ii) If the breach is by a body corporate—an amount not exceeding the greater of the following:
 - a. \$10 000 000;
 - b. if the Court can determine the value of any benefit reasonably attributable to the breach of the civil penalty provision that the body corporate, and any body corporate related to the body corporate, has obtained, 5 directly or indirectly—3 times the value of that benefit;
 - c. if the Court cannot determine the value of the benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the body corporate breached, or began breaching, the civil penalty provision.

Tier 2

- (i) If the breach is by a natural person—
 - a. an amount not exceeding \$287 000; plus
 - b. an amount not exceeding \$14 400 for every day during which the breach continues.
- (ii) If the breach is by a body corporate—
 - a. an amount not exceeding \$1 435 000; plus
 - b. an amount not exceeding \$71 800 for every day during which the breach continues.

Tier 3

- (i) If the breach is by a natural person—
 - a. an amount not exceeding \$33 900; plus
 - b. an amount not exceeding \$3 390 for every day during which the breach continues.
- (ii) If the breach is by a body corporate—
 - a. an amount not exceeding \$170 000; plus
 - b. an amount not exceeding \$17 000 for every day during which the breach continues.

In considering the classification of particular provisions under the tiers, it is important to be aware that the above penalty amounts are maximum amounts. A penalty may only be incurred if a corporation or individual is found to be in breach by a court. Furthermore, the specific dollar amount to be paid (up to the maximum) is always determined by a court. The maximum available penalty tends to serve as a yardstick in the penalty assessment process, and sets the benchmark against which all contravening conduct is assessed.

The Bill also provides that various Infringement Penalties will apply to civil penalty provisions in each Tier.

The AER may serve an Infringement Notice on a person that it has reason to believe has breached a relevant civil penalty provision in the National Energy Laws.³ If the recipient chooses to pay the Infringement Penalty, the AER may not bring civil proceedings against the person for that alleged breach. Payment of an Infringement Penalty is not taken to be an admission by the person of a breach of the provision.

The Infringement Penalties prescribed by the Bill are as follows:

Tiers 1 & 2

- (i) If the breach is alleged to have been committed by a natural person—
 - a. \$13 600 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision
- (ii) If the breach is alleged to have been committed by a body corporate—
 - a. \$67 800 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision

Tier 3

- (i) If the breach is alleged to have been committed by a natural person—
 - a. \$6 790 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;
- (ii) If the breach is alleged to have been committed by a body corporate—
 - a. If the AER makes a determination⁴—\$6 790 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision; or
 - b. In any other case—\$33 900 or any lesser amount that is prescribed by the Regulations in relation to the civil penalty provision;

2. The Decision Matrix

The draft Decision Matrix sets out the criteria for the Minister making the relevant Regulations. It provides the framework to guide the decision maker to classify both current civil penalty provisions and any provisions that are prescribed as civil penalty provisions in the future.

The Decision Matrix poses questions which relate to various 'concepts'. These concepts reflect the key themes of the National Energy Objectives, which are set out in section 7 of the National Electricity Law, section 23 of the National Gas Law and section 13 of the National Energy Retail Law. In this way, the Decision Matrix ties the key themes of the National Energy Objectives to the classification of civil penalty provisions.

The Decision Matrix creates a flow down assessment process. That is, a civil penalty provision is assessed to determine whether it meets the criteria for a Tier 1 maximum penalty. In the event a provision does not meet the criteria for Tier 1, it is then assessed

³ Section 74 of the National Electricity Law; section 308 of the National Energy Retail Law; section 277 of the National Gas Law.

⁴ The AER may make a determination under section 76(2) of the National Electricity Law or 309(3) of the National Gas Law taking into account certain prescribed matters.

against the criteria for Tier 2. If a civil penalty provision does not meet the criteria for Tier 1 or 2, it will automatically default to Tier 3.

The Decision Matrix has been used to arrive at the classifications set out in the Draft Classification document. The Decision Matrix should be read in conjunction with the Concept Table.

3. The Concept Table

The draft Concept Table expands upon each of the 'concepts' in the Decision Matrix. The key concepts are drawn from the National Energy Objectives. These promote the efficient investment in, and the efficient operation of energy services for the long term interests of consumers, particularly with regard to quality, reliability, safety and security of energy supply and services.

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. The Classification of Tiers

The three classification documents list each current civil penalty provision and the proposed tier that it will fall within, categorised by NEL, NERL or NGL. Regulations will be drafted to give effect to the final classification reached following this consultation.

5. Next steps

Following the consultation, an expert working group together with state and territory representatives will reconvene to consider submissions and finalise the penalty tiers, matrix and concept table for Energy Ministers approval. Regulatory amendments will then be drafted to give effect to the penalty provisions.

6. Contact for consultation

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7. Key Dates – submissions are due by 10 August 2020