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Energy Policy WA
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**Proposed Changes to the WEM, GSI and Pilbara Regulations –**

**Civil Penalties and Reviewable Decisions**

The Australian Energy Council (the "**AEC**") welcomes the opportunity to make a submission on the Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions consultation paper ("**Consultation Paper**") published by Energy Policy WA ("**EPWA**").[1]

The AEC is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. Our members collectively generate the overwhelming majority of electricity in Australia, sell gas and electricity to millions of homes and businesses, and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 percent emissions reduction target by 2035, and is part of the Australian Climate Roundtable promoting climate ambition.

The AEC makes the following comments in relation to the Consultation Paper.

**Applying civil penalties**

The Consultation Paper outlines the proposed new arrangements for categorising civil penalties under the Wholesale Electricity Market ("**WEM**") Regulations. It includes a daily amount for a breach of any civil penalty if the ERA or the Board considers it applicable. The Consultation Paper states:

> *"EPWA therefore proposes to prescribe additional factors that the ERA or the Board must consider when choosing to apply a daily amount, including but not limited to:*
>
> - *the percentage of annual turnover of the participant; and*
> - *the benefit gained by the contravening participant."*[2]

(our emphasis added)

[1] See Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions consultation paper
[2] See p4, Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions consultation paper

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This drafting specifically allows for other factors to be considered by the ERA or the Board. The AEC suggests that this is a wide-reaching statement, especially for the provision of civil penalties, and requests further details about what other factors will be considered when the ERA or the Board choose to apply a daily amount.

**Civil penalty amounts**

The Consultation Paper simplifies the amounts within each category and in doing so, proposes higher maximum amounts for many clauses within a category in the case of a breach. The AEC suggests there is a risk that taking a more punitive approach with higher maximum penalties will result in poorer outcomes for customers. Although the direct cost of breaches would not be passed on to customers, the increased penalties will increase businesses' risks, which will be reflected in their cost of operations, administration and compliance, and those additional costs will ultimately increase customers' bills.

Added regulatory burden could be justifiable if it were in response to evidence of low levels of compliance from market participants. However, the absence of action against Rule Participants indicates a strong degree of compliance. In light of this, it is not clear what deterrent effect these changes are intended to bring about in the absence of any suggestion that electricity businesses are disregarding obligations due to insufficient penalties, and by extension, whether the increase can be considered proportionate to the offence when the current penalty levels already sufficiently deter poor market behaviour.

The AEC also considers that the proposed changes to the maximum amounts may have the unintended consequences of deterring cooperation from market participants. The provisions are most appropriately enforced by consultative and constructive engagement with market participants. An adversarial framework carries risks and Rule Participants will be discouraged to voluntarily report breaches because they may receive the same penalty as if the breach was identified by the ERA. In 2018, the AEC was responding to similar proposals in east-coast energy markets and engaged Ashurst lawyers to provide advice on the Australian Energy Regulator's ("**AER**") civil penalties regime. The risks highlighted by Ashurst in that context also apply to this consultation:

> *"A shift to an adversarial approach is likely to result in more conservative behavior by regulated entities, and less collaboration between the regulator, market operator and the regulated as they necessarily move to protect themselves from legal risk."*[3]

The AEC encourages EPWA to consider ways to promote cooperation with market participants, including lower penalty amounts for the voluntary reporting of breaches.

**Impacted party redress**

The Consultation Paper states:

> *"Under the WEM Rules scheduled to commence on the new WEM commencement date, when a breach has occurred and a civil penalty is paid by a Rule Participant, the financial penalty amount will be redistributed to Market Participants (excluding the offending participant).*
>
> *EPWA proposes to amend the WEM Regulations to allow the ERA to also redistribute financial penalty amounts to a party that is not a Rule Participant but that has been adversely impacted by the breach. This would seek to ensure that certain types of impacted parties may also be reimbursed, as and when it is appropriate."*[4]

[3] See AEC submission on AER power and Civil Penalty Regime
[4] See p5, Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions consultation paper

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The AEC does not support the proposal to redistribute financial penalties to non-participants for two reasons:

1. It is inconsistent to claim that non-participants should not contribute to market costs but they can be compensated if they are negatively impacted via the distribution of financial penalties. A consistent approach should be applied.

2. The cost of redistributing monies will likely outweigh the monies recovered and the benefits to non-participants.

If EPWA does progress this proposal, then the AEC considers that penalties should only be redistributed where a financial loss can be established and only to parties directly impacted by the breach.

**Interim orders**

Another proposed amendment identified in the Consultation Paper is allowing the ERA to issue interim orders.

> *"EPWA considers there to be significant value in allowing the ERA to make an order which would intervene in conduct as it is happening, especially if it poses a risk to the market or to power system security and reliability. Under EPWA's proposed changes to the WEM Regulations, the orders the ERA will be able to make will include a range of interim orders, which can be issued before it determines that there has been a breach."*[5]

The AEC can see some merit in the ERA being able to make interim orders in very limited circumstances where there is a material and obvious breach. The difficulty lies in when the ERA is able to exercise this power. The AEC considers that, in the first instance, the ERA should adopt a collaborative and consultative approach to address any inappropriate conduct. This will provide procedural fairness to Rule Participants and limit any losses in the case there was no breach.

The ERA should be given clear guidelines for issuing interim orders. As such, the AEC requests further information, including:

- What criteria the ERA will use for determining that an interim order is required and the process for making an interim order?

- Given market participant can incur a loss because of the interim order, will the ERA prioritise these investigations? How long will the ERA have to conclude the investigation?

- How long will interim orders be in place?

- What is the remedy for Rule Participants if the investigation identifies no breach, or no serious breach, and they have suffered a loss?

[5] See p5 and p6, Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions consultation paper

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**Expansion of public breaches register**

The Consultation Paper states:

> *"EPWA proposes to amend the rules to oblige the ERA to also publish the initiation of compliance investigations in the register. This is intended to maximise transparency and inform participants what compliance actions the ERA is currently focusing on. The details of these changes are still being worked through, including the mechanism of publication and whether information identifying the relevant Rule Participant will be removed."*[6]

While the AEC supports engagement and transparency from the ERA, it is concerning that Rule Participants facing an investigation may be identified. These Rule Participants could bear significant consequences, such as reputational damage and an impact on their business, if they are identified by the ERA as being the focus of an investigation before a breach has been determined. A legalist, enforcement approach will not benefit Rule Participants and consumers, or be the best way to achieve market outcomes. Instead, the approach to investigating Rule Participants should accord with the principles of procedural fairness. Rule Participants should be given the opportunity to provide further information or submissions to the ERA to qualify their position and rebut the compliance investigation. Only after there has been satisfactory engagement and the ERA has determined that a breach occurred should a market participant be identified.

**Enforceable undertakings**

The Consultation Paper notes that "EPWA is also currently investigating the potential inclusion of court enforceable undertakings within the compliance framework."[7] No further information is provided on why enforceable undertakings are now required, what problem they will solve, the benefits of enforceable undertakings compared to the existing arrangements, or the circumstances in which undertakings would be issued.

The AEC requests further details on why enforceable undertakings are being considered and whether the benefits outweigh the costs, such a legal fees and compliance costs.

**Transition**

The new market will present a range of challenges to Rule Participants and they will need time to adjust to the new requirements and update and implement their procedures to ensure compliance with WEM Rule obligations.

EPWA released the Monitoring and Compliance Framework in the Wholesale Electricity Market Information Paper ("**Information Paper**") in 2020 and proposed an amnesty period "to enable participants to adjust and become familiar to the new WEM requirements without the threat of compliance action".[8] The Information Paper also noted that a similar amnesty was introduced for the Balancing Market in 2012.

The AEC encourages EPWA to again implement an amnesty period to assist Rule Participants with adjusting to the significant changes in the operation and obligations in the new market. This amnesty period will help Rule Participants to improve their compliance with WEM Rule obligations without the threat of civil penalties and promote collaboration between the ERA and Rule Participants.

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[6] See p8, Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions consultation paper
[7] See p6, Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions consultation paper
[8] See p14, Monitoring and Compliance Framework in the Wholesale Electricity Market Information Paper

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**Conclusion**

The AEC appreciates this opportunity to provide feedback on the Consultation Paper and encourages EPWA to consider the issues raised above.

Please do not hesitate to contact Graham Pearson, Western Australia Policy Manager by email on graham.pearson@energycouncil.com.au or by telephone on 0466 631 776 should you wish to discuss this further.

Yours sincerely,

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