Federal Court of Australia

Australian Energy Regulator v AGL HP 1 Pty Ltd [2022] FCA 737

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| File number: |  |
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| Judgment of: | **BESANKO J** |
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| Date of judgment: | 28 June 2022 |
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| Catchwords: | **CONSUMER LAW** — application for declaration of contravention of National Electricity Rules (NER) pursuant to s 44AAG(1) of *Competition and Consumer Act 2010* (Cth) (CC Act), imposition of pecuniary penalties pursuant to s 44AAG(2)(a) of CC Act and order for engagement of compliance expert pursuant to s 44AAG(2) of CC Act — where respondents “Registered Participants” in National Electricity Market and “Generators” with respect to four wind farms (Hallett wind farms) — where during relevant period, each wind turbine at each of Hallett wind farms featured low voltage ride through capability (LVRT capability), a control system activated when voltage dipped below 80% of “nominal voltage” level and seeking to ensure turbines capable of “riding through” certain voltage disturbances — where each wind turbine at each of Hallett wind farms included repeat low voltage ride-through protection system (repeat LVRT protection system), which during relevant period had settings applied so as to be triggered if LVRT capability activated three times within 120-second period and when triggered, caused rotational speed of wind turbine to slow and wind turbine to cease generating active power — where system and settings designed and applied by supplier of wind turbines and respondents not aware of system or settings — where on 28 September 2016, six undervoltage disturbances within period of approximately 90 seconds, in response to fourth of which repeat LVRT protection system activated on a number of wind turbines at each of Hallett wind farms — where prior to connecting each of Hallett wind farms to power system, respondents required to negotiate and determine with Network Service Provider set of performance standards, including for requirements in Sch 5.2 of NER — where pursuant to cl 4.4.3 of NER, respondents required, in accordance with Sch 5.2 of NER, to provide protective systems to protect plant and associated facilities against abnormal voltage excursions of power system — where none of agreed performance standards for Hallett wind farms contained reference to repeat LVRT protection system — where pursuant to cl S5.2.2 of NER, respondents only permitted to apply settings to control system or protection system if approved in writing by Network Service Provider and Australian Energy Market Operator (AEMO) and prohibited from allowing wind turbines to supply electricity to power system without such prior approval — where respondents agree orders sought by applicant should be made — whether appropriate to make declaration sought — consideration of matters in s 64 of National Electricity Lawfor which there must be regard in determining civil penalty and other relevant matters — consideration of relevance of statutory maximum in fixing civil penalty in accordance with *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 — where among other things, parties submit serious breaches of NER compromising AEMO’s ability to maintain power system in secure operating state — whether appropriate to impose pecuniary penalties sought — whether appropriate to make order sought for engagement of compliance expert — orders made |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 44AE, 44AAG, 76  *Evidence Act 1995* (Cth) s 191  *Federal Court of Australia Act 1976* (Cth) ss 21, 43  National Electricity Lawss 2, 2AA, 15, 64, 66, 67  National Electricity Rules (Version 82)rr 4.15, 4.2.5, 4.4.3, 5.3.3 and cll S5.2.2, S5.2.5.3, S5.2.5.4, S5.2.5.5, S5.2.5.8  *National Electricity (South Australia) Act 1996* (SA)  *National Electricity (South Australia) Regulations* reg 6 |
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| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68  *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599  *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25  *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1  *Australian Energy Regulator v AGL Sales Pty Limited* [2020] FCA 1623  *Australian Energy Regulator v EnergyAustralia Pty Ltd* [2020] FCA 1647  *Australian Energy Regulator v HWF 1 Pty Ltd* [2021] FCA 732  *Australian Energy Regulator v Pacific Hydro Clements Gap Pty Ltd* [2021] FCA 733  *Australian Energy Regulator v Snowtown Windfarm Stage 2 Pty Ltd* [2020] FCA 1845  *Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482  *Forster v Jododex Australia Pty Limited* [1972] HCA 61; (1972) 127 CLR 421  *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59  *National Electricity Code Administrator v NRG Flinders Operating Services Pty Ltd* (National Electricity Tribunal, No 1 of 2005, orders made on 15 August 2005)  *National Electricity Code Administrator v Pelican Point Power Limited* (National Electricity Tribunal, No 2 of 2005, orders made on 8 September 2005)  *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285  *Trade Practices Commission v CSR Limited* [1990]FCA 762; (1991) ATPR 41-076 |
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| Date of hearing: | 20 August 2021 |
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| Counsel for the Applicant: | Dr R Higgins SC with Mr T Clarke |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondents: | Mr C Moore SC with Ms C Dermody |
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| Solicitor for the Respondents: | Herbert Smith Freehills |

ORDERS

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|  | | SAD 170 of 2019 |
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| BETWEEN: | AUSTRALIAN ENERGY REGULATOR  Applicant | |
| AND: | AGL HP 1 PTY LTD (ACN 080 429 901)  First Respondent  AGL HP 2 PTY LTD (ACN 080 810 546)  Second Respondent  AGL HP 3 PTY LTD (ACN 080 735 815)  Third Respondent | |

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| order made by: | BESANKO J |
| DATE OF ORDER: | 28 june 2022 |

**THE COURT DECLARES THAT:**

1. The respondents contravened cl 4.4.3 and S5.2.2 of the *National Electricity Rules* (the NER) between 6 August 2013 and 23 December 2016, by operating the generating units of the Hallett 1, 2, 4 and 5 wind farms and allowing those generating units to supply electricity to the power system when the settings for the repeat low voltage ride-through protection system applied to them had not been approved in writing by the network service provider or the Australian Energy Market Operator.

**THE COURT ORDERS THAT:**

1. Pursuant to s 44AAG(2) of the *Competition and Consumer Act 2010* (Cth) (the CC Act), the respondents pay the costs of and ensure that the current registered participant for each of the Hallett 1, 2, 4 and 5 wind farms (AGL SA Generation Pty Ltd (ACN 081 074 204)) (the Current Registered Participant):
   1. within 15 days of the making of this order, engages a suitably independent compliance professional with expertise in compliance with Generator Performance Standards (theCompliance Expert), with the identity of the Compliance Expert to be agreed between the AER and the Current Registered Participant, or failing agreement, as proposed by counsel and determined by the Court;
   2. within 15 days of the making of this order, instructs the Compliance Expert to:
      1. review the Current Registered Participant’s compliance program under NER 4.15(b) in respect of the Hallett 1, 2, 4 and 5 wind farms and assess whether it conforms with the requirements of NER 4.15(c);
      2. identify any aspect of the Current Registered Participant’s compliance program that does not conform, or that may be at risk of not conforming, with the requirements of NER 4.15(c);
      3. identify any gaps in the existing procedures under the Current Registered Participant’s compliance program; and
      4. provide recommendations to remedy any such gaps or non-conformities identified in the course of the Compliance Expert’s assessment; and
   3. within six months from the date of this order, provide a written report, signed by the Compliance Expert and the Chief Executive Officer/s (or equivalent) of the Current Registered Participant, to the AER that:
      1. describes the expertise of the Compliance Expert and confirms his or her independence;
      2. states precisely how each of the steps described in Order 2(b) were completed;
      3. annexes a copy of the Compliance Expert’s recommendations to the Current Registered Participant;
      4. states precisely what steps have been taken to give effect to the Compliance Expert’s recommendations;
      5. annexes a copy of all internal documents that were amended as a consequence of the Compliance Expert’s recommendations; and
      6. states any of the Compliance Expert’s recommendations that were not implemented by the Current Registered Participant.
2. Pursuant to s 44AAG(2)(a) of the CC Act, within 28 days of the making of this order, each Respondent pay to the Commonwealth of Australia a pecuniary penalty of $1,166,666.67 in respect of the contravention of cl 4.4.3 of the NER referred to in the Declaration.
3. Pursuant to s 43 of the *Federal Court of Australia Act 1976* (Cth)*,* within 28 days of the making of this Order, the respondents pay the applicant’s costs of, and incidental to, this proceeding, agreed in the amount of $300,000.
4. All of the remaining claims in the Amended Originating Application are dismissed.
5. There be liberty to the parties to apply with respect to the identification of the Compliance Expert referred to in Order 2(a).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BESANKO J:

# Introduction

1. The applicant in this proceeding is the Australian Energy Regulator and the respondents are AGL HP 1 Pty Ltd, AGL HP 2 Pty Ltd and AGL HP 3 Pty Ltd. The applicant seeks against the respondents a declaration, the imposition of pecuniary penalties and other orders. The applicant and the respondents have agreed the terms of a declaration, the amount of pecuniary penalties, the terms of an order for the engagement of a compliance expert and an order for costs. They have placed before the Court a Statement of Agreed Facts, a Further Statement of Agreed Facts (both within s 191 of the *Evidence Act 1995* (Cth)) and Joint Submissions.

# The Facts

1. The statement of facts which follows is taken from the Statement of Agreed Facts and the Further Statement of Agreed Facts. A Glossary, insofar as it relates to expressions in the National Electricity Rules (the NER), is included in these reasons as Appendix A.
2. The “relevant period” for the purposes of the facts which follow is from 6 August 2013 to 23 December 2016.
3. The applicant is a body corporate established pursuant to s 44AE of the *Competition and Consumer Act 2010* (Cth) (the CC Act) and has the functions and powers referred to in s 15 of the National Electricity Law (the NEL), which is set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA).
4. At all material times, the respondents comprised a partnership known as the AGL Hydro Partnership and were *Registered Participants* in the National Electricity Market (the NEM) and *Generators* in relation to each of the following wind farms: (1) the Brown Hill (Hallett 1) wind farm; (2) the Hallett Hill (Hallett 2) wind farm; (3) the North Brown Hill (Hallett 4) wind farm; and (4) the Bluff (Hallett 5) wind farm (together, the Hallett wind farms).
5. At all times since at least 31 May 2011, AGL Energy Limited has been the ultimate holding company of each of the respondents. AGL SA Generation Pty Ltd is also a wholly owned subsidiary of AGL Energy Limited and it is now the *Generator* in respect of the Hallett wind farms.
6. The Australian Energy Market Operator (AEMO) is, and at all relevant times since 1 July 2009 was, the independent market and system operator for the NEM, covering the interconnected *power system* in Australia’s eastern and south-eastern seaboard and Tasmania. Before 1 July 2009, AEMO was known as the National Electricity Market Management Company Ltd (NEMMCO).
7. ElectraNet Pty Ltd (ElectraNet) is, and at all relevant times was, the *Network Service Provider* of the *transmission network* to which the Hallett wind farms are *connected*.
8. Each of the four wind farms is, and was during the relevant period, a *generating system* comprising a number of Suzlon S88 wind turbine *generating units* as set out below and, in the case of the Hallett 5 wind farm, there is and was, in addition to Suzlon S88 wind turbine *generating units*, one Suzlon S97 wind turbine *generating unit*. The number of Suzlon S88 wind turbine *generating units* at each farm is as follows:

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| Hallett 1 | 45 |
| Hallett 2 | 34 |
| Hallett 4 | 63 |
| Hallett 5 | 24 |

1. Suzlon is an international wind turbine supplier and it designed, supplied and installed the wind turbines at each of the Hallett wind farms.
2. During the relevant period, each wind turbine at each of the Hallett wind farms featured a low *voltage* ride through capability (the LVRT capability). The LVRT capability was a *control system* that was activated when the *voltage* at the *generating unit* terminals dipped below 80% of the *nominal voltage* level. The purpose of the LVRT capability was to enable a wind turbine to ride through transient *voltage* dips of specified depths for specified durations. It was agreed between the parties that the LVRT capability of wind turbines and other generating *plant* is important to AEMO’s ability to maintain and restore *power system security*, by seeking to ensure that *generating units* are capable of “riding through” certain *voltage* disturbances that may be caused by faults or other occurrences on the *power system*, so as to mitigate against the risk of cascading failures on the *power system*.
3. Each wind turbine at each of the Hallett wind farms included a number of *protection systems*, including a repeat low *voltage* ride-through *protection system* (the repeat LVRT *protection system*). During the relevant period, the repeat LVRT *protection system* was set so as to be triggered if the LVRT capability was activated three times within a 120 second period.
4. The purpose of the repeat LVRT *protection system* was to avoid the potential for damage to, and failure of, the Hallett wind farms’ *generating units* and *plant* caused by multiple *voltage* disturbances in a short period of time on the external *network*. Unexpected failure of the *generating units* could, in turn, potentially jeopardise *power system security*. In the event that the repeat LVRT *protection system* was triggered, it caused the rotational speed of the wind turbine to slow and the wind turbine to cease generating *active power*. In this way, the repeat LVRT *protection system* prevented the *generating unit*’s LVRT capability from operating in the event that the *voltage* on any of the three phases at the *generating unit* terminals fell below 80% of *nominal voltage* three times within a 120 second period.
5. Neither the NER nor any of the *generator* *performance standards* or transmission *connection agreements* applicable to the Hallett wind farms set an explicit threshold for the number of disturbances a wind farm would be required to ride through.
6. There were differences between the Hallett 1 wind farm on the one hand, and the Hallett 2, Hallett 4 and Hallett 5 wind farms on the other in terms of the version of the NER which applied.
7. The performance standards for the Hallett 1 wind farm were determined prior to 15 March 2007 and, therefore, were required to comply with Version 12 of the NER (NER v12), which were in operation at that time. Those performance standards determined under NER v12 continued to apply to the Hallett 1 wind farm throughout the relevant period.
8. Prior to connecting the Hallett 1 wind farm to the *power system*, the respondents were required to: (1) negotiate and determine with ElectraNet a set of performance standards, including for the technical requirements addressed in Sch 5.2 to the NER and ElectraNet was required to consult with NEMMCO in relation to the technical requirements that NEMMCO was required to be involved in negotiating under cl 5.3.3(b1)(4) of NER v12; and (2) jointly with ElectraNet, provide NEMMCO with the details of the performance standards, once they were agreed. Chapter 5 of NER v12 is titled “Network Connection” and Sch 5.2 is titled “Conditions for Connection of Generators”. Of particular importance in Sch 5.2 is cl S5.2.5.3 (“Generating unit response to disturbances in the power system”) and cl S5.2.5.8 (“Protection of generating units from power system disturbances”). The *generator* performance standards for the Hallett 1 wind farm were set out in the documents annexed as Appendix A to the Statement of Agreed Facts.
9. The relevant version of the NER with respect to the Hallett 2, Hallett 4 and Hallett 5 wind farms is Version 82 (NER v82). With respect to the Hallett 2, Hallett 4 and Hallett 5 wind farms, prior to connecting each of those wind farms to the *power system*, the respondents were was required to: (1) negotiate and determine with ElectraNet a set of *performance standards*, including for the technical requirements addressed in Sch 5.2 to NER v82, and ElectraNet was required to consult with AEMO in relation to the technical requirements that were designated as AEMO *advisory matters*; and (2) jointly, together with ElectraNet, provide AEMO with the details of the *performance standards*, once they were agreed. The technical requirements that were required to be addressed in the *performance standards*, each of which was designated an AEMO *advisory matter*, included the following:
10. *generating system* response to *voltage* disturbances (cl S5.2.5.4);
11. *generating system* response to disturbances following contingency events (cl S5.2.5.5); and
12. protection of *generating systems* from *power system* disturbances (cl S5.2.5.8).

The performance standards for each of the Hallett 2, Hallett 4 and Hallett 5 wind farms were annexed to the Statement of Agreed Facts as Appendix B, Appendix C and Appendix D respectively. In the Joint Submissions, the parties identified the *performance standards* relevant to the ability of the respondents’ turbines at each of the Hallett wind farms to “ride though” undervoltage disturbances. It is not necessary for me to set out those matters.

1. It is agreed between the parties that during the relevant period:
2. the Hallett wind farms were *connected to*, and supplied electricity to, the *power system*;
3. the respondents were required to operate each of the Hallett wind farms in accordance with its *generator* performance standards;
4. the respondents were required, in accordance with Sch 5.2 and Chapter 5 of the NER*,* to provide any necessary automatically initiated protective device or systems to protect their *plant* and associated *facilities* against abnormal *voltage* excursions of the *power system*; and
5. the respondents were only permitted to apply settings to a *control system* or a *protection system* that were necessary to comply with performance requirements of Sch 5.2 of the NERif the settings had been approved in writing by ElectraNet, and also by AEMO if the requirement was an AEMO *advisory matter*, and were prohibited from allowing their *generating units* to supply electricity to the *power system* without such prior approval.
6. None of the *generator* *performance standards* for the Hallett wind farms contained a reference to the repeat LVRT *protection system* installed in the Hallett wind farms’ *generating units*, or its settings. Prior to and during the relevant period, neither ElectraNet nor AEMO gave approval in writing for the settings of the repeat LVRT *protection system*. Prior to, and until shortly before, the end of the relevant period, the respondents did not assess the repeat LVRT *protection system* on *generating units* of any of the Hallett wind farms for compliance with the applicable *generator performance standards*. Prior to, and until shortly before, the end of the relevant period, the respondents were not aware of the repeat LVRT *protection system* or of its settings that had been applied to all the wind turbines at the Hallett wind farms. Those settings had been designed and applied by Suzlon.
7. By reason of the matters referred to in [19(1)] and [20] above, during the relevant period, the respondents allowed the Hallett wind farms’ *generating units* to supply electricity to the *power system* in circumstances where the repeat LVRT *protection system* settings had not been approved in writing for use at the Hallett wind farms by ElectraNet or AEMO, as required by cl S5.2.2 of the NER. By reason of those matters, the respondents did not, in accordance with Sch 5.2, provide protective systems to protect their *plant* and associated *facilities* against abnormal *voltage* excursions of the *power system*, as required by cl 4.4.3 of the NER.
8. On 28 September 2016, five *transmission line faults* occurred on the *power system*, resulting in six undervoltage disturbances, within a period of approximately 90 seconds. The first undervoltage disturbance did not result in the repeat LVRT *protection system* for the Hallett wind farms’ *generating units* detecting an undervoltage disturbance, but it did do so for the second, third and fourth undervoltage disturbances. In response to the fourth undervoltage disturbance, the repeat LVRT *protection system* was activated on the following *generating units* and those *generating units* ceased supplying *active power* to the *power system*:

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| Hallett 1 | 16 |
| Hallett 2 | 11 |
| Hallett 4 | 36 |
| Hallett 5 | 21 |

1. The respondents’ failure to obtain written approval from ElectraNet and AEMO for the settings applied to the repeat LVRT *protection system* was inadvertent. The repeat LVRT *protection system* was designed and applied to the *generating units* by Suzlon. The respondents were not aware of the system or the settings applied to the system until after 28 September 2016.
2. On or around 23 December 2016, the respondents advised AEMO that they had modified the repeat LVRT *protection system* settings on the Hallett 1, Hallett 2, Hallett 4 and Hallett 5 wind farm *generating units* to enable the S88 turbines to ride-through up to seven undervoltage disturbances (when the *voltage* at the *generating unit* terminals dipped below 80% of the *nominal voltage* level) within 120 seconds and on the same day, AEMO gave its approval in writing to the repeat LVRT *protection system* on the basis of it being set to be triggered if the LVRT capability was activated seven times within a 120 second period.
3. It is agreed between the parties that by reason of the repeat LVRT *protection system* settings not having been disclosed in the *generator* *performance standards* of any of the Hallett wind farms and not otherwise having been approved by ElectraNet and AEMO, AMEO’s ability to maintain the secure operation of the *power system* during the relevant period was compromised.
4. The total revenue of the respondents and AGL Energy Limited during the relevant period was as follows:

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| **Revenue** | **AGL HP1 Pty Ltd** | **AGL HP2 Pty Ltd** | **AGL HP3 Pty Ltd** | **AGL Energy Limited** |
| FY 2013-14 | $ 320,352,120 | $ 129,435,200 | $ 197,388,680 | $ 9,543,000,000 |
| FY 2014-15 | $ 209,692,890 | $ 84,724,400 | $ 129,204,710 | $ 10,678,000,000 |
| FY 2015-16 | $ 335,699,600 | $ 135,636,200 | $ 206,845,210 | $ 11,150,000,000 |
| FY 2016-17 | $ 498,675,870 | $ 201,485,200 | $ 307,264,930 | $ 12,584,000,000 |

1. The total profit after tax of each of the respondents and AGL Energy Limited for each financial year during the relevant period was as follows:

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| **Profit after tax** | **AGL HP1 Pty Ltd** | **AGL HP2 Pty Ltd** | **AGL HP3 Pty Ltd** | **AGL Energy Limited** |
| FY 2013-14 | $ (2,412,630) | $ (974,800) | $ (1,486,570) | $ 570,000,000 |
| FY 2014-15 | $ (64,163,880) | $ (25,924,800) | $ (39,535,320) | $ 218,000,000 |
| FY 2015-16 | $ (25,194,020) | $ (10,179,400) | $ (15,523,590) | $ (408,000,000) |
| FY 2016-17 | $ 19,347,570 | $ 7,817,200 | $ 11,921,230 | $ 539,000,000 |

1. Finally, it is agreed that the respondents did not derive any financial benefit by reason of the admitted contraventions.
2. Before leaving this section of my reasons, it is important to record that certain allegations made by the applicant in its Amended Concise Statement are no longer pursued by it. The applicant no longer pursues the following allegations, that:
3. by ceasing to supply *active power* as a result of the activation of the repeat LVRT *protection system*, the *generating units* at the Hallett 2, Hallett 4 and Hallett 5 wind farms did not meet or exceed, and were not operated to comply with, the NER or the relevant *performance standards*; and
4. the activation of the repeat LVRT *protection system* which caused the *generating units* at the Hallett 2, Hallett 4 and Hallett 5 wind farms to cease generating *active power* was a contributing cause of the black system event and blackout throughout the South Australian region of the NEM that occurred on 28 September 2016.
5. I turn now to the relief sought by the applicant.

# The Declaration

1. The applicant seeks the following declaration:

The Respondents contravened cl 4.4.3 and S5.2.2 of the National Electricity Rules (NER) between 6 August 2013 and 23 December 2016, by operating the generating units of the Hallett 1, 2, 4 and 5 wind farms and allowing those generating units to supply electricity to the power system when the settings for the repeat low voltage ride-through protection system applied to them had not been approved in writing by the network service provider or the Australian Energy Market Operator.

The respondents agree to the making of a declaration in these terms.

1. Clause 4.4.3 of the NER appears under the heading, “Generator protection requirements” and is in the following terms:

*Generators* must, in accordance with schedule 5.2 and Chapter 5, provide any necessary automatically initiated protective device or systems to protect their *plant* and associated *facilities* against abnormal *voltage* and extreme *frequency* excursions of the *power system*.

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

1. Clause S5.2.2 of the NER appears under the heading, “Application of Settings” and is in the following terms, relevantly:

A *Generator* must only apply settings to a *control system* or a *protection system* that are necessary to comply with performance requirements of this schedule 5.2 if the settings have been approved in writing by the relevant *Network Service Provider* and, if the requirement is one that would involve *AEMO* under clause 5.3.4A(c) of the *Rules*, also by *AEMO*. A *Generator* must not allow its *generating unit* to *supply* electricity to the *power system* without such prior approval. …

1. The applicant has established four contraventions by the respondents of cll 4.4.3 and S5.2.2 of the NER between the period from 6 August 2013 to 23 December 2016.
2. The power of the Court to make an order declaring that a person is in breach of a uniform energy law that is applied as a law of the Commonwealth or a State/Territory energy law, is contained in s 44AAG(1) of the CC Act. The NEL, including the NER, is a uniform energy law that is applied as a law of the Commonwealth or a State/Territory energy law. Section 21 of the *Federal Court of Australia Act 1976* (Cth) is also a source of power to make declarations.
3. The Court must be satisfied that it is appropriate to make a declaration even where the parties agree that a declaration is appropriate.
4. The circumstances in which the Court will consider it appropriate to make a declaration are well established.
5. In the seminal case of *Forster v Jododex Australia Pty Limited* [1972] HCA 61; (1972) 127 CLR 421, Gibbs J (as his Honour then was) identified (at 437–438) the following matters as relevant to the exercise of the power to make a declaration: (1) the question must be a real and not a hypothetical or theoretical question; (2) the applicant must have a real interest in raising it; and (3) there must be a proper contradictor. Each of these three matters is satisfied in the circumstances of this case.
6. Furthermore, the observations of White J in *Australian Energy Regulator v Pacific Hydro Clements Gap Pty Ltd* [2021] FCA 733 (*AER v Pacific Hydro*),by reference to the observations of Gordon J in *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1 (at [67]–[68]) apply with equal force to this case. Justice White said (at [54]–[55]):

54 In *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1 at [67]-[68], Gordon J said that the matters bearing upon the exercise of the discretion to grant or refuse a declaration include consideration of whether the declaration would have any utility, whether the proceedings involve a matter of public interest, whether the circumstances call for the Court’s disapproval of the contravening conduct; and whether the declaration contains appropriate and adequate particulars of how and why the conduct in question is a contravention of the relevant legislation. Those considerations are pertinent in this case.

55 The declaration proposed by the parties is expressed appropriately; will serve as formal record of the contravention found established by the Court; and will accordingly form part of the community’s censure of the conduct. Further, the declaration may serve an educative purpose in indicating to others involved in the generation of electricity how and why the contravention occurred.

1. It is appropriate to make the declaration set out above.

# The Pecuniary Penalties

1. The applicant seeks the following order:

Pursuant to s 44AAG(2)(a) of the CC Act, within 28 days of the making of this order, each Respondent pay to the Commonwealth of Australia a pecuniary penalty of $1,166,666.67 in respect of the contravention of cl 4.4.3 of the NER referred to in the Declaration.

1. Up until shortly prior to the hearing, the applicant had sought a different order. It sought an order that the respondents pay a pecuniary penalty of $3,500,000. However, the applicant changed the terms of the order it sought because there was a doubt as to the validity of such an order. In doing so, it had regard to what the Full Court of this Court said in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312 (at [376]). In that case, the Full Court expressed the opinion that s 76(1) of the *Trade Practices Act 1974* (Cth), as it existed at the relevant time, did not allow for the imposition of a single joint and several penalty against multiple respondents.
2. The power of the Court to make an order that a person pay a civil penalty for a breach of a uniform energy law that is applied as a law of the Commonwealth or a State/Territory energy law, is contained in s 44AAG(2)(a) of the CC Act and it is a power to order the payment of a civil penalty “determined in accordance with the law”.
3. In s 2AA(1) of the NEL, a civil penalty provision is defined to include, relevantly:

(c) a provision of this Law (other than an offence provision) or the Rules that is prescribed by the Regulations to be a civil penalty provision.

1. Regulation 6(1) of the *National Electricity (South Australia) Regulations* (the Regulations) provides that for the purposes of s 2AA(1)(c) of the new National Electricity Law, a provision of the NER listed in Sch 1 is prescribed to be a civil penalty provision. Clause 4.4.3 is listed in Sch 1 to the Regulations.
2. Section 64 of the NEL identifies five matters for which there must be regard in determining a civil penalty. They are as follows:

(a) the nature and extent of the breach; and

(b) the nature and extent of any loss or damage suffered as a result of the breach; and

(c) the circumstances in which the breach took place; and

(d) whether the person has engaged in any similar conduct and been found to be in breach of a provision of this law, the Rules or the Regulations in respect of that conduct; and

(e) whether the service provider had in place a compliance program approved by the AER or required under the Rules, and if so, whether the service provider has been complying with that program.

1. Section 66 provides that for the purpose of determining the civil penalty for a breach of a civil penalty provision, a breach consisting of a failure to do something that is required to be done continues until the act is done. Section 67 provides that only one civil penalty is to be imposed for the same conduct even though the conduct constitutes a breach of two or more civil penalty provisions and proceedings are brought in relation to the breach of any one or more of the civil penalty provisions.
2. During the relevant period, s 2 of the NEL provided that the maximum civil penalty for a breach of a civil penalty provision by a body corporate was an amount not exceeding $100,000 and an amount not exceeding $10,000 for every day during which the breach continues (see definition of “civil penalty”, para (a)(ii)). The maximum civil penalty for the breach of cl 4.4.3 of the NER for each of the Hallett wind farms is $12,450,000, being $100,000 for the initial breach and $10,000 x 1,235 days thereafter.
3. The High Court recently considered the role of the maximum penalty in fixing a civil penalty in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 (*Pattinson*). The plurality of Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ said that it was an error to treat the statutory maximum as implicitly requiring that contraventions be graded on a scale of increasing seriousness, with the maximum to be reserved exclusively for the worst category of contravening conduct (at [49]) or as controlling, as distinct from being balanced with all other relevant factors (at [52]).
4. The plurality then referred (at [53]) to the following passage from the decision of the Full Court of this Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 (at [155]–[156]):

“The reasoning in *Markarian* about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal. As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.

Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.” (citations omitted)

1. The plurality in *Pattinson* then went on to say (at [54]–[55]):

54 Two aspects of the Full Court’s reasoning in this passage from *Reckitt Benckiser* deserve particular emphasis here. The first is their Honours’ recognition that the maximum penalty is “but one yardstick that ordinarily must be applied” and must be treated “as one of a number of relevant factors”. As has already been seen, other factors relevant for the purposes of the civil penalty regime include those identified by French J in *CSR*.

55 The second point is that the maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring “some reasonable relationship between the theoretical maximum and the final penalty imposed”. This relationship of “reasonableness” may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.

## The significance of the fact that the parties have agreed an amount for the pecuniary penalty

1. The significance of the fact that the parties have agreed an amount for the pecuniary penalty was considered in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*DFWBII*). The plurality (French CJ, Kiefel J (as her Honour then was), Bell, Nettle and Gordon JJ) referred to the existence of an “important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers” (at [46]).
2. The plurality said that the Court is not bound by the figure suggested by the parties. Their Honours said (at [48]):

… The court asks “whether their proposal can be accepted as fixing an *appropriate* amount” and for that purpose the court must satisfy itself that the submitted penalty is appropriate.

(Emphasis in original; footnote omitted.)

The plurality also said (at [58]).

… Subject to the court being sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and, for the reasons identiﬁed in *Allied Mills*, highly desirable in practice for the court to accept the parties’ proposal and therefore impose the proposed penalty. …

(Emphasis in original; footnote omitted.)

1. Finally (for present purposes), the plurality referred to the assistance the Court may obtain as to the appropriate penalty from the regulator which is, it is to be expected, in a position to offer “informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance” (at [60]).

## The importance of deterrence

1. The purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance (*Trade Practices Commission v CSR Limited* [1990]FCA 762; (1991) ATPR 41-076 (*CSR Limited*) at 52,151–52,152 per French J (as his Honour then was); *DFWBII* at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; *Pattinson* at [14]–[19] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
2. In the context of the civil penalty regime under the *Fair Work Act 2009* (Cth), the plurality in *Pattinson* said (at [43]) that the primary objective of the regime was deterrence and at [40], their Honours referred with approval to the observations of Burchett and Kiefel JJ in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 (*NW Frozen Foods*) (at 293) as follows:

… [I]nsistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”. Plainly, if deterrence is the object, the penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression.

The plurality in *Pattinson* went on to say that it is necessary for a civil penalty to be fixed in a way which strikes a reasonable balance between deterrence and oppressive severity (at [41]).

## Other relevant matters

1. The factors identified in s 64 of the NEL are not exhaustive. The Court may also take into account in fixing a civil penalty under the NEL the factors applied in the context of s 76 of the CC Act (*Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58 (*Snowy Hydro*) at [138]–[139] per Beach J). This means that the Court may also consider the following factors:
2. the size of the contravening company;
3. the deliberateness of the contravention and the period over which it extended;
4. the degree of power that the company holds in the relevant market;
5. whether the contravention arose out of the conduct of senior management, or at a lower level;
6. whether the company has a corporate culture conducive to compliance with the NEL, as evidenced by the educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
7. whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the NEL in relation to the contravention;
8. whether the company has engaged in similar conduct in the past;
9. the economic effects of the contravening conduct, including the effect on the functioning of the relevant market;
10. the financial position of the company; and
11. whether the contravening conduct was systematic, deliberate or covert.

(see *Snowy Hydro* at [139] per Beach J; *CSR Limited* at 52,152–52,153 per French J; *NW Frozen Foods* at 290–294 per Burchett and Kiefel JJ; *Pattinson* at [18].)

1. The parties submit that although the four contraventions do not constitute a single course of conduct because each of the respondents’ contraventions of cl 4.4.3 arose in respect of a different wind farm and each respondent had a separate obligation to seek approval from ElectraNet and AEMO in relation to the settings applied to the repeat LVRT *protection system* in relation to each of them and at different times, there is one material factual interrelationship between the four contraventions. That factual interrelationship is that the contraventions were inadvertent and arose out of a lack of knowledge and a failure to make any assessment that the common type of Suzlon turbines used across the four wind farms has the repeat LVRT *protection system* setting. I accept that submission. Furthermore, I am persuaded that it is appropriate in the circumstances to impose a single penalty on each respondent (*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 (*ABCC v CFMEU*) at [146], [148]–[149]).
2. I have had regard to the principle of totality as it has been explained in the authorities. The parties submit that as there were four continuing contraventions, it is relevant to conduct a “final check” consistent with the totality principle to ensure the penalty imposed is “just and appropriate”. I have done that in accordance with the principles identified in *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59 (at 62–63) and *ABCC v CFMEU* (at [116]–[117]).

## Particular matters relevant in this case

1. I turn now to the considerations which are of particular importance in this case.

### The nature and extent of the breach and any loss or damage as a result of the breach.

1. The relevant circumstances in relation to these matters are as follows. AEMO’s ability to maintain *power system* *security* depends on *generators* providing, at the time of *connection* and subsequently, accurate and complete information relating to their ability to operate in accordance with the agreed *performance standards*. AEMO relies on the information it is given to determine the appropriate secure operating limits to apply to the *power system* to ensure that it is resilient to unstable conditions. Clause 4.2.5 of the NER defines the term, *technical envelope*,to mean the technical boundary limits of the *power system* for achieving and maintaining the *secure operating state* of the *power system* for a given demand and *power system* scenario. The clause provides that AEMO must determine and revise the *technical envelope*. Clause 4.2.5(d) provides that AEMOmust, when determining the secure operating limits of the *power system*, assume that the applicable *performance standards* are being met, subject to, among other things, a *Registered Participant* notifying AEMO,in accordance with cl 4.15(f), that a *performance standard* is not being met. Clause 4.15 places an obligation on a *Registered Participant* to immediately notify AEMO if it becomes aware that the *plant* is breaching or reasonably believes that the *plant* is likely to breach, a *performance standard*.
2. As the parties submitted, a failure by a *generator* to ensure that accurate and complete information has been provided to AEMO about the technical settings of its wind turbines when connecting to the *power system*, or anytime thereafter, is a serious breach of the NER, because it compromises AEMO’s ability to maintain the *power system* in a secure operating state. The failure to obtain written approval for the repeat LVRT *protection system* settings applied to the Hallett wind farm turbine *generating units* meant that the respondents caused AEMOto operate with incomplete information. The resulting harm of this conduct was that AEMO’s ability to determine the secure operating limits of the *power system*, and ensure its resilience during abnormal conditions, was compromised. This, in turn, created a risk of impairing AEMO’s ability to maintain the *power system* in a secure operating state.

### The circumstances in which the breach took place

1. The parties submit that the respondents allowed their wind turbines, that were programmed with the repeat LVRT *protection system*, to provide *active energy* to the *power system* without having ensured that prior written approval had been obtained from ElectraNet and AEMO in circumstances where: (1) the respondents were not aware that Suzlon, the manufacturer of the turbines installed at the Hallett wind farms, had applied the repeat LVRT *protection system* (or its settings) to those turbines; (2) because the respondents were not aware that Suzlon had applied the repeat LVRT *protection system* (or its settings) to the turbines installed at the Hallett wind farms, the respondents failed to disclose the repeat LVRT *protection system* (or its settings) to AEMO and ElectraNet at the time of *connection*; and (3) the respondents were, or should have been, aware that AEMO managed *power system* *security* on the assumption that the general *performance standards* of each of the Hallett wind farms contained accurate and complete information in relation to the settings applied to its wind turbines.

### Previous contraventions by the respondents of a similar nature

1. The respondents have not previously been found by a Court to be in breach of cl 4.4.3, cl S5.2.2 or any other provision under the NER or the NEL for conduct of a similar nature. The parties submit, and I accept, that although this is a mandatory consideration under s 64(d) of the NEL and could, in some circumstances, be considered a mitigating factor, the Court is not required to give this significant weight in a situation, such as this, where general deterrence is a significant consideration.

### Pre-existing compliance programs implemented by the respondents

1. During the time of the continuing contraventions, the respondents had in place a compliance program, as required by r 4.15(b) of the NER, in respect of each of the Hallett 1, Hallett 2, Hallett 4 and Hallett 5 wind farms. Part of the relief that the applicant seeks is an order for an independent review of respondents’ existing compliance programs.

### Size and financial position of the respondents

1. As I have said, during the relevant period, the respondents were wholly owned subsidiaries of AGL Energy Limited. The agreed facts are to the effect that between 1 July 2013 and 30 June 2017, a period approximately two months before and six months after the relevant period, AGL Energy Limited reported revenue of approximately $43.955 billion and total profits after tax of approximately $919 million.

### Deliberateness of the contravening conduct

1. The facts are that the respondents engaged Suzlon to install and operate the wind turbines at each of the Hallett wind farms and the respondents were not aware that the repeat LVRT *protection system* was applied on the wind turbines at each of the Hallett wind farms. The respondents’ failure to disclose the application of the repeat LVRT *protection system* on their turbines and assess it for compliance with their general *performance standards* was not deliberate. The respondents gained no financial benefit from the contraventions.

### Whether the conduct arose from senior management

1. The respondents were not aware of the repeat LVRT *protection system*. In the circumstances, the parties submit, and I accept, that this factor has no relevance to the present case.

### Level of cooperation with the applicant

1. The facts are that after the repeat LVRT *protection system* was activated on 28 September 2016, the respondents worked promptly with Suzlon to modify the settings of the repeat LVRT *protection system* in consultation with AEMO.
2. The present case was jointly case managed with three other proceedings relating to similar conduct and the applicant reached an in-principle settlement with each of the respondents in the three related proceedings prior to reaching an in-principle settlement with the respondents in this case. The respondents in this case were the last of the respondents in the four proceedings to reach an in-principle settlement with the applicant to resolve the proceeding. The parties submit that it is appropriate for there to be a reduction to the civil penalty that would otherwise be imposed, having regard to the in-principle settlement agreement, but that is to be balanced against the fact that the respondents in this case were the last of the respondents to do so. The respondents approached the applicant to negotiate and ultimately reached an in-principle agreement with the applicant prior to the applicant finalising its expert evidence and the settlement avoided the need to finalise the Shared Technical Primer and for a substantive liability hearing.

### The proposed civil penalty is within the appropriate range

1. As I have already said, the maximum civil penalty for each wind farm is $12,450,000 giving rise to a total of $49,800,000 for the four wind farms.

### Parity

1. As I have said, this proceeding was case managed with three other proceedings involving similar conduct. The key features of the three other proceedings — *Australian Energy Regulator v Snowtown Windfarm Stage 2 Pty Ltd* [2020] FCA 1845 (*AER v Snowtown*); *Australian Energy Regulator v HWF 1 Pty Ltd* [2021] FCA 732 (*AER v HWF 1*); and *AER v Pacific Hydro* — compared with this case are set out in a table in the Joint Submissions. The table is as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **AGL** | **AER v Snowtown** | **AER v HWF 1** | **AER v Pacific Hydro** |
| **Penalty imposed** |  | $1,000,000 | $550,000 | $1,100,000 |
| **No. of contraventions** | 4 | 1 | 1 | 1 |
| **Length of each contravention** | 1,235 days | 1,226 days | 131 days | 1,155 days |
| **Number of turbines** | 167, comprising:  *45 (Hallett 1)*  *34 (Hallett 2)*  *63 (Hallett 4)*  *25 (Hallett 5)* | 90 | 32 | 27 |
| **Maximum penalty** | $49,800,000 | $11,360,000 | $1,400,000 | $11,650,000 |

1. The parties submit, and I accept, that a higher penalty is appropriate in this case compared with the other cases for the following reasons:
2. The respondents contravened the NER in respect of four wind farms or *generating systems*;
3. The respondents cooperated with the applicant at a later stage in the proceeding than Snowtown, HWF 1 or Pacific Hydro, as the applicant had finalised and filed its lay evidence and taken significant steps to prepare and finalise is expert evidence;
4. The respondents’ four contraventions of the NER, which continued for 1,235 days, were slightly longer than the 1,126 days in the case of the single contravention in *AER v Snowtown* and the 1,155 days in the case of the single contravention in *AER v Pacific Hydro*, and substantively longer than the 131 days in the case of the single contravention in *AER v HWF 1*;
5. The respondents’ four contraventions involved 167 turbines, significantly exceeding the number of turbines involved in the three other proceedings;
6. The respondents’ failure to disclose the repeat LVRT *protection system* to ElectraNet and AEMOconstituted a serious breach of the NER because it had the consequence of compromising AEMO’s ability to maintain *power system* *security*; and
7. Notwithstanding the fact that the respondents were not aware of the repeat LVRT *protection system*, the respondents engaged in the contravening conduct for over three years.
8. I accept the submission made by the parties that it is consistent with the parity principle that the total penalty be less than four times the penalty in *AER v Snowtown* or *AER v Pacific Hydro*. Whilst there were more contraventions in the present case flowing from the fact that the respondents’ turbines were distributed over four wind farms, the contraventions did not arise from deliberate conduct for each wind farm, but rather an inadvertent failure, in common with the failure of the respondents in the other proceedings, to identify that the common *generating units* used across the wind farms had the repeat LVRT *protection system*. The parties submit that the significantly higher proposed penalty in the present case compared to those other proceedings appropriately reflects the matters referred to in the previous paragraph in these reasons and the matters referred to in this paragraph. The parties submit, and I accept, that the proposed penalty is of an amount that the respondents are in a financial position to pay, while also being a sufficient amount to compel the respondents and other *Generators* to take proactive steps in the future to ensure that they are aware of all settings applied to their turbines and to disclose the settings to AEMO and ElectraNet.
9. I have considered the other cases to which the parties referred (*Snowy Hydro*; *National Electricity Code Administrator v NRG Flinders Operating Services Pty Ltd* (National Electricity Tribunal, No 1 of 2005, orders made on 15 August 2005); *National Electricity Code Administrator v Pelican Point Power Limited* (National Electricity Tribunal, No 2 of 2005, orders made on 8 September 2005); *Australian Energy Regulator v AGL Sales Pty Limited* [2020] FCA 1623;and *Australian Energy Regulator v EnergyAustralia Pty Ltd* [2020] FCA 1647), but I do not consider they provide any direct guidance on the determination of the penalty which is just and appropriate and in accordance with the law.
10. In my opinion, having regard to the matters which I have referred, the proposed penalty for each of the respondents is just and appropriate in the circumstances of this case and a penalty determined in accordance with the law.

# Compliance Program

1. The applicant seeks the following order:

Pursuant to s 44AAG(2) of the *Competition and Consumer Act 2010* (Cth) (the CC Act), the Respondents pay the costs of and ensure that the current registered participant for each of the Hallett 1, 2, 4 and 5 wind farms (AGL SA Generation Pty Ltd (ACN 081 074 204)) (the **Current Registered Participant**):

(a) within 15 days of the making of this order, engages a suitably independent compliance professional with expertise in compliance with Generator Performance Standards (the Compliance Expert), with the identity of the Compliance Expert to be agreed between the AER and the Current Registered Participant, or failing agreement, as proposed by counsel and determined by the Court;

(b) within 15 days of the making of this order, instructs the Compliance Expert to:

(i) review the Current Registered Participant’s compliance program under NER 4.15(b) in respect of the Hallett 1, 2, 4 and 5 wind farms and assess whether it conforms with the requirements of NER 4.15(c);

(ii) identify any aspect of the Current Registered Participant’s compliance program that does not conform, or that may be at risk of not conforming, with the requirements of NER 4.15(c);

(iii) identify any gaps in the existing procedures under the Current Registered Participant’s compliance program; and

(iv) provide recommendations to remedy any such gaps or non-conformities identified in the course of the Compliance Expert’s assessment; and

(c) within six months from the date of this order, provide a written report, signed by the Compliance Expert and the Chief Executive Officer/s (or equivalent) of the Current Registered Participant, to the AER that:

(i) describes the expertise of the Compliance Expert and confirms his or her independence;

(ii) states precisely how each of the steps described in Order 2(b) were completed;

(iii) annexes a copy of the Compliance Expert’s recommendations to the Current Registered Participant;

(iv) states precisely what steps have been taken to give effect to the Compliance Expert’s recommendations;

(v) annexes a copy of all internal documents that were amended as a consequence of the Compliance Expert’s recommendations; and

(vi) states any of the Compliance Expert’s recommendations that were not implemented by the Current Registered Participant.

1. In my opinion, in view of the fact that the current *Registered Participant* of the Hallett wind farms and each of the respondents is a wholly owned subsidiary of AGL Energy Limited, the Court has the power to make this order under s 44AAG(2)(c) of the CC Act (an order that the person take such action, or adopt such practice, as the Court requires to prevent a recurrence of the breach) or s 44AAG(2)(d) (an order that the person implement a specified program for compliance with the law) and to make such order is not an exercise in futility. I agree with the submission of the parties that such an order is warranted in the circumstances of this case. There is a clear nexus between the terms of the compliance program and the contravening conduct, in that the compliance program will help to minimise the risk that the current *Registered Participant* will inadvertently engage in the same, or similar contravening conduct that is admitted in the present case and the purpose of the compliance program is to ensure that a compliance program is maintained as required under cl 4.15(b) of the NER that conforms to the requirements of cl 4.15(c) and that helps to minimise the risk of the current *Registered Participant* failing to comply with the NER in the future. Furthermore, it is in the public interest that the compliance program be implemented, having regard to the contraventions in this case and the fact that AEMO’s ability to maintain *power system* *security* in the future will be compromised if limitations on a *Generator*’s ability to comply with its *performance standards* have not been made known to, and (where required) approved by, AEMO.

# Costs

1. The applicant seeks the following order:

Pursuant to s 43 of the *Federal Court of Australia Act 1976* (Cth), within 28 days of the making of this Order, the Respondents pay the Applicant’s costs of, and incidental to, this proceeding, agreed in the amount of $300,000.

1. This order should be made.

|  |
| --- |
| I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated: 28 June 2022

**Appendix A**

**Glossary**

(Certain of the definitions stated in the NER have been edited for brevity and relevance to the subject-matter of this proceeding.)

|  |  |
| --- | --- |
| ***active energy*** | A measure of electrical energy flow, being the time integral of the product of *voltage* and the in-phase component of the current flow across a *connection point*, expressed in watthour (Wh). |
| ***active power*** | The rate at which *active energy* is transferred. |
| ***AEMO advisory matter*** | A matter that relates to AEMO’s functions under the NEL and in which AEMO has a role in schedule 5.2 (among other schedules). |
| ***connect, connected, connection*** | To form a physical link to or through a *transmission network.* |
| ***connection point*** | The agreed point of supply established between [a] *Network Service Provider* and another *Registered Participant*. |
| ***facilities*** | A generic term associated with the apparatus, equipment, buildings and necessary associated supporting resources provided at, typically:  (a) a *power station* or *generating unit*;  (b) a *substation* or *power station switchyard*;  (c) a *control centre* (being a AEMO *control centre*, or a *distribution* or *transmission network control centre*);  (d) facilities providing an *exit service*. |
| ***generating system*** | A system comprising one or more *generating units* and includes auxiliary or *reactive plant* that is located on the *Generator’s* side of the *connection point* and is necessary for the *generating system* to meet its *performance standards*. |
|  |  |
| ***generating unit*** | The plant used in the production of electricity and all related equipment essential to its functioning as a single entity. |
|  |  |
| ***generation*** | The production of electrical power by converting another form of energy in a *generating unit*. |
|  |  |
| ***Generator*** | A person who engages in the activity of owning, controlling or operating a *generating system* that is *connected* to, or who otherwise *supplies* electricity to, a *transmission* … *system* and who is registered by AEMO as a *Generator* under Chapter 2 … |
|  |  |
| ***network*** | The apparatus, equipment, plant and buildings, used to convey, and control the conveyance of electricity to customers … |
|  |  |
| ***Network Service Provider*** | A person who engages in the activity of owning, controlling or operating a *transmission* … *system* and who is registered by AEMO as a *Network Service Provider* under Chapter 2. |
|  |  |
| ***nominal voltage*** | The design *voltage* level, nominated for a particular location on the *power system …* |
|  |  |
| ***normal voltage*** | In respect of a *connection point*, its *nominal voltage* or such other *voltage* up to 10% higher or lower than *nominal voltage*, as approved by AEMO, for that *connection point*. |
|  |  |
| ***performance standard*** | A standard of performance that:  (a) is established as a result of it being taken to be an applicable performance standard in accordance with clause 5.3.4A(i); or  (b) is included in the register of performance standards established and maintained by AEMO under rule 4.14(n),  as the case may be. |
|  |  |
| ***plant*** | In relation to a *connection point*, includes all equipment involved in generating, utilising or transmitting electrical *energy*. |
|  |  |
| ***power system*** | The electricity power system of the *national grid* including associated *generation* and *transmission* … *networks* for the *supply* of electricity, operated as an integrated arrangement. |
|  |  |
| ***power system security*** | The safe scheduling, operation and control of the *power system* on a continuous basis in accordance with the principles set out in clause 4.2.6. |
|  |  |
| ***Protection system*** | A system, which includes equipment, used to protect a *Registered Participant’s facilities* from damage due to an electrical or mechanical fault or due to certain conditions of the *power system*. |
|  |  |
| ***Registered Participant*** | A person who is registered by AEMO in any one or more of the categories listed in rules 2.2 to 2.7 … |
|  |  |
| ***transmission line*** | A power line that is part of a *transmission network.* |
|  |  |
| ***transmission network*** | A *network* within any *participating jurisdiction* operating at nominal *voltages* of 220 kV and above plus:  (a) any part of a *network* operating at nominal voltages between 66 kV and 220 kV that operates in parallel to and provides support to the higher voltage *transmission network*;  (b) any part of a *network* operating at nominal *voltages* between 66 kV and 220 kV that is not referred to in paragraph (a) but is deemed by the *AER* to be part of the *transmission network*. |
|  |  |
| ***voltage*** | The electronic force or electric potential between two points that gives rise to the flow of electricity. |