

29 June 2018



COAG Energy Council Secretariat
GPO Box 787
Canberra ACT 2601

Dear Sir/Madam,

Energy Queensland submission to the AER Powers and Civil Penalty Regime - Consultation Paper

Energy Queensland Limited (Energy Queensland) welcomes the opportunity to provide comment to the Council of Australian Governments (COAG) Energy Council's Senior Committee of Officials (SCO) on its "AER Powers and Civil Penalty Regime Consultation Paper".

This submission is provided by Energy Queensland, on behalf of its related entities Energex Limited (Energex), Ergon Energy Corporation Limited (Ergon Energy), Ergon Energy Queensland Limited (EEQ) and Yurika Pty Ltd (Yurika).

Energy Queensland acknowledges the importance of a robust compliance and enforcement regime for the Australian energy market and recognises the need to adapt the regime to keep pace with developments in the market. However, Energy Queensland considers that the proposed extension of powers for the Australian Energy Regulator is too broad in its current form and should be limited to avoid over-reach. Further, in relation to the proposals to significantly increase the penalty amount for a large number of existing civil penalty provisions, particularly those which apply to retailers and distributors with respect to life support obligations, Energy Queensland is concerned by the lack of demonstrated evidence that existing penalties do not act as a sufficient deterrent.

Energy Queensland's responses on the questions posed in the Consultation paper are provided in the attached response. Should the COAG Energy Council SCO require additional information or wish to discuss any aspect of Energy Queensland's submission, please contact me on (07) 3851 6416 or Trudy Fraser on (07) 3851 6787.

Yours sincerely

A handwritten signature in black ink, appearing to read "Jenny Doyle".

Jenny Doyle
General Manager - Regulation and Pricing
Telephone: (07) 3851 6416 / 0427 156 897
Email: jenny.doyle@energyq.com.au

Attachment – Energy Queensland response to consultation questions

Energy Queensland responses to COAG Energy Council AER Powers and Civil Penalty Regime consultation paper

Questions	Comments
Issue 1 - Giving the AER a power to compel individuals to appear before it and give evidence	
<p>1. Do you agree that the AER should be able to use its new power, to compel individuals to appear before it and give evidence, in relation to any of its functions or powers?</p>	<p>Energy Queensland considers that any power to compel individuals to appear before the AER to give evidence should be limited to obtaining evidence in relation to the AER's exercise of its enforcement powers only.</p> <p>Energy Queensland notes that the AER already has a wide range of functions and powers under the national energy laws and on this basis does not support extending the new power to any AER function or power.</p> <p>The proposed new power should also be limited by:</p> <ul style="list-style-type: none"> - requiring the AER to provide adequate notice to the individual, and - only being available in circumstances where the AER has reasonable grounds to suspect that the person has knowledge of a matter under enforcement.
<p>2. Do you agree that the AER should be able to use information collected using its new power in relation to any of its powers or functions, noting the exception relating to wholesale market monitoring?</p>	<p>Energy Queensland considers that any power to compel individuals to appear before the AER to give evidence should be limited to obtaining evidence in relation to the AER's exercise of its enforcement powers only.</p> <p>Information obtained from individuals under this proposed new power should not be relied on by the AER in exercising any of its functions or powers, but should only be used in relation to a specific enforcement matter, where the AER reasonably suspects that individual has information necessary to enable to AER to conduct those enforcement activities.</p>
<p>3. If not, what limitations should be placed on how the AER is allowed to use information obtained through use of the new power?</p>	<p>Energy Queensland notes that the AER has a wide range of functions and powers and the ability to compel individuals to give information should be limited to enforcement matters only.</p> <p>Energy Queensland considers that adequate notice should be given to the</p>

	<p>individual, and these requirements should be contained in the relevant Act and binding on the AER.</p> <p>Further, an approved form of notice could be adopted for this purpose. At a minimum, the notice should be required to include the individual's details, the information required from that individual, the timeframe within which the individual is required to provide the information, and why the information is required.</p> <p>The individual should also have an avenue to appeal (or seek review of) the requirement to give the information.</p>
<p>4. Do you agree that the existing penalties in the national energy laws for failing to provide information to the AER, or providing false or misleading information, should apply to the AER's new power?</p>	<p>Energy Queensland contends that if penalties were to apply to individuals for failing to provide information, it is critically important that the AER's ability to compel those individuals is adequately limited - i.e.</p> <ul style="list-style-type: none"> - to enforcement matters only; - where the AER reasonably suspects the person has the required information; - the AER must comply with strict notice requirements; and - the individual has the right to appeal/have the requirement reviewed). <p>However, if the information provided by the individual is not provided on oath/affirmation, Energy Queensland considers that no penalties should apply if the information is false but provided in good faith. For example, an individual may be seeking to co-operate in good faith with the AER in giving verbal information but may nonetheless be inaccurate or incorrect.</p> <p>The AER should have an obligation to collect further evidence to independently verify verbal information before acting in reliance on it.</p>
<p>5. Do you agree offence provision penalty amounts should be increased in line with changes in the value of money?</p>	<p>Energy Queensland notes that the 2013 <i>“Review of Enforcement Regimes under the National Energy Laws - A Report Prepared for the Standing Council on Energy and Resources”</i> (the 2013 report) claimed that the deterrence value of the civil penalty amount has diminished as the penalty amount did</p>

	<p>not follow changes in the value of money.</p> <p>Energy Queensland does not disagree that changes in the value of money over this time have reduced the “real” economic value of this penalty. However, given that penalty impacts are more broad-ranging than mere financial impacts, e.g. reputational impacts, Energy Queensland does not consider that this change in the value of money over time has notably reduced the deterrent value of the penalty.</p>
<p>6. Do you agree the AER should be able to require evidence be given on oath or affirmation?</p>	<p>Energy Queensland agrees with the proposal to require evidence to be given on oath or affirmation. However, Energy Queensland recalls that the 2013 report states that <i>“its use in practice should be limited to serious contraventions where there is a demonstrated need for the exercise of the power”</i> (p119).</p> <p>As such, the use of this power should be limited to enforcement matters only and provided adequate notice periods (which should be included in the relevant Act) are complied with. Further, individuals should be afforded adequate time to prepare and the opportunity to seek legal representation prior to providing information on oath or affirmation.</p>
<p>7. Do you agree that individuals compelled to appear before the AER under the new power should have the right to exercise a privilege against self-incrimination for criminal offences?</p>	<p>Energy Queensland agrees that if individuals are compelled to appear before the AER under the proposed new power, they should have a right to privilege against self-incrimination for criminal offences</p> <p>However, Energy Queensland also considers that the individual should be afforded protection against civil penalty proceedings taken against them personally.</p> <p>For example, similar to the arrangements under the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) and the <i>Environment Protection Act 1994</i> (QLD) which provide that incriminating evidence for an individual who answers a question is not admissible in evidence against the individual in either a civil or criminal proceedings.</p>

<p>8. Do you agree that individuals or corporations compelled to provide information to the AER under its existing powers (e.g. s. 28 of the NEL), and under the new power, should not be able to exercise a penalty privilege for civil penalties?</p>	<p>As stated above in response to question 7, Energy Queensland considers that if an individual is compelled to provide evidence to the AER, the individual should also be afforded protection against civil penalty proceedings taken against them personally.</p> <p>If the penalty privilege is not extended to civil penalties, the information obtained from the individual should not be admissible as evidence in civil proceedings against them.</p>
<p>9. Do you agree with the proposal for the AER to be required to produce a guideline on the use of its new information collection powers?</p>	<p>Energy Queensland agrees that the AER should be required to provide a guideline on the use of this proposed new power. Although any guideline should relate to administrative matters only.</p> <p>Energy Queensland considers that matters fundamental to the power to compel people to give evidence should be contained in the relevant Act, for example:</p> <ul style="list-style-type: none"> • the circumstances in which the AER can exercise the power to compel the individual to provide information; • the amount and form of notice required to be given to the person; and • the purpose(s) for which the AER can use the information.
<p>10. Do you agree the provisions described above should be extended to the AER's new power?</p>	<p>Energy Queensland agrees that the provisions listed in section 2.10 of the consultation paper should be extended to the AER's proposed new power.</p>
<p>11. Are there other provisions in the national energy laws or similar laws that should be applied to the AER's new power?</p>	<p>No comment.</p>
<p>Issue 2 - Proposed changes to the civil penalty regime under the National Energy Laws</p>	
<p>12. Do you agree these principles can be used to decide whether a civil penalty provision should attract a higher or lower civil penalty amount?</p>	<p>Energy Queensland notes that the first three principles listed in the consultation paper largely align with the National Electricity Objective and, as a consequence, may be useful in providing high-level guidance for the civil</p>

	<p>penalty regime. However, more detailed guidance is required to explain how these principles could be practically applied to any breach of the civil penalty provisions.</p> <p>Further, Energy Queensland notes that the concept of “consumer harm” is more subjective than the other stated principles and further detail is required to explain how this could be used to practically determine application to breaches.</p>
<p>13. Are there other principles that could be used?</p>	<p>Energy Queensland suggests that the stated principles could be supported with consideration of the following issues:</p> <ul style="list-style-type: none"> • Materiality of the breach or outcome <ul style="list-style-type: none"> - Was anyone actually harmed? If so, how many? - To what extent were they “harmed”? • Proportionality of penalty to outcome <ul style="list-style-type: none"> - Would thresholds be applied for number of customers “harmed” for a breach of a civil penalty provision? • Extent to which undesired outcome can be reasonably avoided or totally eliminated • Cost to totally eliminate risk of undesired outcome.
<p>14. Are the civil penalty provisions identified in Appendix A appropriate to attract the higher civil penalty amount?</p>	<p>Energy Queensland contends that it has not been established at any stage in this review process that the current civil penalty amount for breaches of life support and de-energisation provisions (\$100,000 for a body corporate/\$20,000 for infringement notice) is inadequate or insufficient as a deterrent for non-compliance. Nor has it been established that any increase in the civil penalty for breaches of these provisions would reduce rates of non-compliance.</p> <p>As previously argued by the Energy Networks Association in its submission to the 2014 Discussion Paper <i>“Key Recommendations Arising from the Review of Enforcement Regimes under the National Energy Laws Final</i></p>

	<p><i>Report</i>”, the imposition of higher penalties will increase the regulatory burden for regulated businesses. This impact should be assessed via economic analysis.</p> <p>The proposal to increase the civil penalty for breaches of life support and de-energisations provisions by 1000 per cent appears to assume that higher penalties will provide the necessary incentive for distributors and retailers to avoid breaches of these provisions. However, there is no evidence that higher penalties will overcome wrongful de-energisations caused by:</p> <ul style="list-style-type: none"> • incorrectly recorded address details • incorrect instructions (from retailer to distributor) • transposed metering • incorrectly labelled meters (in multiple occupancy) • technician attending the wrong site or • technician removing the fuse for the wrong premises. <p>Energy Queensland notes that the additional costs associated with increased penalties for breaches of these provisions may be passed on to customers.</p>
<p>15. Are there additional provisions that could be added to the list in Appendix A?</p>	<p>No additional provisions should be added to Appendix A.</p>
<p>16. Do you agree that, if additional civil penalty provisions were to attract the higher maximum civil penalty amount, the AER should be able to issue infringement notices for breaches of these provisions?</p>	<p>Energy Queensland does not dispute the ability for the AER to issue infringement notices for possible/alleged breaches of civil penalty provisions.</p> <p>However, as stated above, Energy Queensland considers that it is yet to be satisfactorily demonstrated that the existing civil penalty amount is not providing the desired deterrence which, it is assumed, would be enabled by significantly higher civil penalty amounts, and by extension, higher penalties for infringement notices.</p>
<p>17. Do you agree infringement notice amounts for these breaches should be 20 percent of the relevant civil penalty amount?</p>	<p>Energy Queensland does not dispute the ability for the AER to issue infringement notices for civil penalty provisions, at an amount not exceeding</p>

	<p>20 per cent of the penalty amount.</p> <p>However, given the proposed 1000 per cent increase in the civil penalty amount for the provisions listed in Appendix A, 20 per cent of the increased penalty amount for an infringement notice is manifestly excessive and fails to consider the materiality of the outcome and proportionality of the penalty, or the consequences in order to eliminate the risk entirely. Further, the need for such an increase has not been established, in a policy context or by regulatory impact analysis.</p> <p>Energy Queensland understands that the AER has no discretion in its application of infringement notice penalties, which means that there will be no consideration of the materiality of the breach, the practical impacts of alleged breaches, the extent to which the alleged breach could be totally avoided by the party accused of the breach, and the proportionality of the penalty to the alleged breach.</p>
<p>18. Do you agree the AER should be able to issue infringement notices for breaches of the electricity market rebidding provisions?</p>	<p>No comment</p>
<p>19. Do you agree that this description reflects the changes that would be needed to introduce a two tier civil penalty regime in the national energy laws?</p>	<p>Energy Queensland considers that any proposed changes to civil penalty regime, like any proposed changes to the governance of the Australia’s energy market, should be appropriately consulted with affected parties. The Australian Energy Market Commission’s (AEMC) rule change process provides adequate opportunity for proposals to be discussed and for stakeholders’ perspectives to be considered. The AEMC, as expert energy policy adviser, is also in the preferred position to adjudicate on changes to civil penalty regime and balance the relative merits of proposals within the context of the energy market.</p> <p>Further, it is appropriate that the changes to the civil penalty regime, following the extensive consultation conducted by AEMC, be implemented via legislation approved by the COAG Energy Council.</p> <p>However, as stated above, Energy Queensland considers that it is yet to be</p>

	<p>satisfactorily demonstrated that the existing civil penalty regime is deficient and not providing the necessary deterrence which, it is assumed, would be provided by significantly higher civil penalty amounts, and by extension, higher penalties for infringement notices. Nor has it been adequately explained why each of the provisions listed in Appendix A to the Consultation Paper should attract a significantly higher penalty than currently applies.</p>
<p>20. Are there other issues you would like to raise in response to this consultation?</p>	<p>No comment</p>