



# QUEENSLAND FARMERS' FEDERATION

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## Submission

29 June 2018

COAG Energy Council Secretariat  
GPO Box 787  
CANBERRA ACT 2601

Via email: [energycouncil@environment.gov.au](mailto:energycouncil@environment.gov.au)

Dear Sir/Madam

### Re: AER Powers and Civil Penalty Regime

The Queensland Farmers' Federation (QFF) is the united voice of intensive agriculture in Queensland. It is a federation that represents the interests of peak state and national agriculture industry organisations, which in turn collectively represent more than 13,000 primary producers across the state. QFF engages in a broad range of economic, social, environmental and regional issues of strategic importance to the productivity, sustainability and growth of the agricultural sector. QFF's mission is to secure a strong and sustainable future for Queensland farmers by representing the common interests of our member organisations:

- CANEGROWERS
- Cotton Australia
- Growcom
- Nursery & Garden Industry Queensland (NGIQ)
- Queensland Chicken Growers Association (QCGA)
- Queensland Dairyfarmers' Organisation (QDO)
- Australian Cane Farmers Association (ACFA)
- Flower Association
- Pork Queensland Inc.
- Queensland United Egg Producers (QUEP)
- Bundaberg Regional Irrigators Group (BRIG)
- Burdekin River Irrigation Area Irrigators Ltd (BRIA)
- Central Downs Irrigators Ltd (CDIL)
- Pioneer Valley Water Cooperative Ltd (PV Water)
- Queensland Chicken Meat Council (QCMC).

QFF welcomes the opportunity to provide comment on the COAG Energy Council Consultation Paper titled 'AER Powers and Civil Penalty Regime' (June 2018). QFF provides this submission without prejudice to any additional submission provided by our members or individual farmers.

*The united voice of intensive agriculture*



## **Background**

QFF understands that the contents of this consultation paper meet the commitments made by the COAG Energy Council in November 2017, to progress recommendations from the review into:

- amending the national energy laws to give the Australian Energy Regulator (AER) the power to compel individuals to appear before it and give evidence (recommendation 13)
- conducting a targeted review of whether additional provisions of the national energy laws or subordinate instruments should attract the highest maximum civil penalty amount (recommendation 5).

Responses to selected consultation questions are provided below.

### **Consultation Question 1**

QFF supports the intent 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. This refers to powers in the regulatory sense and could also apply to the economic regulating function of the AER as well as to the investigation of breaches and other regulatory functions.

### **Consultation Questions 2 & 3**

QFF agrees 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.

### **Consultation Questions 4 & 5**

QFF supports the application of penalties should apply to the AER's new power for failing to provide information or providing false information. Noting that, an 'individual' asked to comment or provide any form of testimony by the AER may be mistaken in their statement; not remember; or, be mistaken in the memory of the incident. Information and data may also be provided in good faith at a point in time, and noting questions pertaining to 'opinion' more accurately refers to someone's personal beliefs, views, or judgments on a matter, rather than what could be considered fact.

QFF notes the Law and Rules making it clear that any civil penalties associated with the AER's exercise of its economic regulatory powers are not able to be passed through as part of a network's regulated revenue cap. This is consistent with the former ruling under the Limited Merits Review (LMR) appeals following the 2012 amendments – the costs of an LMR appeal could not be recovered as part of the network's regulated revenues. Whilst QFF appreciates that the amounts for civil penalties are relatively small, maintenance of this principle is critical.

QFF also agrees that offence provision penalty amounts should be increased in line with changes in the value of money. CPI indexation to penalty's is commonplace in other jurisdictions to ensure that their deterrent effect is maintained. Given the penalties have not been subject to indexation to date, it would appear prudent to apply a mechanism to reflect the historical indexation in a one-off adjustment.

### **Consultation Question 6**

QFF supports the proposal that the AER should be able to require evidence to be given under oath or affirmation to reflect the importance of providing truthful information.

### **Consultation Questions 7 & 8**

QFF considers it essential 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. The Consultation Paper acknowledges that the 'privilege against self-incrimination is enshrined in common law in Australia' (page 10).

However, we agree that this protection should not be made available where they are civil penalties applied for the failure to appear or provide information. The Consultation Paper notes that allowing this penalty privilege for civil penalties could be a significant barrier to the AER's performance of its functions.

#### ***Consultation Question 9***

QFF agrees that the AER should be required to produce guidelines on the use of its new information collection powers. The contents of the guidelines must simplify and make transparent the new processes but not constrain the AER in any way. The guidelines must also be a 'living document', maintaining their relevance and currency.

#### ***Consultation Questions 12, 13, 14 & 15***

QFF considers that the penalties should be proportional to the harm caused (principle of proportionality). QFF supports a framework of principles which could be used to determine which provisions could attract higher/lower penalties. It has also been suggested that such a framework could be used by the AEMC in rule changes rather than changes to legislation per se.

QFF also considers that the civil penalty provisions identified in Appendix A are appropriate to attract the higher civil penalty amount; however, themes including, but not limited to, system security and disconnections and customer hardship could also be considered. The circumstances of the conduct should be considered from inadvertent breaches to deliberate and/or repeat behaviours.

QFF notes that there are already a range of other tools such as enforceable undertakings that may be utilised and suggests a review regarding the effectiveness of the existing use of these tools. QFF is also interested to understand if these powers would apply to economic regulation as it is assumed that the intent of powers would only apply to investigations undertaken as part of a compliance or enforcement activity.

#### ***Consultation Questions 16, 17 & 18***

QFF understands that there are already civil penalties in Queensland for breaches and seeks clarification how the proposed positions will interrelate with the existing framework. QFF also questions how the AER will measure harm both experiential and actual impacts, noting back to the issues surrounding proportionality.

QFF supports the ability for the AER to be able to issue infringement notices for breaches of the electricity rebidding provisions. However, more guidance is required as to what would constitute a rebidding activity that is worthy of an infringement notice versus a litigation process.

QFF reiterates that all civil penalties associated with the AER's exercise of its economic regulatory powers must not be passed through as part of a network's regulated revenue cap.

If you have any queries about this submission, please contact Dr Georgina Davis at [georgina@qff.org.au](mailto:georgina@qff.org.au).

Yours sincerely

Travis Tobin  
Chief Executive Officer