

15 March 2016

COAG Energy Council Secretariat
Department of Industry, Innovation and Science
GPO Box 9839
CANBERRA ACT 2601

Level 9
99 Gawler Place
Adelaide SA 5000
Postal Address:
GPO Box 2010
Adelaide SA 5001
T 1300 858 724
F 08 8410 8545

Via email to: energycouncil@industry.gov.au

Dear Energy Working Group members

National Electricity Law and National Gas Law Amendment Package

The Australian Energy Market Operator (AEMO) welcomes the opportunity to comment on the legislative amendment package.

We support the objectives of both aspects of the proposed reforms. However, we are concerned that the proposed information collection and publication amendments, as currently drafted, will cause material interpretation issues with respect to AEMO's protected information regime in the National Electricity Law (NEL) and National Gas Law (NGL). They could also present a disincentive for participants and other market institutions, including AEMO, to share information with the AER on a voluntary basis.

1. Information collection and publication

a. General observations

It is desirable to address the features of the current confidentiality arrangements that hinder the AER's ability to conduct a rigorous regulatory determination process and effective market monitoring. There is, however, a risk that the proposed drafting of the provisions may have unintended consequences.

The amendments include new and amended provisions regarding the AER's obligations to keep information confidential, and the circumstances in which the AER is authorised to disclose that information. Most of the AER confidentiality provisions in the current NEL and NGL have parallels in AEMO's protected information regime (NEL sections 54 to 54H and NGL sections 91G to 91GH). We understand the reasons for applying more robust requirements to establish confidentiality in relation to information provided by network businesses in response to a regulatory information instrument or as part of a revenue determination process, but there are other material differences that do not have any clear rationale. If the provisions diverge as currently proposed, it is likely that the confidentiality provisions applicable to AEMO will be interpreted to have a different meaning, and some of the AER provisions may conflict with each other.

By way of example (using the proposed NEL amendments):

- Section 18A is formulated very differently from sections 54 and 54A and contains additional provisions that could cause ambiguity, despite subsection (4). In particular subsection (1) potentially conflicts with section 28W; subsection (2) creates the

AEMO SUBMISSION TO COAG NEL NGL AMENDMENT PACKAGE

potential for argument that consent may be required even where disclosure is authorised on other grounds; and subsection (3) seems unnecessary given that subsection (1) is not limited.

- Section 44AAF of the Competition and Consumer Act, which is currently imported by NEL s18 (NGL s 30), defines the information to be protected by the AER in terms that could be inconsistent with the proposed amendments. It may help to set out the AER's confidentiality obligations and permitted disclosures relating to its energy regulatory functions in full in the NEL and NGL, expressly excluding s44AAF.
- Section 28ZAA (aggregated information) is a new provision with no equivalent applicable to AEMO. Both organisations regularly publish aggregated information so as not to reveal confidential aspects of information relating to a participant. AEMO currently relies on NEL s54F to publish information in aggregated form, and we note that the existing s28Z is the equivalent for the AER. The existence of both provisions for the AER may lead participants to question AEMO's authority to disclose aggregated information.
- Section 28ZB(7a) has no equivalent in AEMO's protected information regime. By including it expressly in relation to the AER, questions may be raised as to whether AEMO could be required to do more to satisfy the hearing rule.

We encourage the Energy Working Group to consider whether there are valid reasons for all the drafting differences, and if so to identify these so that the intended meaning is clear. If there is no intention for AEMO and the AER to have different powers and obligations in relation to confidentiality, we suggest that the drafting be aligned.

b. Proposed presumption against confidentiality

Draft NEL s18A(5) and NGL s30A(5) contain a presumption that information is not confidential unless an express claim, with reasons, is made at the time of disclosure. This applies to any information given to the AER in any context, including voluntarily in circumstances where the confidential nature of the disclosure might be obvious.

We understand the rationale for requiring regulated businesses to expressly make and substantiate confidentiality claims when responding to a regulatory information notice or another compulsory disclosure requirement, including information provided in regulatory proposals. Typically those processes are highly formalised, with significant legal oversight on both sides, and this requirement is appropriate.

However, the AER gathers information to perform its functions in many different ways, including through the voluntary exchange of information with market participants and other organisations, including AEMO. As contemplated by NEL s54C and NGL s91GC, AEMO is authorised to disclose protected information to the AER, and we regularly share such information with the AER in relation to our respective functions.

The presumption against confidentiality could undermine the AER's ability to acquire relevant information from other parties in a timely way. In AEMO's case, the proposed amendment would lead us to consider adopting a more formal and bureaucratic approach to sharing information with the AER. Market participants could be unwilling to engage in any informal communication with the AER at all, so information sharing is limited to what is legally required and formalised through approved channels. Unless appropriately targeted, broad powers to publish information have the potential to be counterproductive.

With this in mind, the Energy Working Group may wish to consider whether NEL sections 53 and 54 provide a more appropriate precedent – at least for information that is not given in response to a regulatory information instrument or as part of a revenue proposal and determination process. Under s54, information given ‘in confidence’ is protected, without the need for express claims and reasons. This does not restrict the authorised use or disclosure of that information where permitted by other provisions of the Law.

2. Wholesale market monitoring functions

We support amendments to confer wholesale market monitoring functions on the AER. The National Electricity Market is a unique and complex market that merits specialised regulatory focus. For instance, the exercise of market power may be affected by temporal and/or market design issues that do not arise elsewhere in competition law. The AER should have the capability to identify strengths and weaknesses in the operation of the wholesale electricity market and highlight any problems to policy makers.

We would be happy to work with the Energy Working Group to address the issues raised. If you would like to discuss any aspect of this submission please don't hesitate to contact Louise Thomson on 03 9609 8321.

Yours sincerely

David Swift
Executive General Manager, Corporate Development