

18 March 2016

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Dear Energy Working Group members,

AER submission on National Electricity Law and National Gas Law Amendment Package

The Australian Energy Regulator (AER) welcomes the opportunity to respond to the National Electricity Law (NEL) and National Gas Law (NGL) amendment package released by the Council of Australian Governments (COAG) Energy Council's Energy Working Group.

The proposed amendments are designed to:

- remove barriers to the AER collecting and publishing information for the purposes of benchmarking, and
- introduce an explicit wholesale market monitoring function for the AER into the NEL.

This submission addresses each of these amendments in turn.

Information collection and publication

As highlighted by the Energy Working Group, the purpose of the proposed information collection and publication amendments to the NEL and NGL is to ensure the AER has sufficient and clear powers to collect and publish data as part of its responsibility for economic regulation of network service providers.

The proposed amendments to the NEL and NGL clarify the AER's functions and powers in respect of:

- compulsory powers to collect information
- performance reporting functions, including annual benchmarking reports, and
- the publication of information.

These changes are designed to remove the restriction on the AER issuing regulatory information instruments to obtain data solely for the purpose of performance reports. They are also designed to impose an up-front obligation on service providers to make an express claim of confidentiality when submitting the information and to provide justification at that time.

As highlighted in the Energy Working Group's Explanatory Note, the provisions are designed "to put beyond doubt aspects of the AER's powers, including the ability of the AER to gather and use information for benchmarking and annual performance reports."¹

We support these principles and a number of the proposed drafting changes.

It is important that the NEL and NGL are unequivocal about the AER's ability to collect and use information for the purposes of its benchmarking and performance reporting functions. We therefore support the proposed amendments to section 28F of the NEL and section 28 of the NGL which remove the restriction on our powers to collect information solely for the purpose of preparing network service provider performance reports. We also support the amendments to section 28V of the NEL and section 64 of the NGL which clarify that the AER's performance reports may analyse the efficiency of network service providers in providing network services.

However, we consider that the proposed legislation as currently drafted in some circumstances may need further development to fully meet the policy intent.

In particular we note that proposed sections 18A(5) of the NEL and 30A(5) of the NGL contain a presumption that information is not confidential unless an express claim with reasons is made at the time the information is disclosed. This requirement has been included to address concerns that the current process for the AER to assess claims of confidentiality is time consuming and can encourage blanket claims of confidentiality in response to regulatory information requests.

We agree that it is appropriate to require regulated businesses to expressly make and substantiate confidentiality claims when responding to a regulatory information notice or another compulsory disclosure requirement such as information provided in their regulatory proposals. The provision as currently drafted, however, could have broader coverage. Arguably, any information given to the AER, including information voluntarily provided by

¹ COAG Energy Council, Energy Working Group 2016, *National Electricity Law and National Gas Law Amendment Package – Explanatory note for stakeholder consultation*, p. 2.

any market participant or market institution (such as AEMO and the AEMC) could be caught by this provision.

The AER relies on the voluntary provision and exchange of information to support many of its existing functions across wholesale and retail markets, and networks. Any presumption against confidentiality for all information provided to the AER (or even a perception by participants that there is a presumption against confidentiality) could limit this exchange of information and compromise the ability of the AER to effectively undertake some of its functions.

To avoid any unintended consequences from the operation of this provision, we would encourage the Energy Working Group to consider drafting amendments limiting the operation of proposed sections 18A(5) of the NEL and 30A(5) of the NGL to network businesses responding to a regulatory information notice or another compulsory disclosure requirement, including information provided in regulatory proposals.

Wholesale market monitoring

The Energy Working Group's Explanatory Note highlights that the proposal for an AER wholesale market monitoring role arose from the AEMC's consideration of a rule change request from the Major Energy Users concerning Potential Generator Market Power in the National Electricity Market (NEM). While not making any changes to the rules, the AEMC recognised that the presence of barriers to entry or structural factors may raise the prospect that the wholesale electricity market is not workably competitive. It recommended that the Energy Council introduce an explicit market monitoring function for the AER in the NEL.

The proposed amendments to the NEL give effect to the AEMC's recommendation to introduce an explicit wholesale market monitoring function for the AER. The proposed NEL amendments:

- require the AER to undertake a market review task
- require the AER to publish, not less than every two years, a wholesale market review report containing the results of the monitoring, and
- introduce explicit provisions around the AER process to seek additional information and the terms of confidentiality.

We support the proposal to confer this responsibility on the AER. We consider it important that a monitoring regime is established to regularly report on competitive conditions in the wholesale electricity market. As highlighted by the AEMC:

An appropriately developed monitoring regime is a pre-requisite for identifying at an earlier stage any evidence that the efficient operation of the wholesale electricity market is undermined by the presence of significant barriers to entry or other features of the industry structure.²

² AEMC 2013, *Potential Generator Market Power in the NEM*, Final Rule Determination, p. 6.

We agree that monitoring plays an important role in supporting the efficient operation of the wholesale market, as it allows early detection and analysis of any issues impacting on market efficiency.

We consider that the proposed amendments provide a reasonable basis on which to undertake a market monitoring and reporting role. However, we consider that amendments could be made to the proposed drafting which would improve the operation of the market monitoring function.

'Effective competition' and the AER's proposed monitoring and reporting role

The proposed amendments to the NEL require the AER to consider whether competition is effective, where effective competition is defined as:

Effective competition, in relation to a wholesale electricity market, requires—

- (a) that there be active competitors in the market and that those competitors hold a reasonably sustainable position in the market (rather than there being the mere threat of competition in the market); and*
- (b) that prices be determined on a long term basis by underlying costs rather than the existence of market power, even though a particular competitor may hold a substantial degree of market power from time to time; and*
- (c) that barriers to entry into the market be sufficiently low so that a substantial degree of market power may only be held by a particular competitor on a temporary basis; and*
- (d) that there be independent rivalry in all dimensions of the price, product or service offered in the market;*

While these are factors that should be taken into account in determining whether competition is effective, having a prescribed definition of effective competition potentially limits the scope of the AER's assessment. It may not be able to consider other factors that impact on competition.

There are a couple of potential ways forward on this issue. First, the Energy Working Group could require the AER to have regard to these factors in assessing the effectiveness of competition. Under this approach, the AER would be required to consider these factors, but would also be able to take into account other factors that may impact on competition. This would follow the approach adopted for the AEMC's retail competition reviews.

Alternatively, the Energy Working Group could delete the definition of effective competition and rely on other proposed provisions to guide the AER's reviews. Under the proposed section 18C(3) of the NEL, the AER is required to report on:

- features of the market that impact detrimentally on its efficient functioning and the achievement of the national electricity objective, including (but not limited to) the presence of significant barriers to entry, or any other features of the industry structure that raise potential concerns that the market is not functioning as an effectively competitive market; and
- inefficiencies in the market, their causes and whether conditions in the market are such that the inefficiencies are likely to impact detrimentally in the long term on the efficient functioning of the market.

These provisions appear to already provide significant guidance to the AER in how it should undertake this market monitoring and reporting role.

We would also recommend that the Energy Working Group give consideration to whether provisions such as section 18C(3) should require the AER to report on the 'level of competition' in the market rather than just detrimental impacts on the market and inefficiencies. This change would recognise that elements of the design and market outcomes may have a positive impact on competition in wholesale electricity markets.

Proposed section 18D(3)

The proposed section 18D(3) states that "the AER must not use confidential supplier information for any purpose other than the performance of its wholesale market monitoring functions or wholesale market reporting functions". The Explanatory Note states that information provided to the AER as part of its wholesale market monitoring amendments will be deemed to be given in confidence. The AER will therefore be prevented from using that information for another purpose.

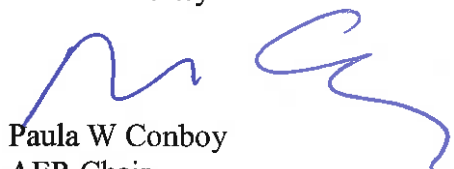
Section 44AAF of the *Competition and Consumer Act 2010* allows the AER to use information given to it in confidence for the performance of any of its powers or functions.

Section 18D(3) of the proposed Bill appears inconsistent with section 44AAF in this regard. In our view, it is not possible to resolve this inconsistency and we would suggest that section 18D(3) be deleted.

Thank you for the opportunity to comment on the NEL and NGL amendment package. We would welcome the opportunity to engage with you further, including on legal drafting issues, as these amendments progress.

If you would like to discuss this submission or require any further information, please contact Gavin Fox on (02) 6243 1249.

Yours sincerely


Paula W Conboy
AER Chair

