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29 September 2017

Dear Sir/Madam,

Ministerial Power to make Rules Statutes Amendment (National Energy Laws) (Rules) Bill 2017

AGL Energy (**AGL**) welcomes the opportunity to make a submission in response to the *Draft Statutes Amendment (National Energy Laws) (Rules) Bill 2017 (Draft Bill)*.

AGL is one of Australia's largest integrated energy companies and the largest ASX listed owner, operator and developer of renewable generation. Our diverse power generation portfolio includes base, peaking and intermediate generation plants, spread across traditional thermal generation as well as renewable sources. AGL is also a significant retailer of energy, providing energy solutions to around 3.7 million customer accounts throughout eastern Australia.

The Establishment of an Energy Security Board

AGL supports the implementation of all 50 recommendations proposed by the Independent Review into the Future Security of the National Electricity Market (**Finkel Blueprint**).

Recommendation 7.2 of the Blueprint, relating to stronger governance, noted that the COAG Energy Council should immediately agree to establish an Energy Security Board (**ESB**) to drive the implementation of the Finkel recommendations, while also providing a vehicle for coordinated action and accountability for whole-of-system performance. It also suggested that governance arrangements in the energy market would need to change to respond effectively to rapid changes in the NEM, with commensurate changes to the rule-making processes to allow a faster response to emerging issues.

While we support the establishment of an ESB with supporting governance arrangements to further the objectives in the Finkel Blueprint, we have significant concerns with the arrangements proposed. Our concerns are related to the potential to undermine the structured and consultative rule making processes that have operated under the National Electricity Law since 2005. AGL is also concerned about gaps and a lack of clarity in the following key areas:

- 1- **Limitations to the circumstances in which the rule making power is used:** The Finkel recommendation in relation to rule making was limited to circumstances "where a faster response to emerging issues" was necessary and appropriate. The Draft Bill does not propose to limit the power of the ESB to these circumstances. Consequently, the ESB will have the power to recommend rules about matters where there is not any exigency.
- 2- **Consultation obligations:** the Draft Bill states that consultation on ESB-proposed rules must be "in accordance with any requirements determined by the MCE". AGL is very concerned that this clause does not provide certainty that rules will not be amended by the ESB without adequate consultation with market participants.
- 3- **ESB Governance and functions:** the powers of the ESB, will be exercised in accordance with a terms of reference which has not yet been established and is subject to change. AGL is concerned that without clear roles and responsibilities, the arrangements proposed may dilute and to some extent duplicate the roles of the Australian Energy Market Commission (**AEMC**), Australian Energy Regulator (**AER**), and Australian Energy Market Operator (**AEMO**).
- 4- **Confidentiality provisions:** Under the proposed Draft Bill¹, the AER is authorised to disclose confidential information to the ESB. AGL is concerned that in the absence of clear legislative safeguards to protect disclosed

¹ Draft Bill, NEL Section 28YA, NGL Section 326A, NERL Section 210A



confidential information, we consider that there are serious risks that such information being disclosed in circumstances which cause loss and damage.

Therefore, while in principle we support the establishment of the ESB, we do not support the arrangements proposed under the Draft Bill that seek to bypass the consultation process and /or duplicate the role of existing market bodies.

Inadequate limitation on the circumstances in which the power is used

AGL agrees with the Finkel Blueprint that the framework for rule making for the NEM and gas market should include a mechanism for responsive rule-making in the face of exigencies and where a faster response to emerging issues is necessary and appropriate. The Draft Bill should limit the rule recommendation power to circumstances where the ESB is satisfied that the issue or concern under consideration is unlikely to be appropriately addressed through the existing rule making processes under the NEL and NGL.

Adequate consultation obligations

A notable divergence from the AEMC rule-making process is the power for ESB-proposed rules to be subjected to a consultation process as prescribed by the MCE². In our view, this clause does not provide adequate assurance to stakeholders as it suggests that the current consultation process could be subverted by direction from the MCE. In our view, such a direction would be rarely, if ever, appropriate, with regard to the exercise of the ESB's functions and the primacy of the National Electricity Objective (NEO) and National Gas objective (NGO) in its decision-making process.

This contrasts with the structured and consultative rule making processes that have operated under the National Electricity Law since 2005. AGL is concerned that the lack of structured industry consultation through mechanisms such as the Reliability Panel will mean that rule making will occur without the benefit of the technical and operational skills and expertise that are currently brought to bear in decision making by the AEMC and Reliability Panel.

Despite the intention of the legislation to expedite the rule-making process in certain scenarios, this requirement needs to be balanced by the need for robust consultation with affected parties in the interests of maintaining confidence in the governance of the regulatory framework for the sector and in the interests of better rule making. It is likely that the subject matter of rules that the ESB will be contemplating involve complex technical and operational matters. Without effective industry consultation, there will be a real risk that rules made actually undermine the long term interests of consumers.

ESB Governance Structure

We note that although the ESB has been established by the COAG Energy Council, the terms of reference for the ESB have yet to be determined and finalised. In our view, these terms of reference are critical in aligning the ESB's powers and functions with its objectives as outlined in the Finkel Blueprint.

In our view, the draft terms of reference are not sufficient to provide the ESB with appropriate guidance on the extent of its roles and responsibilities as a co-ordinating body and should be developed in more detail to clarify the narrow focus of the ESB and protect the independence of its constituent members.

The National Electricity Law (NEL), National Gas Law (NGL), and National Energy Retail Law (NERL) impart strict obligations with clear responsibilities on the AEMC, AER, and AEMO to perform clear functions that support energy markets in line with the NEO, NGO, and national energy retail objective (NERO). The separation of powers between these three bodies is deliberate and is conducive to the efficient operation of energy markets. The ESB should not duplicate, dilute, or impede the ability of the AEMC, AER, and AEMO to meet their ongoing statutory obligations as rule-maker, regulator, and system operator respectively.

Nor do we consider it appropriate that the terms of reference may change through administrative processes over time. The potential use of administrative methods such as changing of terms of reference to direct a rule making process fundamentally undermines the governance arrangements established in 2005 with the universal support of the energy industry. Continued investment in the energy sector requires confidence in the governance framework for rule making.

² Draft Bill, NEL Section 90F Clause (4)(c), NGL Section 294G(3)(c), NERL 238B(3)(c)



Changes to the current framework which reduce the transparency and predictability of decision making will undermine that confidence.

Confidentiality Provisions

Under the proposed Draft Bill³, the AER is authorised to disclose confidential information to the ESB. As the terms of reference for the ESB have yet to be determined, and the use of this confidential information is unknown, we would recommend that the confidentiality provisions should mirror those that are imposed on the AER under the relevant parts of the NEL, NGL⁴.

These provisions are adequate for the operation for the AER and support the effective operation of the market by encouraging parties to provide information that is required for statutory bodies to exercise their functions. In the absence of clear legislative safeguards to protect disclosed confidential information, we consider that there are serious risks that such information could be published elsewhere, including the MCE under a particular consultation directive.

Conclusion

We urge the COAG EC to carefully consider our concerns through establishing adequate consultation obligations on the ESB and appropriate confidentiality provisions are incorporated in the revised version of the Draft Bill.

Should you have any questions in relation to this submission, please contact Stephanie Bashir, Senior Director Public Policy on (03) 8633 6836 or myself on (02) 9921 2516.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tim Nelson', is written in a cursive style.

Dr Tim Nelson

Chief Economist

³ Draft Bill, NEL Section 28YA, NGL Section 326A, NERL Section 210A

⁴ i.e. Part 3 Division 6 of the *National Electricity Law*