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**COAG Energy Council Energy Working Group  
National Electricity Law and National Gas Law Amendment Package**

The Australian Energy Council (the “**Energy Council**”) welcomes the opportunity to make a submission addressing the COAG Energy Council’s Energy Working Group’s proposed National Electricity Law and National Gas Law Amendment Package.

The Energy Council is the industry body representing 22 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

**1. Removal of barriers for the AER to collect & publish information for the purpose of benchmarking**

While in general Energy Council members are cautious about granting government authorities the power to divulge confidential information, the legislative amendments proposed provide comfort that businesses will have adequate opportunity to contest proposed releases of confidential information. On that basis, the Energy Council broadly supports the amendments.

**2. Introduction of an explicit wholesale market monitoring function**

In the *Potential Generator Market Power in the NEM* proposed rule change, the Australian Energy Market Commission (“**AEMC**”) considered the introduction of a monitoring function, and concluded that “it is important that a monitoring regime be established under the NEL/NER framework to regularly report on whether the wholesale electricity market is workably competitive”. While the Energy Council appreciates the additional market information which an Australian Energy Regulator (“**AER**”) assessment will provide, of necessity it will be retrospective in nature, whereas generator investment decisions are prospective, based on companies’ assessment of opportunities and risks, meaning that the ability of the report to further the National Electricity Objective will be limited.

Besides the temporal limitations of the report, the Energy Council has some reservations with regard to the AER’s assessment and powers.

The proposed regime has the AER reporting at least once every two years, on a period of no less than five years, and sets out a definition of “effective competition”, against which the performance of the wholesale electricity markets is to be assessed.

*“Competitors hold a reasonably sustainable position”*

The first test of effective competition is whether the active competitors hold a “reasonably sustainable position in the market”. This is a difficult assessment to make, since it can be affected by so many factors which are internal to market participants, such as fuel costs, maintenance costs and organisational influences such as corporate debt levels and long-term strategy. Without the AER becoming overly intrusive and examining internal arrangements, its assessment is therefore limited to determining generator returns from settlement data and comparing it with indicators such as long-run marginal cost. In addition, there are significant external factors which may affect this assessment of whether competitors are in a sustainable position, such as transmission planning, demand changes and competition from alternative sources of electricity supply.

*“Prices being determined on a long-term basis by underlying costs”*

It is apparent that this effective competition test will lead the AER to rely on a comparison of market prices with long-run marginal costs, as determined by independent experts. Long-run marginal cost is an indicator which must be used cautiously, since it can be affected by such issues as underlying assumptions, atypical market drivers (e.g. drought), government policies, generator contract positions, competing technologies and the geographic definition of the market under consideration.

*“Low barriers to market entry”*

The major barriers to market entry are financial, technological and regulatory in nature. The Energy Council feels there is little the AER can recommend to reduce these barriers which are not already being addressed by the AEMC’s rule change processes, and therefore any difficulty in a market participant entering the wholesale electricity market is not due to a lack of effective competition, but due to external influences which may not be able to be addressed by revised market design *per se*.

*“Independent rivalry in price, product or services”*

The wholesale electricity market is, by its very nature, constrained in the products and services which may be offered, and constrained by the physical characteristics of the generators which participate in the market. On that basis independent rivalry may be limited and fluctuate from time to time. This does not indicate a failure in effective competition, rather it shows the complicated nature of the wholesale electricity market and the range of factors which affect it.

Thus it is apparent that there are significant difficulties in conducting an assessment of the performance of the wholesale electricity market against the definition of “effective competition”. In addition to these difficulties, the Energy Council is concerned about the broadening of the AER’s powers. Section 15 of the National Electricity Law sets out the functions and powers of the AER, which focus on compliance, administration and financial & operational performance of network service providers. While the new powers in the proposed Section 18C will allow the AER to “monitor and review ... the performance of wholesale electricity markets”, the wholesale market reporting functions set out in Section 18C(2)(b) also require the AER to offer an opinion on whether the wholesale electricity market is functioning efficiently or has limitations, such that a legislative, regulatory or other response is required. The report also requires the AER’s opinion on market features and industry structure and their impact on the National Electricity Objective. The Energy Council is concerned that rather than concentrating on the quantitative aspects of wholesale electricity markets, the AER’s new functions will broaden its review of electricity markets to be qualitative in nature, something with which the AER has little expertise and a role more suited to the Australian Energy Market Commission.

The Energy Council suggests that Section 18C(2)(b) and subsection (3) limit the AER to reporting the facts and performing analysis about the wholesale electricity markets, rather than offering an opinion outside its organisational strengths.

Finally, in relation to the AER’s powers to obtain information from wholesale electricity suppliers, the Energy Council members note that they presently supply significant information to a range of government regulatory bodies and caution about the additional cost of supplying more information to satisfy increased regulatory

reporting requirements, particularly since the proposed Section 18D(1)(b) imposes no restrictions on the information which the AER may request from wholesale electricity suppliers.

## Conclusion

In conclusion, while the Energy Council accepts the proposed legislative amendments for the AER to collect & publish information for the purpose of benchmarking, the Energy Council has concerns about the AER's proposed wholesale market monitoring function and recommends the legislation:

- (a) limit the AER's assessment to a factual report; and
- (b) include restrictions on the amount and frequency of information requests made by the AER to wholesale electricity suppliers.

Any questions about this submission should be addressed to the writer, by e-mail to [kieran.donoghue@energycouncil.com.au](mailto:kieran.donoghue@energycouncil.com.au) or by telephone on (03) 9205 3116.

Yours sincerely,



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