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COAG Energy Council Secretariat
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Via email: energycouncil@environment.gov.au

Dear Secretariat

COAG ENERGY COUNCIL SENIOR COMMITTEE OF OFFICIALS - CONSULTATION ON BINDING RATE OF RETURN AMENDMENTS

The Australian Pipelines and Gas Association (APGA) welcomes the opportunity to comment on the draft Statutes Amendment (National Energy Laws) (Biding Rate of Return Instrument) Bill 2018. APGA appreciates that the draft Bill contains a broad range of issues, but we will limit our comments in this submissions to a few key areas that are of particular concern to us and our members.

APGA is the peak body representing Australia's pipeline infrastructure, with a focus on gas transmission, but also including transportation of other products. Our members include owners, operators, constructors, advisers, engineering companies and suppliers of pipeline products and services. APGA's members build, own and operate the gas transmission infrastructure connecting the disparate gas supply basins and demand centers of Australia, offering a wide range of services to gas producers, retailers and users. The replacement value of Australia's gas transmission infrastructure is estimated to be $50 billion.

A stable, predictable regulatory framework is vital to maintaining the attractiveness of the Australian energy sector as a destination for investment. Since 2010, we have seen a deterioration in the investment environment as regulatory rate of return outcomes have become less predictable, and the opportunity to address undesirable outcomes through limited merits review has been removed. The proposed amendment introduces further, significant weakening, reducing regulatory accountability and significantly widening regulatory discretion. In particular, it removes:

- The allowed rate of return objective requiring that the allowed return is to be commensurate with efficient financing costs of the benchmark efficient entity facing similar risks to the service provider.
- The requirement to use a weighted average cost of capital approach.
- The requirement to have regard to all relevant methods, models, evidence and data.
- The requirement to have regard to prevailing conditions in equity markets.
- The guidance on the range of return on debt methodologies that may be used.
- The requirement to consider impacts of a change in debt methodology.
- The ability for processes towards determining the rate of return to change and improve via the rule-change process governed by the AEMC where any stakeholder can propose such a rule change; the proposed amendments removes the AEMC from the governance process in respect of the rate of return.

In place of the framework of the Rules, the governance framework around the AEMC, and the considerable precedent which has been built up in respect of their application, there is now only a requirement that the regulator make a decision which in its mind best meets the National Gas Objective **(NGO)** or National Electricity Objective **(NEO)**. Moreover, the proposed Section 30M of the amendment (18R for electricity) proposes that failure by a regulator to meet even this low bar in respect of a binding rate of return instrument does not invalidate the instrument. It is not clear to us how failure to comply with the law can be an acceptable approach for regulators to take. In our view, a law which protects a regulator from having legal accountability for its decisions cannot represent the long-term interests of the consumers it protects.

Whilst the amendments are far from an ideal starting point for good governance of the energy sector in respect of the rate of return, we are cognizant that the Federal Government is unlikely to contemplate significant changes to the proposed bill as it stands. However, we consider that there are a few changes which could be made to ameliorate what we see as the most harmful effects of the proposed amendments. It is to these that we now turn.

Removal of Sections 30M and 18R

We would like to see Sections 30M and 18R removed from the Bill. It is not clear to APGA how a law which allows a regulator to work around its governing legislation can be anything other than ultra-vires. Removing these sections provides stakeholders with a continued ability to challenge decisions if they consider there have been errors of law made by the regulator. This is not only commonplace in respect of the application of administrative law in Australia (and elsewhere) but it is also critical to maintain discipline in decision-making in the long-term interest of consumers.

Role of AEMC

In APGA's view the AEMC should retain a role in rate of return process. In the past Australia's energy market governance has benefited from a relatively stable policy environment, a clear delineation of the functions and powers of key regulatory bodies established under the National Energy Law, and importantly, accountable and transparent regulatory decision making. We consider that the AEMC is a fundamental part of the energy market governance arrangements that currently exist in Australia, and its role should not be circumscribed. In order to achieve this, we would suggest:

1. Sections 10 and 20 from the proposed amendment, which specifically exclude rate of return as one area wherein the AEMC can make rules, be removed.
2. The existing Rules around rate of return remain in place, with perhaps some simplification.

Role of independent review panel

We consider there is merit in enhancing the role of the independent review panel. As drafted, the Independent Review Panel is required to assess a regulator's draft Rate of Return Guidelines (how, and against what standard is left unaddressed), and the AER is required to have regard to that assessment when finalising the Guidelines. There is scope to make this process more robust by:

- Requiring that the Independent Review Panel members have necessary economic, legal or financial expertise and that they have not been engaged to act for any stakeholders (or the regulator) at any earlier stage of the Guideline review process; or for some nominated period prior. Additionally, to maintain independence, the AEMC could be required to either serve on the panel or nominate its members.
- Requiring that the Independent Review Panel assess the Draft Guidelines against the same NGO/NEO that the regulator does and, where the Panel considers that the Draft Guidelines fall short, explain why it considers that the Draft Guideline does not meet the NGO/NEO.
- Requiring the regulator, if it disagrees with the Independent Review Panel's assessment above to, in making its Final Guidelines, explain how the its proposed approach meets the NGO/NEO better than that proposed by the Independent Review Panel.

Giving the Independent Review Panel this slightly enhanced role does not take away from the responsibilities of the AER, which will still have the final word in its Guidelines. However, the AER being required to meaningfully engage with the Panel, on the basis of a consistent goal, will give stakeholders considerable comfort that the current high standard of practice by the AER in this guideline process will be maintained.

Differentiation in electricity and gas return

Section 30R allows the regulator to consider gas and electricity differently by suggesting only that it may make one instrument for electricity and gas. There are significant differences between electricity and gas, not least of which are price versus revenue caps and a higher elasticity of demand for what is a fuel of choice. Whilst the AER has treated the two industries identically in the past, other regulators (notably in New Zealand) have treated them differently, and it is important that the law not direct regulators towards taking an inappropriate one-size-fits-all solution as the default option. Therefore, unless there is clear evidence that the rate of return for electricity and gas is the same, and that making one guideline best meets the NGO and NEO, separate guidelines should be made for electricity and gas. Sections 18W(1) and 30R(1) would need to be altered to reflect this.

Transitional arrangements for WA

Whilst the transition mechanisms for our member businesses governed by the AER are comprehensive, they are almost non-existent for those businesses with assets in Western Australia. In particular:

- The ERA will be exempt from the requirement to consult with a consumer reference group.
- The ERA will not be required to consult stakeholders before publishing a draft instrument.
- The ERA will not be required to have the draft reviewed by an independent panel.

The Bulletin contemplates that these specific arrangements will be adopted separately under the *National Gas Access (WA) Act 2009* (WA) or by changes to the draft Bill. No specific transitional arrangements applicable to the ERA are included in the current version of the draft Bill. Additionally, the draft bill will not become binding via passage through South Australian Parliament, but requires passage through the WA Parliament, which may see the final law, in WA, appearing at around the same time that the ERA is required to deliver its Guidelines. This would leave no time for any party (the ERA included) to address the Guidelines to the relevant WA legislation.

In our view specific provision needs to be made for transitional arrangements. We understand that it may not be possible to resolve the timing issue, but there is time for the ERA to be required (like the AER) to undergo an independent review (subject to the same provisos as above) of its Draft Guidelines; which the ERA is currently planning to publish in late April.

We thank you for the opportunity to provide feedback on the proposed amendment. If you would like to discuss any of these issues further, please contact APGA's National Policy Manager, Andrew Robertson on (02) 6273 0577 or at arobertson@apga.org.au.

Yours sincerely

STEVE DAVIES

Chief Executive Officer