



27 September 2017

By email: energycouncil@environment.gov.au

COAG Energy Council Secretariat
GPO Box 787
Canberra ACT 2601

Dear Secretariat

Energy Security Board – Ministerial Power to Make Rules

We write in response to the COAG Energy Council Bulletin (**Bulletin**) published on Monday 18 September, requesting comment on the *Statutes Amendment (National Energy Laws) (Rules) Bill 2017 (Bill)*. The Bill will establish a mechanism by which a proposed Rule recommended by the Energy Security Board (**ESB**), once it has the unanimous support of the COAG Energy Council, can be made by the South Australian Minister for Mineral Resources and Energy under the National Electricity Law (**NEL**), National Energy Retail Law (**NERL**) or National Gas Law (**NGL**), as appropriate.

The Bill has been proposed to meet the COAG Energy Ministers direction that a mechanism be established to allow ESB recommendations to be implemented in a timely manner. The establishment of the ESB itself was a key recommendation of the Independent Review into the Future Security of the National Electricity Market – Final Report (**Finkel Review**). The ESB will play a major role in the National Energy Market (**NEM**), implementing a national blueprint for reform and providing whole-of-system oversight of security and reliability. Importantly, the ESB will also be required to produce an annual report – *The Health of the NEM*. Recommendation 6.2 of the Finkel Review states:

The Energy Security Board's annual Health of the NEM report to the COAG Energy Council should include the impact of changes in the market on the price and availability of long-term retail contracts for commercial and industrial consumers.¹

Further, recommendation 6.4 states:

The Energy Security Board's annual Health of the NEM report to the COAG Energy Council should report on affordability issues and proactively identify emerging issues.²

¹ Dr Alan Finkel, *Independent Review into the Future Security of the National Electricity Market – Blueprint for the Future*, June 2017, p.141.

² Dr Alan Finkel, *Independent Review into the Future Security of the National Electricity Market – Blueprint for the Future*, June 2017, p.144.

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Given the remit the ESB has in relation to monitoring price and affordability issues, we are disappointed that the Bill defines the ESB as:

Energy Security Board means the Board established by the MCE on XX/YY/ZZ to provide the MCE with advice for the purposes of –

- (a) whole-of-system oversight for energy security and reliability of the national electricity market; and*
- (b) improving long-term planning for the national electricity market;*

The omission of affordability and price issues in the definition is concerning, and we urge the Secretariat ensure that it be expanded to reflect the ESB's full terms of reference.

The ESB's Terms of Reference state that the ESB:

*...will have responsibility for the implementation of recommendations from the Independent Review into the Future Security of the National Electricity Market (**Finkel Review**), and provide whole-of-system oversight to the Council on energy security, reliability and affordability in the NEM.*

Further, the ESB's role in Rule-making be expanded to include retail rules, and not limited to rules related to "energy security and reliability" or "long-term planning for the national electricity market". We believe that affordability issues should also fall within the ESB's Rule making remit, along with energy security and reliability.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Questions in Bulletin

- 1. Does the proposed mechanism for the making of Rules by the Minister deliver the desired outcome of timely implementation of the Energy Security Board's recommendations?**

Yes, provided there is sufficient consensus the proposed mechanism will enable ESB recommendations to be implemented in a timely manner. We're supportive of this approach, and have been concerned for some time at the slowness of Rule changes through the AEMC. While Rule changes may be fast-tracked, this is not necessarily a much faster process given that there

are additional requirements for submitting a fast track rule change request. We have been concerned for some time about the need for a much more flexible multi-layered rule change process.³

2. Is the mechanism for the proposed Rule making process sufficiently robust by requiring a Rule be recommended by the ESB and the MCE before it can be made by the Minister?

The requirement for unanimous COAG EC support is important, and should ensure that sufficient checks and balances are brought to bear before a Rule change can be made by the South Australian Minister.

That being said, this will depend on the nature of the consultation undertaken—which is difficult to assess. Under proposed sections 238B(3)(c) and s 294G(3)(c) of the Bill, the ESB may recommend Rule changes to the Minister provided:

the Energy Security Board has undertaken consultation on the proposed Rules in accordance with any requirements determined by the MCE.

We can only comment on the assumption that this consultation will be comprehensive, and allow for full consideration of all issues related to the Rule change—and that this process will ensure that only Rules which will be of genuine benefit are able to achieve unanimous support from the COAG Energy Council.

3. Does the Bill deliver on the intention that Rules made by the Minister utilising this power become indistinguishable from all other Rules over which the AEMC has jurisdiction?

Yes. There is no reason under this Bill why Rules made through this mechanism would be treated differently to any other rule over which the AEMC has jurisdiction.

4. Is it clear that the ESB will be required to apply the same rule making tests as the AEMC in its making of Rules utilising this process?

No. Where the AEMC is required to consider whether a proposed Rule “*will or is likely to contribute to the achievement of the National Electricity Objective (NEO)*”, the Bill only requires the ESB to “*be satisfied that the proposed Rules are consistent with the national energy retail objective*”⁴, or “*consistent with the national gas objective*”⁵ (emphasis added).

This is a lower bar, and will enable the ESB to potentially recommend Rule changes to the Minister that the AEMC would not be able to make.

³ Consumer Action and CUAC, *Fix It: How to fix the energy market rule making process to improve competition and consumer outcomes*, November 2015, available at: <http://consumeraction.org.au/wp-content/uploads/2015/11/FINAL-FixIt-Advocacy-Report.pdf>

⁴ Proposed section 238B(3)(b)

⁵ Proposed section 294G(3)(b)

5. Are there any changes to the draft Bill that you consider may better deliver on the desired outcome?

As stated in our comments above, we are concerned that the Bill makes no mention of the ESB's remit to address affordability issues in the NEM.

In addition to the definition of the ESB precluding any mention of affordability, the Bill states at proposed section 238B(3)(a) (in relation to amendments to the *National Energy Retail Law*):

...The Energy Security Board may only make a recommendation for the purposes of subsection (2)(b) in relation to proposed Rules if—

- (a) the proposed Rules are in connection with energy security and reliability of the national electricity market (within the meaning of the NEL) or long-term planning for the national electricity market;...*

And similarly, under proposed section 294G(3) in relation to amendments to the *National Gas Law*, the Bill states:

The Energy Security Board may only make a recommendation for the purposes of subsection (2)(b) in relation to proposed Rules if—

- (a) the proposed Rules are in connection with energy security and reliability of the NEM or long-term planning—
 - (i) for the NEM; or*
 - (ii) in relation to investment in, and operation and use of, natural gas services; and...**

Finally, proposed section 90F(4)(a) in relation to amendments to the *National Electricity Law* reflects similar terms, stating:

The Energy Security Board may only make a recommendation for the purposes of subsection (2)(b) in relation to proposed Rules if—

- (a) the proposed Rules are in connection with any of the following:
 - (i) energy security and reliability of the NEM or long-term planning for the NEM;*
 - (ii) energy security and reliability of a local electricity system or long-term planning for a local electricity system;...**

In each case, we are concerned that the ESB's requirement to monitor affordability has been omitted, and that the Bill does not provide the ESB with the capacity to make Rules which may address affordability issues.

Terms of Reference

As a further note, the ESB's terms of reference state that the ESB:

*will have responsibility for the implementation of recommendations from the Independent Review into the Future Security of the National Electricity Market (**Finkel Review**), and provide whole-of-system oversight to the Council on energy security, reliability and **affordability** in the NEM (emphasis added).*

We are concerned that affordability does not feature sufficiently in the conception of the organisation. From the single focus terminology throughout (i.e. including the name of the organisation itself, the Energy "Security" Board), to the make-up of the Board (which fails to include a member with a consumer focus and/or expertise), there is a lack of emphasis on affordability issues as one purpose for the establishment of the ESB.

While the Finkel Review is explicit about the requirement for the ESB to address affordability in compiling its annual *Health of the NEM* report, affordability does not seem to be being given the same degree of priority where other ESB functions are concerned. We would suggest that this is a mistake, and fails to acknowledge a central tenet of the Finkel Review—that consumers are at the 'heart of the transition' facing our energy system.

Please contact Zac Gillam, Senior Policy Officer on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
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