

6 October 2017



**EnergyAustralia**

LIGHT THE WAY

**COAG Energy Council**

c/o COAG Energy Council Secretariat  
Department of the Environment and Energy  
[energycouncil@environment.gov.au](mailto:energycouncil@environment.gov.au)

EnergyAustralia Pty Ltd  
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Dear COAG Energy Council

Level 33  
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**RE: Ministerial Rule Making Powers**

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EnergyAustralia welcomes the opportunity to make a submission on the introduction of a Ministerial Power to make rules recommended by the Energy Security Board (ESB) and approved by the COAG Energy Council, as outlined under the *Statutes Amendment (National Energy Laws) (Rules) Bill 2017* ('the Amendment').

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EnergyAustralia is one of Australia's largest energy companies, providing gas and electricity to 2.6 million household and business customer accounts in New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory. EnergyAustralia owns and operates a portfolio of energy generation across Australia, including coal, gas and wind assets with control of over 4,500MW of generation in the National Electricity Market (NEM).

We support ongoing reforms to the operation of the NEM - this is essential to creating a modern and flexible energy grid capable of accommodating the ever-increasing pace of technological change. In turn, it will help us to deliver better outcomes for households and businesses through improved service and products that will ensure smarter consumption and lower prices.

To achieve these improvements, we need stable policy and regulatory frameworks across all aspects of the energy system in order to provide the necessary investor certainty. As such, while we support the establishment of the ESB and its new role to better coordinate and plan for our energy future, we do not agree with its new rule making powers. Indeed, it is unclear to us the problem the COAG Energy Council is attempting to overcome through this change.

The Australian Energy Market Commission (AEMC) rule change process has been established to ensure thorough consultation and cost/benefit analysis are undertaken before changes can be made to the NEM. It is a multi-phased process that is well understood, evidence-based, consultative, and based on stakeholder input. There is no such certainty with the ESB's approach. A better approach would be to reform the established rule making process rather than create a confusing parallel process just to bypass the AEMC.

We are conscious that this reform has already been approved by the COAG Energy Council at its July 2017 meeting and will proceed as planned. As such, while we are still unclear on the fundamental problem this Amendment is attempting to solve, we have proposed some improvements that will hopefully offset the potential for perverse outcomes.

We look forward to working with the COAG Energy Council, its Senior Committee of Officials and the Secretariat to better flesh out how these new powers will be implemented.

If you have any questions in relation to this submission please contact Sara Williams, Policy and Advocacy Lead, on (03) 8628 1742.

Yours sincerely

**Andrew Fisher**  
Executive | Corporate

## **We believe ongoing reform to the NEM is necessary**

EnergyAustralia has long advocated for a secure, affordable and clean energy system that serves the long-term interests of Australian households and businesses. This belief underpinned our submission to Dr Alan Finkel's Independent Review into the Future Security of the National Electricity Market, the 'Finkel Review', in which we proposed several recommendations for achieving a modern energy system.<sup>1</sup>

Importantly, as an investor and market participant, we believe that a predictable planning and operating framework is fundamental to achieving this goal. It will help to incentivise investment when and where it is needed at least possible cost.

In this respect, the NEM has largely served us well since it was created in 1998 and consistently met its objective of reliable and affordable power. However, this has been eroded in recent years through policy instability which has challenged investor confidence to make long term decisions. What we need now is a commitment to evidence-based reforms that will rebuild confidence in the stability and predictability of the energy market while delivering a more modern grid.

EnergyAustralia believes the package of Finkel Review recommendations make significant headway in restoring investor confidence. We also support the establishment of the ESB to better coordinate across the energy market bodies, as well as to provide better long term planning.

We do not, however, support the circumvention of proper process or good governance, particularly when it comes to the rules that underlie the operation of the NEM.

Importantly, good governance does not mean less consultation and analysis, to the detriment of the NEM and consumers, which is the potential outcome from this new rule making power.

## **Is this Amendment necessary to improve outcomes in the NEM?**

It is unclear to EnergyAustralia as to the problem the COAG Energy Council is seeking to overcome through this proposed Amendment.

The AEMC already has the necessary powers, expertise and established processes to execute an expedited rule change if necessary, under the National Electricity Law (NEL), National Energy Retail Law (NERL) or National Gas Law (NGL).

Indeed, there is an expedited rule change currently underway - *Notification of end of fixed benefit period* - that was proposed by the Federal Energy Minister and may be in place within a matter of months from initial proposal to conclusion.

Importantly, as part of the expedited rule change process currently underway, the AEMC can only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the national energy retail objective (NERO). The aim of the NERO is, "to promote efficient investment in, and efficient operation and use of, energy services for the long-term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy."<sup>2</sup>

This is the decision-making framework that the Commission must apply. There are equivalent criteria for rule changes under the NEL and NGL through the National Electricity Objective and the National Gas Objective. Decisions are subsequently open to administrative review if parties are dissatisfied the AEMC has taken proper account of the relevant Objective, even after the draft rule change and final rule change process have run their course.

While the ESB must be satisfied a rule change is consistent with the relevant Objective, there are no clear avenues for recourse if parties believe the ESB has disregarded certain key aspects or made a poor judgement.

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<sup>1</sup> <http://www.environment.gov.au/submissions/nem-review/energy-australia.pdf>

<sup>2</sup> National Energy Retail Law, Section 236(1) - *Application of national energy retail objective*  
[https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20\(SOUTH%20AUSTRALIA\)%20ACT%202011/CURRENT/2011.6.UN.PDF](https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20(SOUTH%20AUSTRALIA)%20ACT%202011/CURRENT/2011.6.UN.PDF)

It is worth reiterating that EnergyAustralia fully supports the establishment of the ESB for the purposes of enhanced coordination and planning. However, it is impossible to support the additional rule making aspect that puts significant power into a non-statutory body and will bypass a full and proper set of established processes. This is exacerbated by a lack of detail around how rule changes will be selected by the ESB and subjected to appropriate scrutiny.

As we are all aware, changes to the energy market affecting any aspect of the supply chain can have wide-reaching consequences that may not be felt for many years after the decision.

EnergyAustralia fully acknowledges that the operation of the energy market is becoming increasingly complicated given the rapid changes in technology. The NEM must be flexible to accommodate these changes and reflect the needs of the consumers it serves; however good governance does not need to be sacrificed for that to be achieved.

There are many examples of well-intentioned ideas that were put forward for rule change and supported by stakeholders that were eventually discontinued once the details of the proposal were fleshed out and costs and benefits properly analysed. Examples include the Optional Firm Access regime, Transmission Framework Review, Multiple Trading Relationships, and the Demand Response Mechanism.

As with our judicial and legislative system, there is a deliberate separation of powers enshrined in the NEM to provide the necessary checks and balances on decision making. The rule maker is not the market operator nor is it the regulator; these individual parts provide complementary services and scrutiny for a stronger overall system.

If the COAG Energy Council's goal is to simplify the NEM's governance arrangements or it is dissatisfied with the performance of the AEMC in its rule making role, there are better reforms that could be undertaken. Importantly, these should build off the existing strong base, rather than creating something entirely new. It is hard to perceive how deferring the AEMC's powers to the ESB delivers an improved outcome while maintaining the integrity of the system.

To maintain objectivity in rule change proposals, EnergyAustralia suggests that the respective member of that ESB that proposes a rule should then be ineligible to vote on it, consistent with the arrangements that currently prohibit the AEMC from self-initiating rule changes. We acknowledge that this will affect the ability of the ESB to deliver a majority vote if two members oppose the proposal, but this seems a reasonable gauge that the rule change should not proceed.

It is also unclear from the ESB's draft Terms of Reference or the draft Amendment how consultation will be undertaken as part of this new rule making power and how the ESB will be required to justify that it has appropriately taken stakeholder views into account.

At present, the ESB's draft Terms of Reference stipulate that, "the Board will undertake appropriate consultation beforehand with stakeholders and include in their advice to Council details of the consultation and a summary of views expressed."<sup>3</sup>

By stark comparison, under the AEMC's fast-track rule change process, a number of criteria around consultation must still be satisfied<sup>4</sup> such as:

- Have the issues raised during the electricity market regulatory body's consultation been adequately identified and responded to?
- How was the consultation conducted?
- How were interested parties given the opportunity to raise issues and provide comments?
- What matters were the subject of the consultation compared to the matters which were the subject of the Rule change proposal?

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<sup>3</sup> COAG Energy Council, *Energy Security Board - Terms of Reference*, <http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/ESB%20Terms%20of%20Reference.pdf>

<sup>4</sup> AEMC, *Guidelines for electricity market regulatory bodies: Preparing a Rule change proposal for "fast track" Rules - electricity* (May 2009) <http://www.aemc.gov.au/Energy-Rules/National-energy-rules/Rule-making-process/Guidelines-for-preparing-a-rule-change-request-for.aspx>

- How open was the consultation? E.g. Was the consultation targeted at a particular group of stakeholders? Who had the opportunity to provide comments?
- Did all stakeholders who could be affected by the Rule change proposal have the opportunity to provide comments as part of the consultation process?

There is no such certainty for stakeholders that they will be consulted and provided appropriate time for response under the Ministerial rule making power. Indeed, the fact that this substantive Amendment has been put to stakeholders with a mere two-week turnaround for response does not engender confidence as to the level of consultation we can expect going forward.

We therefore seek appropriate limitations on the way that this new power can be used:

- Any rule change put forward by the ESB should relate explicitly to an energy security matter *of significant urgency*.
- The ESB must clearly articulate and justify why the rule change is not going through the usual AEMC-led process.
- Any rule made through these new powers should have a two-year sunset period, during which time a full and proper assessment process should be undertaken by the AEMC.