

29 September 2017

COAG Energy Council Secretariat  
GPO Box 787  
Canberra ACT 2601

## Statutes Amendment (National Energy Laws) (Rules) Bill 2017

Dear Secretariat,

Thank you for the opportunity to contribute to the COAG Energy Council's consultation process on the Statutes Amendment (National Energy Laws) (Rules) Bill 2017.

Energy Networks Australia is the national industry body representing businesses operating Australia's electricity transmission and distribution and gas distribution networks. Member businesses provide energy to virtually every household and business in Australia.

Energy Networks Australia supports timely implementation of the Finkel Review recommendations. We note that a key recommendation of the Review was the establishment of the Energy Security Board (ESB).

Energy network businesses agree that there is a need to provide a mechanism to allow for the timely implementation of the ESB's recommendations. The integration of this need within the deliberately and carefully established governance framework set out in the Australian Energy Market Agreement is a critical matter for policy decision-making.

The existing Bill represents a fundamental change to the existing National Electricity Market governance framework. The provision of an alternative additional route for energy rule making alters agreed arrangements adopted following significant experience across Australian energy markets of fragmentary, overlapping and non-transparent rule-making processes, a lack of clear separation between rule-making, regulation and market operation functions, and a consequent lack of stakeholder confidence in governance arrangements.

Networks support a capacity for accelerated Ministerial rule making on urgent and critical reliability and security of supply issues, provided:

- 1. Mechanism is confined to 'exceptional' circumstances** - such accelerated Ministerial rule-making processes apply to a well-defined set of critical implementation issues flowing from the Finkel Review, occur only on the basis that the ESB recommends that the Ministerial rule making power should be exercised, and that this mechanism does not become a default path for rule changes affecting a wider range of issues.

Further, agreed and previously recommended improvements to the normal rule making processes should be progressed in parallel with these new arrangements. This additional path for rule making should be a temporary mechanism and should only be used when the other rule making process is considered not to provide an

appropriate outcome for security of supply in terms of timeframes able to be achieved; and

- 2. Open consultation conducted on proposed Ministerial changes** - these accelerated processes must have an appropriate minimum threshold of transparency and natural justice, delivered by open consultation carried out by the Energy Security Board with stakeholders. This recognises the absence of standard public AEMC rule-making processes in these cases. There should also be sufficient time periods, published reasons for the rule change recommendation and decisions, and details of how the implementation takes into account the public consultation undertaken.

Energy Networks Australia responds to the COAG Energy Council's Bulletin's short consultation questions below.

- 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?*

Energy Networks Australia agrees that the proposed mechanism for the making of Rules by the Minister is likely to facilitate the timely implementation of the ESB's recommendations. As outlined above, network businesses would have significant concerns if this process routinely bypasses the AEMC rule change process. In this regard, we note that the Finkel Review discusses closer coordination between the energy market institutions, which reinforces that this mechanism should only be necessary in exceptional circumstances.

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

In principle, Energy Networks Australia agrees that the mechanism for the proposed rule making process appears generally robust.

Energy Networks Australia supports the requirement that potential rule changes must be recommended by both the ESB and COAG Energy Council Ministers.

There is the potential for some uncertainty, however, if disagreement should arise within the ESB. For example, it is unclear how the voting rules will accommodate instances where a member of the ESB is a rule change proponent (and therefore potentially conflicted on ESB votes).

In our view, such conflicts of interest should be explicitly recognised in the legislation. That is, an ESB member should not be able to vote on something where a conflict of interest exists or there is a perception of a conflict of interest. This would arise, for example, where one of the members submits the rule change that is being voted on. That would be a clear conflict of interest and the legislation should confirm that the party in question is not to vote.

Further, Energy Networks Australia notes that the Bill does not define what constitutes a rule being 'recommended' by MCE (see s.90F). The associated COAG Energy Council Bulletin discusses a requirement for 'unanimous support' for a proposed rule prior to the South Australian Minister acquiring the right to make the rule. The existing Bill does not appear to contain this requirement in any binding form.

3. *Does this 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?*

Energy Networks Australia considers that the intention that Rules made by the Minister utilising this power become indistinguishable from all other Rules over which the AEMC has jurisdiction is given effect in the draft Bill.

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

It is stated in the draft Bill that the ESB must be satisfied that the proposed Rules are 'consistent' with the national electricity, national gas or national energy retail objective. We note that this is not the same rule-making test as applied by the AEMC in the primary national energy legislation (i.e. 'will or is likely to contribute to the achievement of' the National Electricity and Gas Objectives). The rule making test in this legislation should be aligned to the rule making test in existing legislation so as to ensure the same rule making test is applied.

Beyond this, a remaining close issue of concern relating to the predictability and coherence of national energy rule making is that both the ESB and AEMC in practice apply the same considerations and rule making approaches in implementing the National Electricity and Gas Objectives. This highlights the need for the ESB and AEMC to work closely in an aligned way to deliver outcomes consistent with the long-term interests of consumers.

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

One further issue to be considered in finalising the draft Bill is the potential need for a 'sunset' provision on the clauses establishing the new mechanism if the ESB does not continue in operation or is not subsequently established through legislation. The current draft Bill and explanatory material does not set out the operation of this additional mechanism in such circumstances.

Energy Networks Australia understands the need for the COAG Energy Council to act in a timely manner on important ESB recommendations. At the same time, we urge the COAG Energy Council to keep in mind the importance of the independence of the AEMC and the many reasons it was originally established as an independent policy advisory and rule making body. These reasons remain valid today.

Should you have any additional queries, please feel free to contact Ms Kate Healey, Director Regulation on (02) 6272 1516 or [khealey@energynetworks.com.au](mailto:khealey@energynetworks.com.au).

Yours sincerely,



**Andrew Dillon**  
Interim Chief Executive Officer