



COAG Energy Council

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Energy Working Group

National Electricity Law and National Gas Law Amendment Package

Explanatory note for stakeholder consultation

3 February 2016

1. Introduction

The Council of Australian Governments (COAG) Energy Council's Energy Working Group (EWG) has released draft Bills relating to amendments to the National Electricity (South Australia) Act 1996 (NEL) and National Gas (South Australia) Act 2008 (NGL). These amendments are the result of two different policies:

- the removal of barriers in the NEL and NGL to the Australian Energy Regulator (AER) collecting and publishing information for the purposes of benchmarking; and
- introducing an explicit wholesale market monitoring function for the AER into the NEL.

While these amendments relate to different functions for the AER, the Bills are being consulted on as one package. Both of the draft Bills have implications for the AER's powers to collect and disseminate information and are therefore complementary.

The following paper provides some background to each of the draft Bills and raises some issues that EWG intends to explore as part of this consultation process.

1.1. Consultation

The EWG encourages stakeholders to provide feedback, preferably through a written submission, on the draft Bills.

Where possible, EWG will publish submissions on the COAG Energy Council's website. However, if the submission contains confidential information (or a confidential attachment), please make it clear in writing what should or should not be published.

Submissions are requested to be provided by Tuesday, 15 March 2016.

For more information, please contact the COAG Energy Council Secretariat at energycouncil@industry.gov.au, on (02) 6243 7788 or through the COAG Energy Council's website: <http://www.scer.gov.au/contact-us-3/>.

2. Removal of barriers for the AER to collect and publish information for the purpose of benchmarking

As part of its energy market reform implementation plan, COAG on 7 December 2012 endorsed a Standing Council on Energy and Resources (SCER) (now the COAG Energy Council) commitment to ensure the AER has sufficient and clear powers to collect and publish data as part of its responsibility for economic regulation of network service providers under the NEL and NGL.

On 3 May 2013 the former SCER, based on comprehensive advice received from the AER and the Australian Energy Market Commission (AEMC), agreed to amend the NEL and NGL to clarify the AER's functions and powers in respect of:

- compulsory powers to collect information;
- performance reporting functions, including annual benchmarking reports; and
- the publication of information.

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The draft Statutes Amendment (National Electricity and Gas Laws - Information Collection and Publication) Bill 2015 will amend the NEL and the NGL, to put beyond doubt aspects of the AER's powers, including the ability of the AER to gather and use information for benchmarking and annual performance reports.

The purpose of these amendments is set out in more detail below.

2.1. Proposed amendments

For ease of reference, the below provides details in the context of the NEL. For consistency, relevant sections of the NGL will also be amended.

Compulsory powers to collect information

Changes to the AER's powers to collect information¹ will remove the restriction on the AER under the NEL which prevents it from issuing a regulatory information instrument to obtain data solely for the purposes of preparing network service provider performance reports. This will facilitate the AER issuing a regulatory information instrument to collect data solely for the purposes of annual benchmarking reports, which are a type of network service provider performance report under the National Electricity Rules (NER).

The amendments therefore support the AER's ability to collect data for the performance of its functions.

Network service provider performance reporting functions

The NEL states that the AER may prepare electricity network service provider performance reports.² These performance reports may deal with the financial or operational performance of a network service provider in relation to service standards and profitability. The NEL amendments will clarify that network service provider performance reports may concern service provider efficiency. The amendments are intended to provide clarity to the scope of the AER's benchmarking reporting functions which require the AER to test the relative efficiency of network service providers in providing certain kinds of services.

Publication of information

To support the AER's obligation to publish network service provider performance reports the proposed amendments³ seek to address some identified barriers to the AER's publication of information.

It should be noted, existing sections⁴ of the NEL already provide for circumstances in which the AER is authorised to disclose confidential information. This includes provision for the AER to disclose confidential information if the detriment does not outweigh the public benefit.⁵ If the AER proposes to release confidential information under that provision, there is a

¹ NEL - section 28F and NGL – section 48.

² NEL - section 28V and NGL – section 64.

³ NEL - section 18A, 28OA, 28X, 28ZAA and 28ZB and NGL - section 30A, 57A, 325, 328B and 329.

⁴ NEL – Part 3, Div 6 and NGL – Chap 10, Part 2, Div 1.

⁵ NEL – section 28ZB and NGL – section 329.

process for the AER to provide notice to the giver of the information and allow it to make representations before the AER makes a final decision about its release.

However, SCER is concerned that the current process for the AER to assess claims of confidentiality is time consuming and resource intensive and can encourage blanket claims of confidentiality in response to regulatory information requests. Specifically, the existing legislative arrangements place too much onus on the AER to justify the publication of confidential information, when the owner of the information is better placed to justify why their information should not be subject to release. Notwithstanding, the AER may disclose information given to it in confidence if the AER considers that the detriment does not outweigh the public benefit or that disclosure would not relevantly cause detriment.

The proposed amendments will therefore clarify the AER's ability to disclose information that is given to it in, or in connection with, the performance of its functions (under the NGL, National Gas Rules (NGR), NEL, the NER, except in the performance of its wholesale market monitoring function (refer to Section 3 of this paper)), subject to the other provisions of the Law that relate to the disclosure of information given to the AER in-confidence. The amendments also change the process to in effect reverse the onus and impose an up-front obligation on service providers to make an express claim of confidentiality upon the giving of the information and to provide justification at that time⁶.

The Bill states that the AER is authorised to disclose confidential information where it is aggregated in a form that does not reveal the confidential aspects concerned.⁷ The amendments are expected to improve AER processes to assess claims of confidentiality, and discourage blanket claims of confidentiality in response to regulatory information requests.

Transitional arrangements

The Bill includes transitional arrangements to ensure that information provided to the AER in confidence before the commencement of this Bill will not be subject to the new provisions but will continue to be treated under the existing legislative arrangements⁸.

2.2.Previous consultation process

On 30 August 2013, the EWG published the draft Statutes Amendment (National Electricity and Gas Laws - Information Collection and Publication) Bill 2013 for the purpose of consultation. Submissions closed on this draft Bill on 13 September 2013. Submissions were received from six parties.

The main issues and how these were addressed in the current draft Bill follows.

Confidentiality issues – public benefit disclosure test

Stakeholders raised concerns about the proposed requirement for service providers to set out reasons why any detriment to a business in the release of confidential information outweighs the public benefit of the information being released. Specifically, there were calls for this not to be mandated as there is little public information about what regulators with

⁶ NEL - section 18A read with 28OA and NGL - section 30A read with 57A.

⁷ NEL - section 28ZAA and NGL - section 328B.

⁸ NEL – item 26 of Schedule 3 and NGL – item 89 of Schedule 3.

disclosure powers regard as public benefits and the process that those regulators go through in weighing detriments against benefits. Instead, stakeholders called for the Bill to be amended to allow a person to provide public benefit disclosure information at their own discretion.

In response, EWG notes the intent is to place the onus on businesses to justify why information provided to the AER should be treated by the AER as confidential information and not disclosed. This is appropriate as businesses have better knowledge of what information is sensitive and why.

However, the EWG recognises that businesses may not be in a position to establish the public benefits, or otherwise, of publishing information. Consequently, the Bill has been amended to only require network businesses, in providing reasons in support of a claim of confidentiality, to provide any information which is reasonably within its knowledge and capacity to provide, which may be relevant to the AER's assessment of whether the detriment that may be caused by a disclosure of the information would outweigh the public benefit in disclosing it.⁹

Ability to respond to decisions to disclose information

Stakeholders raised concerns that the proposed amendments would inappropriately enable the AER to publish information, which is subject to a confidentiality claim, prior to providing an opportunity for the person who would suffer detriment to respond to the proposed disclosure.

EWG recognises the importance of natural justice and considers it is important for the AER to consult with affected parties in establishing whether to release confidential information. Therefore, requirements on the AER to consult with affected parties prior to the publication of information will be retained under the Bill. However, the process has been streamlined to prevent duplication.

The amendments will retain the opportunity for the business to be heard before the AER discloses information. However, in relation to information given to the AER in order to comply with a regulatory information instrument, this opportunity to be heard will be limited to the issue of whether there is public interest in disclosing the information. This is because under the amended process upon giving of the information the business has already had the opportunity to outline all other reasons why disclosure of the material may be detrimental to the business.¹⁰

Review of decisions to disclose information

Stakeholders raised concerns that the proposed amendments potentially undermine the ability of affected parties to seek review of a decision to release confidential information. They suggested the proposed amendments appear to remove the "restricted period" requirement, which delays release of confidential information until five business days after the AER gives notice.

⁹ NEL – section 280A(b)(ii) and NGL – section 57A(b)(ii).

¹⁰ NEL – see amendments to section 282B and NGL – see amendments to section 329.

EWG notes it was not the Energy Council's intent to remove the five day restricted period before the AER discloses information provided to it in confidence. The amended legislation clarifies that the 'restricted period' extends to the disclosure of information provided in confidence to the AER in compliance with a regulatory information instrument.¹¹ The retention of the five day restricted period will provide a sufficient opportunity for affected parties to take any necessary action, which may include seeking merits review of the AER's decision.

Scope of the changes

Some stakeholders, particularly generators, raised concerns that the approach to drafting of the amendments would have the unintended result of relating to information being given to the AER outside of its economic regulatory functions or powers. However, the amendments provide that information collected by the AER under the proposed wholesale market monitoring amendments is taken to have been given to the AER in confidence and the use and disclosure by the AER of that information must be in accordance with new obligations specific to that new regime in the NEL.¹²

EWG recognises the regulatory implications of applying the new information provisions, beyond the AER's economic regulatory functions, have not been fully explored. Therefore, EWG is seeking additional feedback on this issue. See Section 4 of this paper for more detail.

Transitional arrangements

Stakeholders raised concerns that the draft Bill would allow the AER to apply the new laws retrospectively. Businesses consider that retrospectivity imports an unacceptable level of risk and uncertainty into the regulatory framework.

EWG recognises the intent around transitional arrangements is to ensure that information provided to the AER in confidence before the commencement of the new provisions will continue to be treated under the historical legislative arrangements. However, an exception was included in the previous draft of the Bill, which related to the disclosure of such information if released in an aggregated form.

In light of the stakeholder feedback, the legislation will be amended to clarify that the AER will not have the capacity to release confidential information in an aggregated form (beyond its existing powers) which was received prior to the commencement of the new amendments. EWG notes this clarification is unlikely to present any risks to the AER around its ability to pursue its benchmarking functions effectively in accordance with the NEL.

3. Introduction of an explicit wholesale market monitoring function

In November 2010, the AEMC received a rule change request from the Major Energy Users (MEU) seeking to address vulnerabilities in the National Electricity Market's (NEM) market design and regulatory regime. The MEU argued that the potential for the exercise of market power in the NEM is increasing due to greater concentration of the electricity supply industry

¹¹ NEL - section 28ZB(8) and NGL - section 329(8).

¹² NEL - section 18D.

through vertical and horizontal integration and the increased constraints (including those engendered by generator bidding strategies) applying to interconnections between regions.

On 26 April 2013, the AEMC published its final determination on the *Potential Generator Market Power in the NEM Rule Change*. The AEMC concluded that the MEU's rule change request would not satisfy the National Electricity Objective. However, the AEMC recognised that the presence of barriers to entry or structural factors may raise the possibility that the wholesale electricity market is not workably competitive, which would be detrimental to the long-term interests of consumers. In particular, it would be likely to have an adverse effect on the efficient investment in, and efficient operation of, electricity services in the NEM.

Therefore, the AEMC recommended that SCER confer on the AER a specific function to monitor the wholesale electricity market. The AEMC argues that, by providing a longer term perspective on the operation of the market, this periodic monitoring work would fulfil the AEMC's identified need for recognising the causes of inefficiencies in the wholesale market and would complement the AER's existing monitoring work.

On 13 December 2013, SCER agreed to the AEMC's recommendation. Further, on 11 December 2014, the Energy Council agreed to steps to improve the flexibility and responsiveness of the market, including through the introduction of an explicit wholesale market monitoring function for the AER by amending the NEL (as previously agreed on 13 December 2013) as a priority.

The agreed wholesale market monitoring framework will amend the NEL to:

- Require the AER to undertake a market review task that broadly consists of:
 1. systematic monitoring of the performance of wholesale electricity markets, in order to analyse whether market features are observed which could be detrimental to effective competition; and
 2. other monitoring or analysing functions that relate to offers and prices within any wholesale electricity market conferred on the AER by the Rules.¹³
- Require the AER to publish on its website, not less than every two years, a wholesale market review report containing the results of the monitoring.¹⁴ The report should, at a minimum, provide analysis and comment on:
 1. market features observed during the review period (of at least five years) which impact on efficient functioning of electricity wholesale markets in the NEM and achievement of the National Electricity Objective, such as the presence of significant barriers to entry or other features of the industry structure that raise potential concerns that the wholesale electricity market is not functioning as an effectively competitive market;
 2. inefficiencies in the market, their causes and whether market conditions are such that these inefficiencies are likely to impact detrimentally in the long term on the efficient functioning of the market;

¹³ NEL – section 18C(1).

¹⁴ NEL – section 18C(2)(a).

3. the monitoring methodology applied and the results of indicators, tests and calculations performed; and
 4. other matters of a long term nature relating to the market, for example, observations relating to planned increases in interconnector capacity, trends in demand and trends in uptake of alternative energy sources.¹⁵
- Enable the AER, as it thinks fit, to provide advice to the Energy Council on the results of the performance of its wholesale market monitoring functions.¹⁶
 - Introduce explicit provisions around the process the AER must undertake prior to seeking any information in addition to that which is publicly available and which provide that such information is taken to be provided on a confidential basis, is only to be used or disclosed by the AER for the purposes of its wholesale market monitoring and reporting functions and must only be disclosed in aggregated form.¹⁷

Similar to circumstances currently provided for under the NEL¹⁸, it is intended that any confidential information obtained by the AER will be returned to the provider.

Other provisions include AER immunity from liability and a definition of a 'wholesale electricity supplier'.

The AER immunity from liability provision will restrict action brought against the AER for breach of confidence in respect of disclosing certain confidential information.¹⁹

The new definition of 'wholesale electricity supplier' will ensure that the scope of the monitoring function is limited to entities that supply electricity or services through the wholesale exchange.²⁰

4. Issues for consultation

In providing the draft Bills for consultation, EWG is seeking feedback on the provisions as drafted. In light of previous comments, EWG is specifically seeking information from stakeholders on:

1. What information would be captured under the changes outlined in the removal of barriers for the AER to collect and publish information for the purpose of benchmarking?
2. How often is the information described in the response to question 1 requested by the AER?
3. What are the characteristics of the information (such as sensitivity or quantity) described in the response to question 1 that would mean the new provisions would impose a new and more onerous regulatory burden?

¹⁵ NEL – section 18C(3).

¹⁶ NEL – section 18C(2)(b).

¹⁷ NEL – section 18D.

¹⁸ NEL – section 25.

¹⁹ NEL – section 18E.

²⁰ NEL – see definition in section 18B.

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4. Will the scope of the 'wholesale electricity supplier' definition capture unintended market participants?