



March 16, 2016

Manager, COAG Energy Council Secretariat
Department of Industry, Innovation and Science
GPO Box 9839
Canberra ACT 2601

Dear COAG Energy Working Group (EWG):

EWG Bulletin #41 - National Electricity Law and National Gas Law Amendment Package

The Major Energy Users (MEU) welcomes the opportunity to provide comment on the COAG Energy Council Working Group Bulletin No 41, and its associated draft bill relating to amendments to the National Energy Law (NEL) and National Gas Law (NGL). We note that responses to the draft bill were sought by 15 March 2016 and we apologise for being one day late with this response.

While we agree that the AER should have adequate information gathering powers (and we support the changes proposed in this regard), the MEU primary interest is with the proposed changes to the Law in regard to the enhanced monitoring of the wholesale electricity market. This enhanced monitoring arose as a recommendation from the AEMC assessment of our proposed rule change in 2010 to address the abuse of market power that had occurred in the electricity market and could occur in the future.

The MEU would like to support the proposed Law change. However, we consider that under the proposed design, the Australian Energy Regulator (AER) might be limited in its ability to effectively undertake this task, and suggest the following aspects should be considered:

- 1) We note the use of the definition of Effective Competition outlined within section 18B – Definitions, of the proposed National Electricity Amendment Bill 2015. We view that the four subsections of section 18B (especially subsections (b) and (c)) may unnecessarily constrain the AER in its monitoring activities, and would suggest that there is a strong need for Bill to be expanded beyond the imposed constraints implicit in subsections (b) and

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(c) to ensure that the AER is granted the powers to monitor all appropriate aspects that relate to market power.

In particular, we note that the Market Price Cap (MPC) used in the National Electricity Market (NEM) is many hundreds of multiples of the average cost of electricity and so even a few trading periods at MPC has the potential to cause considerable harm to consumers. The MEU notes that overseas jurisdictions provide their market monitors with an ability to seek for all aspects where it considers there is abuse of market power concerns and then to report on these. To proscribe the NEM market monitor to only address those aspects of the wholesale market where the prices do not reflect underlying costs opens up the monitoring process to dispute as there are varying methods of assessing what "underlying costs" might be. The MEU considers that the AER should be required to use a range of tools and measures to assess whether the market is being subjected to abuse of market power rather than the one measure implicitly detailed in the proposed wording of the Law.

The MEU suggests the following wording for 18B(b):

"that prices be assessed using a range of market measures (including underlying costs measured on a long term basis) to identify if there has been abuse of market power, recognising that a particular competitor may hold a substantial degree of market power from time to time; and"

In relation to subsection 18B (c) we note that the barriers to entry include the time needed for a competitor to enter the market and that a competitor with market power can cease abuse of that market power in ways that effectively prevents a new entrant. This means that for considerable periods of time, an incumbent can abuse its market power but using the time lag for a new entrant, to make it impossible for the new entrant to be able provide the competition needed by the market.

Further, the actual market conditions that exist (eg no new supply needs) might preclude a new entrant even though prices might otherwise signal the need for a new entrant. Effectively, while the market power might in theory be temporary, in practice, it could be long term. For example, in South Australia region at the moment there are generators leaving the market because of insufficient volume of electricity supply from thermal generators even though forward prices are at a level that implies a need for new investment, and this is providing potential for those generators remaining to abuse their market power with little chance of a new competitor entering the market.

The MEU suggests the following wording for 18B(c)

"that barriers to entry may be sufficiently low and/or that the market conditions imply a need for more investment, so that a substantial degree of market power may only be held by a particular competitor on a temporary basis; and"

- 2) We note section 18 C subsection (2) (b)(i) of the Bill, referring to the AER wholesale reporting functions. We suggest that this area should be expanded to capture not only *“features of the market that impact detrimentally on its efficient functioning...”*; but also captures those areas of the wholesale market that are working well. If this function is achieved, the MEU is of the view this as a positive step within the NEM that will provide positive benchmarks which will encourage market participants to actively strive towards more efficient and effective outcomes to benefit all energy consumers.
- 3) Given the importance of these new functions, the MEU considers that it would be prudent for the AER to be explicitly and appropriately resourced for it to implement the new role and achieve the aims outlined within the proposed bill.

We thank you for the opportunity to provide feedback on the proposed amendments. The MEU considers that its suggested refinements are in the best interest of all energy consumers and therefore is in accordance with the National Electricity Objective.

We are available for further comment if required, and please do not hesitate to contact our Public Officer – David Headberry – on 03 5962 3225 or at davidheadberry@bigpond.com.

Sincerely,

A handwritten signature in black ink, appearing to read 'D.H. Headberry', with a stylized flourish at the end.

David Headberry
Public Officer
Major Energy Users Inc.