

COAG ENERGY COUNCIL PROPOSES TO BYPASS THE AEMC WHEN MAKING RULES FOR ENERGY SECURITY AND RELIABILITY OF THE NEM OR LONG TERM PLANNING FOR THE NEM

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Legal Briefings - By **Liza Carver and Richard Robinson**

Draft legislation that will allow the Coalition of Australian Governments (**COAG**) Energy Council to bypass the current rule change processes by allowing the South Australian Minister to make rules under the National Electricity Law (**NEL**) and National Gas Law (**NGL**) (and to a limited extent the National Energy Retail Law (**NERL**)) has been released for consultation.

The draft legislation requires a recommendation from the Energy Security Board (**ESB**) and agreement from the COAG Energy Council before the South Australian Minister is permitted to make rules.

Consultation on the exposure draft closes on **Friday 29 September 2017**. A copy of the exposure draft and related information is available [here](#).

ENERGY SECURITY BOARD

The establishment of an ESB, comprised of the AEMC, the Australian Energy Market Operator and the Australian Energy Regulator with an independent chair and deputy chair, was recommended by Dr Finkel in the *Independent Review into the Future Security of the National Electricity Market* (**Finkel Review**).

The *Statutes Amendment (National Energy Laws) (Rules) Bill 2017* (SA) (**Bill**) will include a new definition in the NEL, NGL and NERL referring to the ESB as a non-statutory entity established by the COAG Energy Council to provide it with advice for the purposes of:

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

As a non-statutory authority, the ESB will not be established by law. It will be governed by terms of reference, which are still being developed. A draft version of the terms of reference was provided by the COAG Energy Council with the exposure draft of the Bill and is also available at the link above.

The draft terms of reference provide a very broad scope of responsibility for the ESB, and extend further than what would normally be considered to be energy security and reliability of the NEM or long-term planning for the NEM. For example, the EBS's responsibility includes 'the implementation of recommendations from the [Finkel Review] and provide whole-of-system oversight to the COAG Energy Council on energy security, reliability and affordability in the NEM'. We note that the power for the ESB to recommend that rules be made is limited as discussed below.

RULE MAKING PROCESS

The Bill will introduce a new section 90F to the NEL allowing the South Australian Minister to make rules following a recommendation by the COAG Energy Council. The COAG Energy Council may only recommend that rules be made if the proposed rules are first recommended by the ESB. In turn, the ESB may only recommend rules where:

- the proposed rules are in connection with energy security and reliability of the NEM or long-term planning for the NEM;
- the ESB is satisfied that the proposed rules are consistent with the national energy objective; and

- the ESB has undertaken consultation on the proposed rules in accordance with any requirements determined by the COAG Energy Council.

Similar powers are included in proposed new sections 294G of the NGL and 238B of the NERL. However, the ESB may only recommend rule changes:

- in the case of the NGL, that are connected with the energy security and reliability of the NEM or long-term planning for the NEM or in relation to investment in, and operation and use of, natural gas services; and
- in the case of the NERL, for any purpose that is necessary or consequential as a result of the making of a rule for the NER or the NGR.

The ability for the SA Minister to make rule changes on the recommendation of the COAG Energy Council and the ESB was not contemplated by the Finkel Review. It presents a potentially significant departure from the existing governance arrangements under the NEL and NGL through bypassing the AEMC (the body established to make rules). It also potentially weakens the consultation processes required to be followed by the AEMC when considering rule changes under the NEL (we note that the only obligation on the ESB to consult with market participants is to be determined by the COAG Energy Council).

An additional rule making power appears unnecessary and duplicative given that the AEMC already has the power to make urgent rules in accordance with section 96 of the NEL. The AEMC may use this power where the rule relates to any matter or thing that, if not made as a matter of urgency, will result in that matter or thing imminently prejudicing or threatening the effective operation or administration of the wholesale exchange, or the safety, security or reliability of the national electricity system. A similar power to make urgent rules is provided by section 304 of the NGL.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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