



COAG Energy Council

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Senior Committee of Officials

Omnibus legislative amendments

Explanatory note for stakeholder consultation

15 March 2020

Acronyms

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
COAG	Council of Australian Governments
DWGM	(Victorian) Declared Wholesale Gas Market
MCE	Ministerial Council on Energy
NCC	National Competition Council
NEL	National Electricity Law
NEM	National Electricity Market
NGL	National Gas Law
NERL	National Energy Retail Law
RIS	Regulation Impact Statement
SCER	Standing Council on Energy and Resources
SCO	Senior Committee of Officials

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1. Introduction

The COAG Energy Council has agreed to make a number of changes to national energy laws and in progressing these reforms, the Senior Committee of Officials (SCO) has released the draft *Statutes Amendment (National Energy Laws) (Omnibus) Bill 2020* (Bill).

The Bill is for amendments to key legislation establishing the national energy cooperative schemes:

- the National Electricity Law (NEL) set out in the schedule to the *National Electricity (South Australia) Act 1996* (SA)
- the National Gas Law (NGL) set out in the schedule to the *National Gas (South Australia) Act 2008* (SA)
- the National Energy Retail Law (NERL) set out in the schedule to the *National Energy Retail Law (South Australia) Act 2011* (SA)
- the *Australian Energy Market Commission Establishment Act 2005* (SA) (AEMC Act).

Together, these ‘national energy laws’ are being amended to implement various policy initiatives of the COAG Energy Council’s ongoing energy market reform agenda and to make minor corrections or changes to address identified ambiguity.

The table below sets out the subject matter of each of these amendments. Each is further discussed in the section of this paper listed in the table.

Section	Subject	Instrument amended
2	Legacy package 1 amendments	NEL
2.1	Participating Jurisdiction amendments	NEL, NGL, NERL
2.2	Commercial Arbitration provisions	NEL, NGL, National Electricity Regulations, National Gas Regulations
3	Victorian Declared Wholesale Gas Market amendments	NGL
4	Information disclosure amendments	NEL, NGL, NERL
5	Ministerial Council amendments	NEL, NGL, NERL, AEMC Act
6	Statutory Notices amendments	NEL, NGL, NERL
7	Removal of Limited Merits Review amendments	NEL, NGL
8	Limitation of Duty on Commonwealth Officers or Bodies amendments	NEL, NGL, NERL

While these amendments relate to different matters, they are being progressed together and consulted on as one package as they are being progressed through the South Australian Parliament as a single “Omnibus” Bill.

The following paper provides some background on each of the proposed amendments for the purpose of consultation.

The Bill and the draft Variation Regulations are published alongside this consultation paper. These documents do not represent final government policy and have not been endorsed by the Energy Council or any government participating in the national process at this stage.

1.1. Consultation

SCO encourages stakeholders to provide feedback, preferably through a written submission, on the draft Bill and Regulations. SCO will publish submissions on the COAG Energy Council's website. If the submission contains confidential information (or a confidential attachment) please make this clear in writing what should or should not be published.

Submissions are requested to be provided by 28 May 2020

For more information, please contact the COAG Energy Council Secretariat:

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- phone: (02) 6243 7844
- web: <http://www.coagenergycouncil.gov.au/contact-us/contact-us>

2. Legacy package 1 amendments

2.1. Participating jurisdiction amendments

The Bill seeks to clarify the operation of section 5 of the NEL and to bring it in to line with the drafting approaches in the NGL and NERL. Section 5 provides for the identification of 'participating jurisdictions'. This term is used as a means of distinguishing those jurisdictions which apply the NEL.

Section 5 provides for South Australia, as the lead legislator jurisdiction for the NEL, to be expressly identified as a participating jurisdiction. The Commonwealth, a Territory, or a State will also be a participating jurisdiction '...if there is in force, as part of the law of that jurisdiction, a law that corresponds to Part 2 of the *National Electricity (South Australia) Act 1996 of South Australia*' (emphasis added).

There is a degree of inherent ambiguity about the meaning of 'corresponds to' in this section. In the context of non-interconnected jurisdictions seeking to apply the NEL, and noting those jurisdictions have or will make modifications to the NEL to accommodate the different nature of the electricity systems in those jurisdictions, it is prudent to avoid this ambiguity.

For this reason, the Bill amends section 5 to ensure there is no uncertainty in the identification of any of the participating jurisdictions for the purposes of the NEL. The Bill achieves this by expressly stating that a jurisdiction is a 'participating jurisdiction' if the jurisdiction has passed a law that applies the NEL, or any part of the NEL.

To ensure consistency with the policy approach in relation to the section 5 amendments, the Bill also seeks to amend section 6 of the NEL in the same terms. The effect of this change is to clarify that a Minister is a Minister of a participating jurisdiction if the jurisdiction has passed a law applying the NEL, or part of the NEL. Similarly, to ensure consistency between the NEL, NGL and NERL in relation

to ‘Ministers of participating jurisdictions’, the Bill also amends the analogous provisions of the NGL and the NERL.

2.2. Commercial arbitration provisions

Under the national electricity rules (the Rules), certain disputes between parties in relation to matters arising under the Rules may be determined by a ‘dispute resolution panel’. For each jurisdiction applying the NEL, the NEL provides that the ‘Commercial Arbitration Act’ of that jurisdiction govern:

- the procedures for hearing disputes in that jurisdiction; and
- requirements relating to the review of decisions by a dispute resolution panel.

Section 69A and 71 of the NEL give rise to these requirements and both make reference to certain provisions of the ‘Commercial Arbitration Act of this jurisdiction’.

As the structure and form of commercial arbitration legislation has evolved since the commencement of the NEL and will continue to evolve, the Bill ensures that references to commercial arbitration act provisions can be prescribed by regulation. This will ensure these references can be easily amended in the future, should subsequent changes occur. Similar amendments have also been made to the NGL.

The *National Electricity (South Australia) (Commercial Arbitration Acts) Variation Regulations 2019* and the *National Gas (South Australia) (Commercial Arbitration Acts) Variation Regulations 2019* include changes to procedural provisions of the relevant ‘Commercial Arbitration Act of the jurisdiction’.

3. Victorian Declared Wholesale Gas Market amendments

The Victorian Declared Wholesale Gas Market (DWGM) is a wholesale gas market for the scheduling of pipeline capacity and trading of gas imbalances.

The NGL currently allows for a request for a DWGM rule change to be made only by the Australian Energy Market Operator (AEMO) or the Victorian Minister for Energy.

As part of the Australian Energy Market Commission’s (AEMC) East Coast Wholesale Gas Market and Pipelines Frameworks Review, the AEMC recommended this restriction be removed. In July 2015, the COAG Energy Council agreed with this recommendation.

The Bill would now enable any party to propose rule changes applying to the DWGM in relation to the operation and administration of the DWGM.

4. Information disclosure amendments

Section 28ZB of the NEL and section 329 of the NGL authorise the Australian Energy Regulator (AER) to disclose confidential information in certain circumstances. On 15 December 2016, changes were

made to those provisions through the *Statutes Amendment (National Electricity and Gas Laws – Information Collection and Publication) Act 2016* (SA) (ICP Act). For the sake of consistency, the ICP Act also made changes to AEMO’s information disclosure powers in the NEL (section 54H) and NGL (section 91GH).

This Bill contains minor revisions to sections 54H and 91GH to correct very minor drafting errors.

There is a terminology difference between the AER and AEMO provisions. The AER authorised disclosure provisions relate to the disclosure of ‘confidential information’, while the AEMO authorised disclosure provisions relate to ‘protected information’.

To allow consistent application of these information disclosures, and in-line with the original intent of the ICP Act amendments, the Bill ensures that the AER provisions in section 54H of the NEL and section 91GH of the NGL will also refer to ‘protected information’.

As a further measure to ensure consistency throughout the national energy legislative framework, the Bill amends section 214 of the NERL concerning the AER’s information disclosure powers. As the NERL does not include analogous disclosure provisions for AEMO, this amendment ensures the same approach to information disclosure requirements by the AER and AEMO across the NEL, NGL and NERL.

5. Ministerial Council amendments

The Council of Australian Governments (COAG) Energy Council (the Energy Council) is a Ministerial forum for Ministers of the Commonwealth and the States and Territories, to work together in the pursuit of national energy reforms.¹

Due to changes to the structure of the COAG Ministerial Council system, there have been two name changes to the Energy Council since 2011.

Originally called the Ministerial Council on Energy (MCE), the first change involved a transition to the Standing Council on Energy and Resources (SCER) on 17 September 2011. The second change occurred following the 2013 federal election when further consolidation of the Ministerial Council system resulted in SCER becoming known as the COAG Energy Council.

At the time of the 2011 change, COAG sought to improve legislative references to Ministerial Councils to cater for potential future name changes. This position has been more recently restated in COAG’s guidance to Ministerial Councils:

“COAG has asked the Councils to amend references to Ministerial Councils that pre-date the new Council System by 30 June 2016. References should be amended to refer instead to the ‘Ministers with responsibility for [.....]’. This more general reference will remain current even if Councils change their names in the future.”²

¹ <http://www.coagenergycouncil.gov.au/about-us/our-role>

² See p7: http://educationcouncil.edu.au/site/DefaultSite/filesystem/documents/PDF/Handbook_for_COAG_Councils.pdf

The Bill seeks to give effect to this policy position to ensure the legislative references to the Energy Council operate effectively, no matter whether the name of the Council evolves over time.

6. Statutory Notices amendments

On 19 December 2018, the Energy Council gave policy approval to develop amendments to the NEL, NGL and NERL to remove requirements for the AEMC to publish various statutory notices in newspapers circulating throughout Australia. Subsequently, in October 2019, the Energy Council agreed to extend its policy decision to include the removal of similar provisions in the three energy laws requiring AEMO, the AER and the National Competition Council (NCC) to publish notices in newspapers.

The Bill seeks to give effect to this policy position by ensuring all legislative requirements in the NEL, NGL and NERL obliging the AEMC, AER, AEMO and NCC to publish notices in newspapers are removed from relevant provisions. In all cases, the relevant provisions will continue to impose minimum notice requirements on these bodies, such as notification on websites.

In seeking Energy Council approval for the change, the AEMC advised that significant increases in its work load, particularly its rule-making function, had increased the number of newspaper notices to be published; and that the associated cost has become material despite notices being kept succinct. It considered the benefit from removing the requirement would outweigh any potential negative impact. This is because it would result in removal of a regulatory cost that is ultimately borne by industry and other taxpayers. Further, the AEMC noted newspaper publication is no longer a reliable source of information dissemination as electronic communication modes are now preferred by its stakeholders.

Consultation also occurred with representatives of the AER, AEMO and the NCC regarding the extension of the policy decision to also remove similar requirements applying to them under the laws. These bodies noted in their case that savings are likely to be immaterial, but noted the cost of a single advertisement is, however, relatively high at \$2000-\$3000. They supported the change for a number of reasons including that such notices are no longer considered an effective and reliable means of information dissemination and the costs are likely to outweigh any benefits provided by the notice as well as expectations of little, if any, negative impact on their stakeholders from the change.

Overall the proposed changes will:

- Reduce the cost of the relevant bodies regulatory functions, which is ultimately borne by industry, consumers and other taxpayers;
- Modernise the regulatory regime to recognise the growth of the digital economy and changes in stakeholder preferences for how they access information;
- Provide relevant bodies with discretion to choose to use communication channel(s) that will best reach their customer base, while retaining some minimum notice requirements in the laws; and
- Maintain consistency across the regulatory framework.

7. Removal of Limited Merits Review regime

On 30 October 2017, the *Competition and Consumer Amendment (Abolition of Limited Merits Review) Act 2017* (Amendment Act) received Royal Assent. This Amendment Act modified the *Competition and Consumer Act 2010* and removed the ability for electricity and gas network service providers to apply for Limited Merits Review of some of the AER's decisions.

The Bill removes redundant references to the Limited Merits Review regime in the NEL and NGL.

8. Limitation of Duty on Commonwealth Officers or Bodies amendments

The amendments in the Omnibus Bill complement the *Competition and Consumer Act 2010* and address constitutional issues raised in *R v Hughes* (2000) 202 CLR 535. These amendments are modelled on section 6AAC of the *Therapeutic Goods Act 1989*.

The Bill removes the inconsistencies in the constitutional reading down provisions in the NEL, NGL and NERL (cl 2(4) and 42(4) of the NEL; Schedule 2 cl 2(4) and 52(4) of the NGL; s 320(3) of the NERL) and brings those provisions into line with current drafting practice.

9. Issues for consultation

In providing the draft Bill and Regulations for comment, SCO is seeking feedback on the provisions as they are drafted. Specifically, SCO is seeking comments from stakeholders on whether the amendments will raise any practical implementation concerns.