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Dear Sir/Madam

Statutes Amendment (National Electricity and Gas Laws- Information Collection and Publication) Bill, (the Draft Bill)

Ausgrid welcomes the opportunity to respond to the Council of Australian Governments (COAG) Energy Council's Energy Working Group (EWG) Draft Bill relating to amendments to the National Electricity Law (NEL) with respect to Information Collection and Publication.

We understand that these amendments have been proposed to address a perceived restriction on the Australian Energy Regulator (AER) to collect and publish information for the purpose of benchmarking and remove the current restriction upon the AER to issuing Regulatory Information Instruments such as Regulatory Information Notices (RIN) to obtain data solely for the purpose of performance reports.

Ausgrid notes that the proposed amendments will effectively result in the merging of the concepts of network service provider (NSP) performance reporting contemplated under the NEL with benchmarking contemplated under Chapter 6 of the National Electricity Rules (NER or 'Rules'). We are not clear from the accompanying explanatory material whether this was the intended outcome, however it is not apparent that any amendments to the NEL were required to enable the AER to obtain information for benchmarking purposes through a Regulatory Information Instrument.

We also note that the proposed Draft Bill also seeks to amend the confidentiality regime under the NEL in two significant ways. The first is to impose pre-conditions upon the ability of NSPs' to claim confidentiality in respect of information when responding to compulsory Regulatory Information Instruments. The second is to reduce the ability of NSPs to support its claim for confidentiality and to seek a review of the AER's decision.

Ausgrid does not support the proposed amendments as they do not appropriately balance the public interest in a regulator being able to compel the production of information with the right of NSPs to claim confidentiality in respect of information provided under compulsory processes. The proposed amendments dismantle the careful balance that was previously struck in the NEL between these competing interests when the provisions were introduced in 2007 in line with recommendations of the

Expert Panel on Energy Access Pricing¹. That report recognised the importance of confidential information being protected and anticipated that the AEMC would make rules addressing the detailed requirements, which is what has now occurred with the introduction of the requirement for the AER to prepare Confidentiality Guidelines under Chapter 6 of the Rules which are mandatory. The AER's Guidelines (which are one of the few mandatory Guidelines in the Rules) have been very effective in discouraging blanket claims of confidentiality in response to regulatory information requests.

A review of the AER's regulatory determination section of its website reveals a significant reduction in the number of claims of confidentiality as a direct outcome of the AER's Confidentiality Guidelines. For example, the page count for confidential documents one Victorian DNSP submitted to the AER's Victorian electricity distribution determination (2011-15) was 92 per cent of pages of submission that include information subject to claim of confidentiality².

This compares with recent confidentiality claims by Victorian DNSPs for their substantive regulatory proposals (2016-20) where the percentage of pages of submission that included information subject to a claim of confidentiality was between 1 to 12 per cent³. In the case of Ausgrid's 2014-19 regulatory proposal it was 2.25 per cent⁴. Considering the evidence, any additional legislative amendments would not represent a proportionate regulatory response. Nevertheless we address the issues raised by EWG in its consultation paper on the Draft Bill in the commentary below.

Confidentiality issues – public benefit disclosure

We note that in response to stakeholder concerns regarding NSPs being in a position to determine public benefit disclosure that the proposed NEL amendments now require NSPs "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 it⁵." We reiterate our concern that this approach does not support sound decision-making. This approach, combined with the truncated process for making decisions will mean that the AER will make a decision about disclosure without the benefit of the NSP's views on the decision that the AER has reached on the impact of the disclosure.

The AER's task is to assess whether there is a genuine basis for the confidentiality claim and whether there is value in disclosing the document to maintain the integrity of the public consultation process. Where the AER does form the view that there is public benefit in disclosing the information it should either seek the agreement of the NSP to disclose the information or follow the process currently provided for under section 28ZB of the NEL.

Whilst the AER has the discretionary power to disclose information provided in confidence, this is subject to it determining that the public benefit of doing so outweighs any detriment to the person that provided the information.⁶ Therefore, whether the AER exercises its discretionary powers to disclose confidential information should depend on the merits and consequences of each confidentiality claim. This is because current confidentiality arrangements were designed to balance the need for

¹ Expert Panel on Energy Access Pricing, Report to the Ministerial Council, April 2006 at pages 132-133.

² AER Distribution and transmission confidentiality guidelines Issues Paper, p 11

³ AER Confidentiality Claims by VIC Distributors substantive regulatory proposals 2016-20

⁴ AER Confidentiality claims by NSW distributors (Ausgrid, Endeavour Energy and Essential Energy)

⁵ COAG Energy Council, Energy Working Group National Electricity Law and National Gas Law Amendment Package Explanatory note for stakeholder consultation, p 4.

⁶ National Electricity Law, s 28ZB.

stakeholders to have access to the information upon which regulatory decisions are made and the need to protect confidential information.

It is important that the fundamental right for NSPs to provide information in confidence and the AER's role in protecting such information from unauthorised disclosure⁷ is maintained. Under the current framework for providing confidential information, a NSP is required to provide an indication of the parts of its proposal (if any) that it claims to be confidential and wants suppressed from publication on that ground.⁸ Once information is identified as confidential, the AER must take all reasonable measures to protect that information from unauthorised use or disclosure.⁹ The NEL also places a number of restrictions on the AER from releasing information unless specific circumstances have been met or a proper process has been followed.¹⁰ These rights and restrictions should remain.

Ability to respond to decisions to disclose information

We support that the Draft Bill retains requirements on the AER to consult with affected parties prior to the publication of information.

However, we note with much concern that in relation to information given to the AER in order to comply with a Regulatory Information Instrument, there will be no opportunity for NSPs to be heard before a decision is made by the AER to disclose confidential information where it considers that the disclosure would be detrimental to the NSP. And once a decision is made, NSPs will have only 5 business days to seek a review of the decision. Ausgrid does not consider that these arrangements are in any way fair or an appropriate way to deal with confidential sensitive information provided under coercive information gathering powers.

As indicated above there could be a long period of time between when confidential information is provided under a compulsory instrument and when the AER determines that it proposes to disclose the information. For example, the AER published its first annual benchmarking report *AER, Electricity distribution network service providers—annual benchmarking report*, November 2014, 7 months¹¹ after information was provided by NSPs in response to the AER's benchmarking RIN. In this respect, we remind the EWG that r 6.27 enlivens r 8.74 in relation to the steps that the AER must take before preparing and publishing an annual benchmarking report. Those steps include consultation with the NSP and a 30 day period to make submissions before the report is published, including an opportunity to comment on material of a factual nature to be included in the report. We therefore do not support the Section 28OA Bill amendments to the NEL as they may impact on confidentiality related issues that may arise in relation to material of a factual nature.

The lack of any opportunity to provide further input into the AER's decision contemporaneously with the disclosure decision means that there may be detriment which was not apparent at the time the information was provided and that the NSP has no opportunity to put before the AER prior to making its decision; that these new arrangements could be perceived as inherently unfair is supported by the fact that a new section 28ZB has been included to preclude any formal challenge as a denial of nature justice by the AER making decisions in accordance with the provisions. Ausgrid considers that this is a

⁷ NEL, s 28Z.

⁸ National Electricity Rules (NER) clause 6.8.2(c)(6).

⁹ *Competition and Consumer Act 2010(Cth)*, s 44AAF(1); National Electricity Law, s 18.

¹⁰ The AER is permitted to disclose information to the Australian Competition and Consumer Commission (ACCC), the Australian Energy Market Commission (AEMC), the Australian Energy Market Operator (AEMO), or any other consultant engaged by those bodies. It is also permitted to disclose information in connection with the exercise of its statutory obligations, where it has received written consent, in connection with court or tribunal proceedings or to afford a party procedural fairness. See *Competition and Consumer Act 2010(Cth)*, s 44AAF; National Electricity Law, s18 and ss 28W-28Y.

¹¹ The AER's Annual Benchmarking Report was released in November 2014. It relied on RIN data submitted by the NSW DNSPs in April 2014 covering the regulatory years from 2006 to 2013 inclusive.

disproportionate and inappropriate response. For these reasons, Ausgrid urges the COAG Energy Council to reconsider this aspect of the Draft Bill and not proceed to dismantle the current regime which appropriately balances the rights of NSPs to protect the disclosure of sensitive information and the ability of the AER to provide transparency in its decision making.

Transitional arrangements

Ausgrid supports that 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.

If you would like to discuss this letter further or arrange a meeting with Ausgrid representatives please contact Mr Son Truong Vu on (02) 9269 4360.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joe Pizzinga', with a stylized flourish extending to the right.

JOE PIZZINGA
Chief Financial Officer