

15 March 2016

Nicole Metherell
Manager, COAG Energy Council Secretariat
Department of Industry, Innovation and Science
Industry House Level 7
10 Binara Street, Canberra City ACT 2601
GPO Box 9839, Canberra ACT 2601

National Electricity and Gas Law Amendments– Information Collection and Publication

Dear Ms Metherell,

The Energy Networks Association (ENA) welcomes the opportunity to provide its comments in relation to the draft *Statutes Amendment (National Electricity and Gas Laws – Information Collection and Publication) Bill 2015*, which was released for consultation on 3 February 2016.

The ENA is the national industry association representing the businesses operating Australia's electricity transmission and distribution and gas distribution networks. Member businesses provide energy to almost every household and business in Australia.

The ENA acknowledges that the policy intent of these amendments is to ensure that the Australian Energy Regulator (AER) has sufficient and clear powers around the annual collection and publication of benchmarking material. The ENA supports the stated policy intent and considers it consistent with the agreed outcomes of the AEMC *Economic Regulation of Network Service Providers* rule change process that was finalised in November 2012.

This revised draft Bill follows a previous consultation process on the previous draft Statutes Amendment (National Electricity and Gas Laws – Information Collection and Publication) Bill in 2013. At the time, the ENA expressed some concerns with the drafting of the proposed legislative amendments and provided the COAG Energy Council (the then Standing Council on Energy and Resources or SCER) with a formal legal review of the Bill by Gilbert + Tobin ([Attachment A](#)).

It is evident from the review of the Explanatory note that the legislation proposed by COAG Energy Council has now addressed a number of issues raised by the ENA in 2013, with some modifications. The ENA appreciates the consideration that the COAG Energy Council has given to addressing industry concerns. The ENA considers that the proposed amendments are generally workable and likely to address the key issues associated with the previous version of the Bill.

The ENA provides its further comments on the proposed amendments in the sections below.

Confidentiality issues—public benefit test

The ENA notes that the draft Bill has been amended to only require a network service provider, in complying with a regulatory information instrument, to provide information on any public benefit aspects of a confidentiality claim that is reasonably within its knowledge and capacity to provide. The ENA considers that this represents an improvement when compared to the previous drafting. It is important to note, however, that whilst the revised draft Bill affords the opportunity for network service providers to provide such information, the responsibility to undertake the analysis of detriment as against public benefit rests with the AER. This is to recognise that network service providers may not be in a position to establish the nature of the public benefits of disclosure.

Confidentiality issues—ability to respond to disclosure information

The revised draft Bill retains the opportunity for parties which are facing disclosure of regulatory instrument information that may cause them significant detriment to be heard before the AER discloses this information. However, this opportunity is limited to the issue of whether there is public interest in disclosing the information. It would not, for instance, allow a party to raise potential detriment issues which have become known subsequent to any earlier advice being provided. The ENA understands that the intent of limiting an opportunity to respond in such a way is to streamline the process and avoid duplication. However, the ENA is concerned that the current drafting creates the potential that the AER's decision may not be informed by the most recent information available at that time.

Confidentiality issues—review of decisions to disclose information

The revised draft Bill retains the current safeguard (i.e. the five day restricted period) which allows affected parties to seek review of a decision to release confidential information provided pursuant to a regulatory information instrument which may cause them significant detriment. The ENA support this amendment to the previous version of the Bill.

In relation to the handling of confidentiality claims more generally, we note that the AER published its *Confidentiality Guideline* in November 2013. This guideline sets out an open and transparent process for making confidentiality claims by network service providers. Importantly, the guideline includes measures which mitigate the potential for blanket confidentiality claims which the AER had previously identified as a concern.

The guideline also requires network service providers to provide reasons supporting how and why disclosure would cause detriment, and asks, on an optional basis, for reasons as to why any such detriment is not outweighed by the public benefit in disclosing the confidential information.

Consequently, the ENA recognises that significant changes to the management of the process of claiming confidentiality now applies, compared to when the Bill was first proposed. The AER has used the relevant power to make its *Confidentiality Guideline* binding under current legislation in relation to responses to requests for information arising out of AER's gathering powers (i.e. regulatory information instruments), as well as a range of other documents that businesses submit to the AER.¹ The ENA considers this guideline has been generally effective in enhancing the process of making confidentiality claims. Arguably, the contents of the *Confidentiality Guideline* and its binding nature now significantly reduce the likelihood that the AER will use its information disclosure powers under the National Electricity and Gas Laws in a way that will result in the use of the amendments contained in the revised draft Bill.

¹ AER, Confidentiality Guideline, November 2013, p.7.

If you have any questions, or the ENA can be of further assistance in this process, please contact Garth Crawford, Executive Director, Economic Regulation on 02 6272 1555.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Bradley', with a long horizontal flourish extending to the right.

John Bradley
Chief Executive Officer