Energy Ministers

Submitted online: netp@industry.gov.au

7 February 2023

Submission to Incorporating an emissions reduction objective into the national energy objectives: Consultation Paper

The Australian Energy Council welcomes the opportunity to make a submission to Incorporating an emissions reduction objective into the national energy objectives (**NEOs**): Consultation Paper (**Consultation Paper**).

The Australian Energy Council (AEC) is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

The AEC strongly supports the federal government's commitment to reducing Australia's emissions and reiterates its position on a national approach to emissions reductions being the most cost effective and efficient approach to reduce national emissions. The AEC also strongly prefers national approaches over local, as piecemeal policy is not be in the long-term interests of Australian energy consumers and increases the cost of decarbonising the economy.

In this submission we set out the historical and future contributions to emissions reductions of the electricity sector and demonstrate how it is the only emitting sector that has made substantial reductions so far. This has all occurred in the absence of an emissions objective in the NEOs having been driven by government policies and private sector investment decisions. Nevertheless, we accept the reality that the governments have agreed to pursue this change to the NEOs and we offer some observations and suggestions regarding potential legal issues that may arise from the amended legislation as currently drafted.

The National Electricity Objective (NEO):

> *"to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to:*
>
> - *price, quality, safety and reliability and security of supply of electricity*
> - *the reliability, safety and security of the national electricity system."*

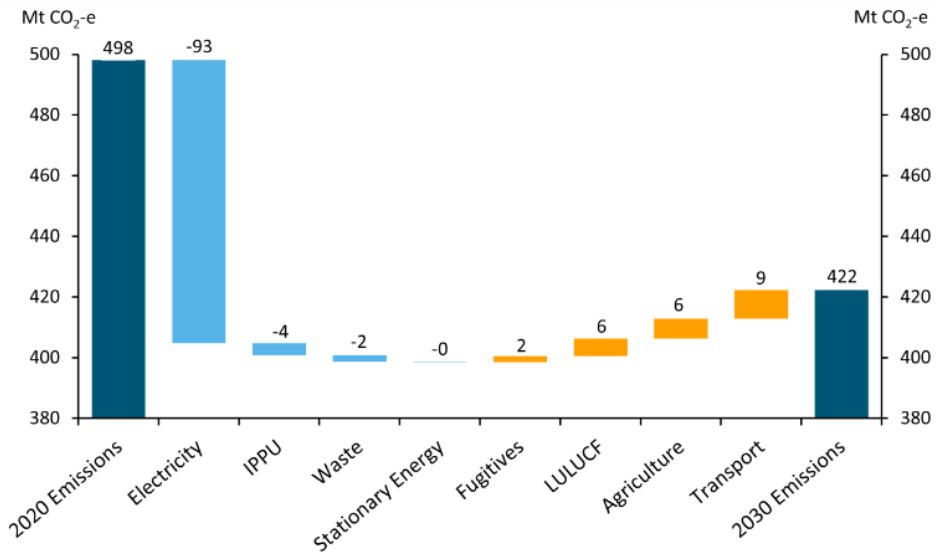
The NEOs have had the current form for almost two decades, a period in which the electricity sector has made extraordinary steps to prepare for a low carbon economy. Indeed, almost the entire effort to reduce emissions in the economy has been undertaken by the electricity sector. There is no other sector that has the experience and understanding of reducing emissions. As noted in the Consultation paper electricity accounts for approximately a third of Australia's emissions and Figure 1 illustrates how this is projected to reduce to 19 per cent by 2030. It also shows that electricity is the only sector projected to meaningfully reduce its emissions this decade.

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

P +61 3 9205 3100
E info@energycouncil.com.au
W energycouncil.com.au

ABN 98 052 416 083

Figure 1: Change in Australia's baseline emissions from 2020 to 2030 by sector, Mt CO_2-e.



Source: Australian Emissions Projections 2022[1]

Table 1 sets out projections to 2035 where electricity accounts for 17 per cent of total emissions by 2035 which is less than agriculture's emissions.

Table 1: Australian emissions projections to 2035 in the baseline scenario, by sector, Mt CO_2-e by sector

Sector	National Greenhouse Gas Inventory		Projection	
	2005	2020	2030	2035
Electricity	197	172	79	66
Stationary energy	82	101	101	94
Transport	82	93	103	99
Fugitives	43	53	55	55
Agriculture	86	73	79	78
Industrial processes and product use	30	32	28	25
Waste	16	13	11	10
Land use, land-use change and forestry	85	-39	-33	-44
Total	**621**	**498**	**422**	**383**

Source: Australian Emissions Projections 2022[2]

The electricity sector's pre-eminence with respect to emissions reductions has been acknowledged by the Commonwealth in its recent Safeguard mechanism release.

> *"Finally, industrial sector emissions are among the fastest growing across the economy. Emissions across the stationary energy, fugitive emissions, transport and industrial processes and product use sectors—which contain the majority of Safeguard facilities—have all grown since 2005 (Figure 2.1). In contrast, emissions from the electricity sector peaked in 2009 and are now around 20 per cent below 2005 levels."*[3]

[1] https://www.dcceew.gov.au/sites/default/files/documents/australias-emissions-projections-2022.pdf
[2] https://www.dcceew.gov.au/sites/default/files/documents/australias-emissions-projections-2022.pdf
[3] Safeguard Mechanism Reforms, p14.

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

Phone +61 3 9205 3100
Email info@energycouncil.com.au
Website www.energycouncil.com.au

ABN 98 052 416 083

Since 2016-17 when renewable generation investment was $1.4 billion it has reached annual levels of up to $8 billion (2018-19). Total investment over the period from 2016-17 to 2021-22 was $27.6 billion. Investment in renewable generation and storage is going to continue to accelerate over the next decade with the 2021-22 ISP forecasting a nearly tripling of current capacity by 2030 and then doubling that by 2040. More importantly renewable generation is expected to be 83% by 2030-31 and 96 per cent by 2040.

The success has occurred despite the energy objectives not explicitly mentioning environmental matters. This is not a paradox. Environmental externalities as laid down by government, be it carbon targets, renewable quotas or local pollutant restrictions, have always been implicitly captured in the present objectives. Those externalities are taken as given, with the economic objective requiring the market to be then efficiently optimised subject to those externalities.

For example, the existing Regulatory Investment Test for Transmission (RIT-T) expresses well the way environmental policy is to be captured in this regime. It advises transmission planners how to develop a "reasonable scenario" (section 22):

> *"….may include the following variables or parameters…*
>
> *(d) the form of any market-based regulatory instrument that may be used to address greenhouse an environmental issues;*
>
> *(e) the magnitude of a penalty (if any) for failing to meet government-imposed target or instrument on parties who produce, consume and/or transport electricity in the market…"* [4]

A risk of now introducing an environmental objective into energy market objectives is that it confuses governance responsibility for setting the direction of the decarbonisation of the industry between government and the industry's market bodies. Such confusion could actually detract from the industry's transition.

Legal issues

The AEMC already takes into account the reduction of carbon emissions when making its decisions. This was made clear in its 2021 Strategic Plan and in its October 2022 paper 'How the National Energy Objectives Shape our Decisions'. In the latter, the AEMC states that *'When making decisions, we cannot lose sight of the bigger picture'* and that its decisions *'guide action towards a decarbonising, affordable and reliable energy system'*. Decarbonisation is named as the first of the '*Elements shaping the big picture*' which it takes into account when making decisions.

Similarly, AEMO in its June 2022 'Integrated System Plan' describes its plan as a *'plan --- for a true transformation of the NEM, from fossil fuels to firmed renewables'.*

As the AEMC and AEMO already take into account decarbonisation when making decisions, and given the dramatic reductions in carbon emissions (actual and forecast) described above, there does not appear to be any case for amending the National Energy Objectives to require these regulators to have regard to emissions reduction targets.

We recognise that this does invite the converse argument: if the regulators already have regard to emissions reduction targets when making decisions, what is the harm in including those targets as a National Energy Objective?

---

[4] https://www.aer.gov.au/system/files/AER%20-%20Regulatory%20investment%20test%20for%20transmission%20-%2025%20August%202020.pdf

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

Phone +61 3 9205 3100
Email info@energycouncil.com.au
Website www.energycouncil.com.au

ABN 98 052 416 083

The answer is litigation risk. There are, in Australia, numerous, well-funded organisations which frequently challenge decisions by regulators on the basis that the decisions do not have sufficient regard to climate change and other environmental risks. The challenges, although mostly unsuccessful, create considerable delay and expense for energy projects, at a time when the energy transition can ill-afford further delays and even higher expenses.

If emissions reduction is a National Energy Objective, then it will be mandatory for regulators to have regard to emissions reduction policies when exercising their powers. An alleged failure to have regard to these policies, or an allegedly 'unreasonable' decision in light of these policies, might become the basis for an application for judicial review of the decision.

Once again, the response might be: if regulators do in fact have regard to decarbonisation when making decision, where is the litigation risk? There are a number of answers:

1. In many cases, the issue is not whether a regulator had regard to a relevant matter (such as emissions reduction policies), but whether the record shows such consideration. A challenge might be successful, or at least not be so hopeless as to be struck out immediately, if a regulator has not carefully recorded their consideration of climate change risks when making a decision.
2. The proposed objective will require regulators to have regard to:

   the achievement of targets for reducing Australia's greenhouse gas emissions to which the Commonwealth, a State or a Territory has made a public commitment.

   Although many of these targets are consistent, there will often be inconsistencies. For example, the Tasmanian government has legislated a 200% renewable energy target for 2040. This clearly has the potential to be inconsistent with other energy targets (noting that Tasmania is not the only jurisdiction where state government policy is inconsistent with other targets ie, Queensland, Victoria and NSW). This inconsistency will open the way for climate change activists to allege a failure to consider the right targets.
3. The reference to 'public commitments', rather than legislated targets, could create uncertainty and place regulators in difficult positions in a number of ways:
   a. If the executive arm of a government makes a commitment that is not supported by the legislature, should regulators follow the will of parliament or the will of the executive?
   b. The 'public commitments' are defined to include targets in international agreements to which the Commonwealth or a state or territory is a party. Once again, if the relevant parliament declines to implement the treaty, will regulators nevertheless still be required to have regard to those commitments?

   These difficulties could be avoided if the commitments were defined as those stated in a law of the Commonwealth or a state or territory.
4. If a regulator should, in the interests of energy system security, approve a measure which would result in a short-term increase in emissions, activists are likely to argue that the decision was 'unreasonable' (in the legal sense) having regard to the relevant Commonwealth, State and/or Territory targets.

A recent example of this type of litigation was the claim brought by Environment Victoria Inc against the Victorian EPA and a number of energy companies,[5] in which it was unsuccessfully alleged that the Victorian

[5] *Environment Victoria v AGL Loy Yang & ors* [2022] VSC 814 (21 December 2022) http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC//2022/814.html. See also *The Environment Centre NT Inc v Minister for Resources and Water (No 2)* [2021] FCA 1635 for another example of an unsuccessful challenge to a decision based on an alleged failure to have regard to climate change risks.

EPA failed to have regard to climate change when imposing stricter licence conditions. The conditions were issued in March 2021 and the proceedings were not determined until December 2022.

If, notwithstanding these risks, the government does decide to include emissions reduction targets as a National Energy Objective, then the litigation risk can be mitigated in a variety of ways. The AEC strongly urges the government to consider one or more of these measures, including:

a) making it permissible, rather than mandatory[6], for regulators to have regard to emissions reduction targets. This could be achieved by stating that regulators should, rather than must, have regard to emissions reduction targets;
b) removing the right to challenge decisions of regulators on the basis of an alleged failure to have regard to emissions targets (or, alternatively, only permitting such challenges to be brought with, for example, the approval of the responsible Minister);
c) defining emissions targets as those stated in a Commonwealth, state or territory law; and
d) in so far as there may be inconsistencies between different emissions targets, either:
    a. indicating an order of priority; or
    b. providing the regulator with an absolute and unreviewable discretion to select the target to which it will have regard.

Jurisdictional Hierarchy

The draft legislation places at equality targets set by Commonwealth, State and Territory government, yet there is no mechanism nor guidance provided in enabling the agencies to interpret how sub-national targets should be contemplated in the context of a national energy market and how to resolve the inevitable inconsistencies between these targets.

As noted above, the Tasmanian Government has legislated a 200% Renewable Energy Target[7] to be met by on-island generation only. In doing so, it is going well beyond addressing its own electricity emissions and seeking to export surplus renewable energy into other states. Whilst the surplus is clearly motivated by industrial development rather than environmental policy, it is still nevertheless labelled as an environmental target. NSW, Victoria and Queensland governments also have policies that are inconsistent with a national approach to emissions reductions.

An agency would be required to attempt to satisfy this target by facilitating infrastructure to allow the surplus to be exported to other states and territories. Those importing jurisdictions are unlikely to welcome the national market being adjusted to undermine industrial development in their own states and seem likely to retaliate by imposing inconsistent targets of their own. Clearly, not all states can be exporters.

The draft legislation provides no guidance on how agencies could deal with the inconsistencies of inevitable parochial actions being taken within a national market. The AEC suggests the following solutions could be considered:

- Given this is a *national* energy objective, excluding references to state and territory targets.
- Creating a clear hierarchy of Commonwealth over sub-national targets.
- Including discussion that only state and territory targets may be considered only to the extent that they do not have ex-jurisdictional impacts.

---

[6] As is currently the case: see s32 of the NEL.

[7] https://www.stategrowth.tas.gov.au/recfit/renewables/tasmanian_renewable_energy_target#:~:text=That's%20why%20we've%20legislated,clean%20energy%20for%20all%20Tasmanians.

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

Phone +61 3 9205 3100
Email info@energycouncil.com.au
Website www.energycouncil.com.au

ABN 98 052 416 083

Chapter 3: Approach to incorporating an emissions reduction objective

Question 1: Do you consider incorporating the emissions reduction objective into the existing 'economic-efficiency' framework is an effective way of integrating the concept into the decision making of energy market bodies?

As stated in the introduction, the existing objective already implicitly incorporates environmental matters to the extent they are legislated and regulated. The present approach is effective, and the inclusion of an objective based on matters such as "stated publicly as a matter of policy" will confuse the decision making of energy market bodies.

Question 2: Is the current level of discretion afforded through an 'economic efficiency' framework appropriate for balancing an emissions reduction component against existing components of the energy objectives?

The AEC agrees with the paper that the existing level of discretion is appropriate for the existing objective, which is well understood and clear. If this environmental objective is included, then a new level of uncertainty is introduced for the industry and it would be appropriate to oblige the AEMC to promulgate a guideline as to how the agencies should navigate this uncertainty.

Question 3: Do you consider that, for certain instances/processes, market bodies should develop/update guidance material to assist market participants in understanding how market bodies will interpret the proposed revised national energy objectives?

a) What are these instances/processes and what sort of content would you want to be included in this guidance?

Yes. If the legislation is to require that all policy statements are to be taken into account, then this guideline may have to be regularly updated to keep track of the ever-changing levels of policy ambition being expressed in the many jurisdictions that are part of the national energy markets.

Section 3.3 Reference to Australia's greenhouse gas emissions reduction targets

Question 5: Does the inclusion of 'public commitments' including 'publicly as a matter of policy,' as well as legislated targets, provide sufficient certainty for effective consideration of an emissions objective by market bodies?

The draft legislation incorporates as an environmental objective targets "stated publicly as a matter of policy by the Commonwealth, a State or a Territory" and places such policy at equal footing to legislation and international agreements. "Policy" is an unreasonably vague concept to include in such an instrument as it requires interpretation of the many statements made by ministers from time to time. It also seems to place the executive at an equal level to legislation approved by parliament. Australia has a considerable history of its executive levels of government being in conflict with inherited environmental legislation, and it should not be assumed that parliament will it necessary conform to the executives' view.

For example, in the initial years of the Abbott government, it would have been reasonable to interpret its policy as a complete repeal the commonwealth's renewable energy act, which, as an explicit quota, was then being taken into account implicitly within agency decisions being guided by the existing objective. However, that government proved unable to legislate that policy through parliament, and the act ultimately remained in place. In hindsight, it was beneficial that the existing objective only recognised costs with an explicit

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

Phone +61 3 9205 3100
Email info@energycouncil.com.au
Website www.energycouncil.com.au

ABN 98 052 416 083

mechanism (such as the then operating Renewable Energy Target) and did not require the agencies to also contemplate the executive's policies as "stated publicly".

The inclusion of "stated publicly as a matter of policy" will introduce confusion and volatility into the interpretation by energy agencies of what is in fact the target that is presently to be followed.

Section 3.4 Amendments to acknowledge interactions between electricity and gas markets and enable management of transition impact

Question 6: Do you agree that the proposed change to 'consumers of energy' is necessary and appropriate to recognise the interconnections between the two energy markets and to enable future decisions to consider the implications for the energy system as a whole?

The AEC has consistently stated that there needs to be better alignment between gas and electricity markets. The consequences of the failure to do this was illustrated in the June 2022 energy crisis where the administered price cap in electricity markets did not incorporate the reality of prices and grossly understated the cost of gas powered generation.

The AEC does not have concerns with combining gas and electricity consumers but would expect governments and market bodies to recognise and respond accordingly to situations where one consumer type is irrelevant to a particular decision.

Question 7: What impacts (positive and/or negative) would the proposed change have on your organisation or your stakeholders/customers?

a) What are these instances/processes and what sort of content would you want to be included in this guidance?
b) Do you foresee any unintended adverse consequences coming from such a change, especially for market participants or consumers?

As stated in the introduction, the AEC considers the existing objective capable of implicitly capturing environmental targets set by government by adapting the market to accommodate them, which they have always done. The explicit inclusion of legislated targets should actually have no effect except to confuse the interpretation of why this particular legislation is explicitly mentioned whilst the innumerable other legislations that the objective operates within is not. This confusion may then result in distracting legal challenges by parties who disagree with particular decisions.

The explicit inclusion of public policy, as opposed to legislation, creates considerable confusion and risk of volatility in decision making due to the volatility of executive policy as opposed to legislation.

Question 8: Do you consider the additional change to 'supply of energy' is necessary given the reasons above?

Not necessary but the AEC does not oppose this.

Question 9: Do you agree that the market bodies, when making a decision under the NEL/NER should be empowered to consider the implications for price, reliability, security etc. in the gas market and vice versa? If not, what are other ways of managing the potential implications of the transition on all energy consumers?

The AEC supports the ability of decision makers to consider intersecting implications between electricity and gas markets.

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

Phone +61 3 9205 3100
Email info@energycouncil.com.au
Website www.energycouncil.com.au

ABN 98 052 416 083

Section 3.6 Commencement and transitional arrangements

Question 16: What are your views on the proposed transitional arrangements in the Draft Bill?

a) Are there particular processes that should be subject to different transitional arrangements?
b) How or where should arrangements for these specific processes be prescribed – in the primary legislation or through a subordinate instrument?

The AEC believes that the amended objectives should only apply to new processes that commenced after the commencement of the amendments. Consequential reviews that are currently on foot and may lead ultimately to rule changes should also not be subjected to the amended objectives. An example of this is the ESB's Transmission Access Reform project.

Chapter 4: Application by market bodies of the proposed changes

Question 20: Do you agree with the characterisation of how market bodies' decision processes might be impacted or changed as a result of inclusion of an emissions reduction component in the energy objectives?

With respect to AEMO's decision making, the consultation paper notes that AEMO will be able to take emissions reduction as a new category of market benefit into its ISP planning function. The AEC understands that AEMO already does this, whilst operating under the existing energy objective and has not been challenged in its doing so. This observation supports the AEC's thesis that emissions targets are already implicitly captured within the existing objective.

The paper then notes that it is not intended for the new objective to materially impact AEMO's operations in real-time dispatch. The AEC agrees with that intention but fears the introduction of the objective incorporates risk that AEMO will be challenged in their "technology neutral" approach to dispatch. The new objective may invite legal activism in regards to AEMO's dispatch engine not applying an environmental weighting to the bidding auction process.

It is thus unclear to the AEC how the introduction of the environmental objective furthers government's intentions with respect to AEMO's planning and operational tasks.

Any questions about our submission should be addressed to Peter Brook, by email to peter.brook@energycouncil.com.au or by telephone on (03) 9205 3103.

Yours sincerely,

Peter Brook

Wholesale Policy Manager

Australian Energy Council