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Mr John Pierce
Chairman
Australian Energy Market Commission
PO Box H166
AUSTRALIA SQUARE NSW 1215

By Online Lodgement

Dear Mr Pierce

AEMC 2010, Review into the use of total factor productivity for the determination of prices and revenues, Draft Report, 12 November 2010


I am pleased to submit EnergyAustralia's comments on the Commission's draft report into the use of total factor productivity (TFP). Our detailed comments are outlined in the attached submission.

In EnergyAustralia's view, the draft report does not substantiate a finding that a Total Factor Productivity method would contribute to the achievement of the National Electricity Objectives and satisfy the Revenue and Pricing Principles. Therefore, we concur with the Commission's intentions to delay the development of Rules to implement TFP.

EnergyAustralia's submission includes comments and matters for the drafting of Rules regarding data collection. EnergyAustralia recommends that the Commission, using its powers under Clause 39 of the National Electricity Law, convene an industry committee to input the operating matters and practical considerations on the content and scope of data requirements at an early stage.

I would be pleased to discuss the submission or any other matter at any time. Please contact my office, or contact Craig Moody on (02) 9269 2611.

Yours sincerely


GEORGE MALTABAROW
Managing Director



Submission on AEMC's draft report on total factor productivity

JANUARY 2011

1 Overview

Key points

1. The Commission's finding that TFP could promote the NEO should be re-considered as the analysis set out in the draft report does not substantiate such a finding.
2. The cost and magnitude of the TFP data collection exercise should not be underestimated and would not be marginal as the Commission contended.
3. The deferral of the development of Rules to implement TFP is a prudent step.
4. We recommend that the Commission rely on its power under clause 39 of the NEL to convene a committee of industry representatives to consider the development of rules to collect TFP data. Accordingly, the final stage 1 report to the MCE should be delayed until the content of the proposed draft rules to facilitate the collection of TFP data have been adequately developed and subject to stakeholder involvement.
5. We set out preliminary comments on the scope of the TFP data collection rule as outlined in the draft report.
 - Draft TFP data collection Rules should be principle-based with tight prescription around the content and scope.
 - TFP data cannot be used for any other purposes.
 - Standard rule change process should be adopted.
 - No back-casting of data be required.
 - AER's ability to adjust data must be tightly constrained.
 - Businesses should not be required to explain and reconcile TFP data with any other information provided.
 - Businesses should have the sole discretion to adopt TFP.
 - Confidentiality of TFP data should be in favour of businesses and of non disclosure.

Energy Australia welcomes the opportunity to comment on the AEMC's Draft Report on the Review into the use of total factor productivity for the determination of prices and revenues (draft report).

We understand that the key recommendations of the draft report are as follow:

1. TPF could, in principle, contribute to the achievement of the national electricity objectives (NEO).¹
2. However, the proper application of TFP requires the existence of a number of conditions namely: long term series of consistent, reliable and robust data; comparability of TFP growth of each business within the industry; past TFP growth is a good estimator of future TFP growth and that TFP growth be predictable and stable.

¹ AEMC 2010, Review into the use of total factor productivity for the determination of prices and revenues, Draft Report, 12 November 2010, Sydney (Draft Report), page i.

3. These conditions currently do not exist in the Australian energy sector. Nevertheless, the Commission considers that there is potential for these conditions to exist in the future; and as such the current review into the use of TFP as a method to determine regulated revenue and prices should continue to proceed.
4. To proceed, the Commission now proposes to implement TFP in two parts, that is split stage 2 of the review into 2 parts:
 - a. First, an initial Rule is made to facilitate the collection of the necessary dataset for the empirical testing of the conditions required for application of TFP and to apply TFP at a later stage (TFP data collection Rule). This Rule enabling the collection of TFP data is additional to the current information gathering powers given to the AER under the NEL.
 - b. Second, drafting of Rules for the detailed design of a TFP method is deferred until the necessary conditions can be, or are likely to be, met and it is considered that introducing a TFP method would contribute to either or both the national electricity or gas objective given the status of the market at that time.

We do not consider that the analysis set out in the Commission's Draft Report to substantiate the conclusions reached in the same report sufficiently demonstrates how the proposed approach to TFP will meet the NEO.

The Commission's finding is premised on the theoretical properties of a TFP method. As we have stated in our previous submissions, this alone is not sufficient to warrant a finding that a TFP method should be introduced into the regulatory framework or that steps should be undertaken (e.g. collection of the necessary TFP data) to facilitate the implementation of this method. We strongly consider that the Commission's finding should be re-considered.

We maintained our view that the magnitude and costs involved in the collection of a long term, robust and reliable TFP data set is significant, or at the very least not marginal as the Commission contended. This cost to the industry is not outweighed by any apparent benefits given at present it is not known whether a TFP method would be appropriate and suitable for the Australian energy industry and whether all (or indeed any) businesses would apply TFP. Regardless of these limitations, the Commission proposes to require all businesses to provide data.

If, despite the lack of any real and identifiable benefits from TFP, the Commission remains of the view that TFP could, in principle, contribute to the achievement of the NEO and intends to proceed to develop National Electricity Rules (NER) to facilitate its implementation, we consider that the proposed deferral of the development of Rules to implement a TFP method to mitigate to some extent the negative consequences of implementing a TFP method. The deferral will (and should) enable all outstanding matters to be satisfactorily resolved and also ensure that the pre-conditions have been satisfied including ensuring that a TFP method would contribute to the national electricity and/or gas objectives.

The Commission has proposed to include in its final stage 1 report to the Ministerial Council on Energy (MCE) a Rule Change Request to initiate Rules for the collection of TFP data (TFP data collection Rules). This process will mean that the Commission will develop the proposed Rules without any consultation from stakeholders and the next time stakeholders will have the opportunity to comment on the proposed Rules will be when it is reverted to the Commission as a Rule change proposal at which point, the fundamental aspects of the proposed Rules would have been determined.

We consider that it would be more prudent for the Commission to delay the submission of the final report to the MCE until the content of the proposed Rules have been adequately developed and been the subject of stakeholder involvement. This can be achieved by the Commission relying on its power under clause 39 of the NEL to establish a committee/panel to properly consider the scope and content of the proposed TFP data

collection Rules for inclusion into the final Stage 1 report to the MCE. This would ensure that there is a robust and transparent process in the development of draft Rules on a subject matter that has attracted divergent views.

The Commission has set out in this draft report a high level scope for this TFP data collection Rules. As stated above, we consider that this high level scope should be subject to thorough review and input by members of a committee established by the Commission under clause 39 of the NEL. We however have some preliminary comments on the scope of the TFP data collection rule as outlined in the Commission's draft report. We consider that the TFP data collection rules should be principle-based with robust and transparent requirements around the content and scope of the information that the AER can request. We are concerned that without clearly identifying the parameters of both the content of the data and the way in which the data can be used, the AER will have a wide discretion in relation to such data, enabling it to undertake a comparison analysis behind the scenes, without the consent of the businesses, using the data the businesses have been compelled to provide for a separate and discreet purpose. The scope and content of the TFP data collection should be tightly prescribed such that the role of the AER is confined to implementing these rules.

2 Merits of TFP

We note that the Commission's draft report finding that TFP in principle could contribute to the achievement of the NEO remains the same as that of the Commission's preliminary report despite numerous submissions from stakeholders² and EnergyAustralia to the contrary. We are disappointed that the Commission appears not to have engaged with the issues raised in our submissions.

In support of its draft report findings, the Commission engaged Economic Insights to perform comparative analysis of the TFP methodology and the Building Block method. Economic Insights' report and excel spreadsheet model were released in June 2010.

Whilst this work may have given further insights into the working of a TFP method, we do not see any conclusive evidence from this analysis to support a finding that TFP would promote the NEO and RPP.

We note that Grid Australia engaged Harding Katz to review and comment on the Economic Insights' report and model. Harding Katz's review raised a number of concerns about Economic Insight's modelling and consequently the conclusions that can be drawn from this work.

Specifically, Harding Katz commented that:³

The forecast data used in the modelling is relatively stable, and this may lead to unrealistically stable TFP outcomes

The modelling examines one TFP-specification, and therefore does not test the sensitivity of the model outputs to alternative specifications. In addition, the chosen TFP-specification does not tackle some of the more potentially challenging and important design issues, such as how to address differences in reliability performance or topography.

The modelling assumes that under the building block model X factors would be set to zero, contrary to the requirements of the National Electricity Rules. The criticisms of building block regulation made by Economic Insights appear to be a direct consequence of this modelling assumption.

² For example, Energex's submission on the preliminary findings, 26 February 2010; or Ergon Energy's submission on the discussion paper, 30 October 2009.

³ Harding Katz, A note on the TFP spreadsheets models and report prepared by Economic Insights, Report prepared for Grid Australia, 4 October 2010, p 2-3.

The modelling does not include an efficiency benefit sharing scheme for the building block model, and therefore an accurate comparison of the retention rates cannot be made.

Economic Insights' overall assessment of TFP-based regulation is unduly favourable given the limitations of the modelling exercise and the inferences that can be drawn from any hypothetical case study.

The work of Harding Katz is illuminating and provides a balanced view on the assessment of the merits of a TFP method. We could not however find any consideration by the Commission of the issues raised by Harding Katz in the draft report. To the extent that the Commission has addressed these concerns, we consider that the Commission's (or its consultant's) responses should be made explicit. To the extent that the Commission have not considered these issues, we submit that the Commission should revisit its draft report findings to take into account these legitimate concerns raised by Harding Katz on Economic Insights' modelling.

We also note the Energy Network Association's (ENA) submission to the draft report in which the ENA stated that:⁴

ENA considers a number of assumptions and simplifications adopted in the modelling, however, means that caution needs to be taken before concluding, as is claimed, that the building block model may be 'riskier' than some variants of the TFP approach. In addition, ENA is concerned that under a range of scenarios TFP approaches modelled appear to fail to meet revenue and pricing principles enshrined in the national energy laws.

In sum, we see no conclusive evidence in this draft report to support the conclusion that a TFP method to determine regulated revenue and prices would promote the NEO and RPP. We therefore consider that the current recommendations should be reconsidered as it has not been conclusively demonstrated that TFP would promote the NEO and reflect an exercise of powers by both the Commission and subsequently by the AER (in applying the proposed Rules) in a manner consistent with the RPP.

3 Commission's proposed approach to next stage of TFP review

We understand that the Commission next stage is to develop Rules to facilitate the collection of TFP data (TFP data collection Rules) and defer the development of Rules for the detailed design of a TFP methodology which should only occur if both of the following conditions are met:

- a. The necessary conditions are, or are likely to be met, and
- b. It is considered, at that time, that the introduction of a TFP method would contribute to either or both the national electricity or gas objectives.

We consider that the Commission's decision to defer the development of Rules for the detailed design of TFP until it is proven that all the prerequisites are satisfied is a prudent step that mitigates the negative consequences from proceeding with a TFP method now. We however have the following concerns about the Commission's proposed next stage of the review i.e. development of TFP data collection Rules.

⁴ ENA, Response to the Australian Energy Market Commission – Draft Report – Review into the use of total factory productivity for the determination of prices and revenues – 24 December 2010, p 3.

Additional information gathering powers not needed

We question how a data collection Rule aimed at assessing the application of TFP (and its appropriateness⁵) would satisfy the NEO when the purpose for which the data collection is based (i.e. TFP) does not of itself satisfy the NEO. Clearly, a main driver for deferring the TFP method relates to the fact that applying a TFP method now would not satisfy the NEO.

In addition, it is questionable whether giving the AER additional powers to collect information is required and better satisfies the NEO given that the AER currently has the powers to collect data reasonably necessary for the exercise of its functions and powers (i.e. RIN and RIO). The Rules require the AER to demonstrate that the information is reasonably necessary for the exercise of its functions or powers. It appears that the Commission, by proposing a different data collection Rule, is sidestepping this safeguard in the NEL regarding the provision and disclosure of data, particularly highly confidential data relating to the economic regulation of network service providers.

The Commission stated that:⁶

The benefits of having this separate rule is that it will remove uncertainty on what information is to be provided for revenue decision making processes, and prevent service providers from delaying revenue determinations and information gathering processes by questioning of or seeking justification for data request from the AER.

This has the effect of undermining the principles on which the regulatory framework is based which seeks to balance the interests of both regulators and businesses.

Magnitude and cost of data collection should not be underestimated

We are concerned that the Commission has underestimated the magnitude and costs of this data collection exercise.

We note that for the proper application of a TFP method, the data must be robust and reliable. Specifically this data must be (a) consistent across service providers and (b) consistent over time.

We consider that there are currently numerous impediments that must be resolved before a reliable, robust data set that meets these objectives can be achieved. These impediments were identified by the Commission's consultants and some of these impediments are:

- a. Current reporting is only concerned with financial data whereas TFP would require physical data as well.⁷
- b. Definitions vary across jurisdictions and these often change between regulatory control periods.⁸
- c. Regulatory reporting requirements are not uniform between jurisdictions.⁹
- d. Different categorisation of distribution services.
- e. Differences in cost allocation method and capitalisation policies.
- f. Differences in contestability arrangements between jurisdictions.

The above impediments underline the magnitude of achieving and obtaining a reliable and robust data set that is consistent across service providers and over time. Further, as we have noted previously because the TFP data set must be consistent over time and across service providers, the Commission's proposal will impose

⁵ That is, whether the necessary preconditions exist for its proper application.

⁶ Draft Report, 96

⁷ Economic Insights, Assessment of Data Currently Available to Support TFP-based Network Regulation, 9 June 2009, pag 41.

⁸ *ibid*

⁹ *ibid*

additional record keeping obligations on service providers who will ultimately be required to keep two sets of data, one for TFP purpose and one reflecting its changed structure and circumstances.¹⁰

Moreover, we consider that the costs of capturing data will be substantive if the need for uniformity of data leads to changes in underlying cost allocation method or accounting policies etc. Costs would be significant if businesses are forced to change to ensure that data can be meaningfully compared.

We therefore disagree with the Commission's view that the costs of collecting TFP data, to the standard required for the proper application of a TFP method, will be marginal or that the benefits would more than offset any such costs. We consider these costs to be significant and there is no conclusive evidence that the benefits would outweigh these costs, particularly because:

- the data must be collected for 8 years before a TFP method can be applied;
- there is no certainty that TFP would ever be appropriate for the Australian economic regulatory framework; and
- there is no certainty that all businesses (if any) would apply TFP if it becomes available as an alternative regulatory method.

Businesses should be allowed to recover cost of collecting and providing data

As the costs of collecting and providing a long term series of data is not insignificant, we consider that there should be a mechanism within the TFP data collection Rules that allows businesses to recover the costs of complying with this regulatory obligation, with no applicable materiality threshold. If the outcomes of the information reporting exercise are in the long term interests of consumers, customers should be willing to pay for the costs of undertaking the exercise.

4 Recommended alternative approach

We have stated above that we do not consider a new set of rules are required to enable the collection of TFP data. However, if contrary to our submission, the Commission decides that these new rules are necessary, we recommend an alternative approach to the development of these Rules.

Subject to stakeholder comments on the Draft Report, the Commission intends to include in the stage 1 final report a draft rule change request which would seek to initiate the TFP data collection Rule for the MCE to consider.¹¹ We acknowledge that the Commission's draft report has provided some insights into various aspect of the proposed draft TFP data collection Rule, however, no proposed Rules have been provided in the draft report for the businesses to consider. Accordingly, stakeholders will not be provided with the opportunity to consider and comment on the draft proposed Rules before those Rules are finalised and included in the Final Report. This means the next opportunity for stakeholders to comment will be when the proposed Rules are reverted to the Commission in the form of a Rule change proposal at which point the fundamental aspects of the proposed Rules would have been determined.

We consider it important and consistent with the consultative framework through which Rules are developed for stakeholders to have the opportunity to consider the drafting of any Rules which form part of the Final Report. To discharge this task, the Commission can rely on its powers under clause 39 of the NEL to establish a committee comprising of key stakeholders to consider and develop the details and content of the draft TFP data collection Rules. These draft Rules, once finalised by the committee would be included in the AEMC's stage 1 final report to the MCE for consideration.

¹⁰ See Energy Australia's submission to the AEMC's TFP design discussion paper, October 2009, pp 10-11.

¹¹ Draft Report, p 94.

We believe that this is a more efficient, transparent and robust process for the development of Rules with respect to a subject matter that to date has attracted conflicting views and which is likely to continue to be the subject of divergent perspectives. Such a process would ensure that all stakeholders are properly consulted, that all the substantive issues pertaining to the scope and content of the draft Rules are resolved and that all stakeholders have 'buy-in' to the final draft Rules prior to their being submitted to the MCE. Further, we consider that this process would ensure that the subsequent Rule change processes can be used to enhance the proposed draft Rules rather than becoming a vehicle by which substantive and potentially wholesale changes are made to the draft Rules. This process will ensure that the satisfaction of the NEO is maximised in the long term interests of consumers.

We are willing to participate in this committee and contribute towards the achievement of a robust set of TFP data collection rules for inclusion in the stage 1 final report to the MCE.

5 Preliminary comments on aspects of proposed TFP data collection Rule

Further to our recommendation that the Commission establish a committee to consider and develop the detailed content and scope of the TFP data collection Rule, we outline below our preliminary comments on various aspects of the proposed draft Rule as outlined in the Commission's draft report.

It is important to note that the draft Rules that the Commission intends to provide to the MCE in the stage 1 final report have not been included in the draft report. Consequently, we can only comment on the high level details of these Rules as outlined in the Commission's draft report.

Draft TFP data collection Rules should be principle-based with tight prescription around the content and scope

Our overarching consideration with respect to the development of the TFP data collection Rule is that the Commission needs to adopt a principle-based, purposive approach to the content of the proposed draft Rules; i.e. the proposed draft Rules must specify the scope and content of the TFP data proposed to be collected by the AER with a clear purpose; thereby setting the parameters within which the data collection will be undertaken. The draft Rules must specify how the AER can require and use TFP data; i.e. the use of the data must be confined to the purposes for which the information has been provided. There is a risk that the information reported could be used inappropriately, before any analysis and testing of the data and its relative usefulness for economic regulatory purposes.

We consider that the scope and content of TFP data must be tightly defined so as to avoid any potential for a comparative analysis outside the purpose and scope for which the data was provided by businesses.

Further, we do not consider it appropriate for the AER to be given a wide discretion as envisaged by the Commission. For example, it appears that the scope of the AER's powers to determine the 'appropriate' specifications, the 'appropriate' definition or to make adjustments to data to improve 'consistency' are significantly broad. The Commission must be careful to balance the interests of the AER with the interests of participants who are required to provide the information. If the balance is tipped in favour of the regulator leading to burdensome obligations on service providers, it is arguable that the interests of consumers and the achievement of the NEO are not being met.

To achieve this objective and to ensure a transparent process, we have recommended above that the development of the draft TFP data collection Rules be undertaken by an industry committee established by the Commission.

TFP data provided cannot be used for any other purpose

The Commission stated that all businesses must provide annual TFP data to the AER. The AER can use the data to perform a number of functions with respect to TFP such as publish annual TFP calculation etc.

As we noted above, the draft Rules must confine the use of TFP data to the purpose for which it was collected. Information provided should not be used for any other purposes and they should not form part of or be a factor in the AER's consideration of regulatory proposal. Further, TFP data provided to the AER should not be used for benchmarking and comparative analysis between service providers within the building block approach. The AER already has open powers to require information for the purposes of current regulation of businesses. The use of TFP data for assessment of a building block proposal is outside the scope of the TFP review.

Standard Rule change process should be adopted

The Commission stated that 'if the MCE accepts our recommendations then changes to the Rules would then be considered through a standard Rule change process in 2011'¹². We consider that the Commission should clarify the process it intends to undertake in relation to the TFP data collection Rules and explicitly confirm that a standard Rule change process will be adopted for any Rule change proposal relating to the current TFP review, including a Rule change proposal for the collection of TFP data.

We note that it may be possible for the Commission to invoke clause 96A of the NEL to fast track the TFP data collection Rule. This power however is discretionary and can only be exercised where the relevant Rule change proposal contains conclusions from an AEMC or MCE review. Nevertheless, we strongly consider that the Commission should not invoke this power under clause 96A if that is available but instead undertake any Rule change proposal relating to TFP (including a TFP data collection Rule change proposal) using the standard rule change proposal process. The highly controversial nature of the proposed Rules and the questionable basis on which such Rules would satisfy the NEO, clearly justify erring on the side of more consultation and stakeholder comment, rather than less.

No back-casting of data be required

The inappropriateness of the currently available data for the purpose of applying a TFP method is well established and is beyond doubt. Therefore, we are surprised that the Commission recommended that the AER, in consultation with service providers, can back-cast data to earlier years if the AER thinks that this can be done with the required degree of robustness and consistency. Also, the AER will be required to assess and report on whether available data (from both formal data collection and **backcasting**¹³) are sufficiently robust and consistent to support rigorous TFP analysis.¹⁴

First, the implication of this recommendation is that service providers will be required to provide back-cast data to the AER. We cannot see how the AER can 'back-cast data to earlier years if it thinks that this can be done with the required degree of robustness and consistency' without extensive involvement by the businesses. In fact, back-casting of data would have to be done by the businesses themselves.

Second, we do not see any benefits in the Commission's recommendation that that AER be required to assess and report on whether the back-casted data is sufficiently robust and consistent to support rigorous TFP.¹⁵ This assessment has already been done by the Commission's consultant, Economic Insights, who have concluded that the currently available data is not of a sufficient standard to support TFP as a method to determine regulated prices and revenues.¹⁶

¹² Draft Report p 94.

¹³ Emphasis added

¹⁴ Draft Report, p 101.

¹⁵ Draft Report, p 101

¹⁶ Economic Insights, Assessment of Data Currently Available to Support TFP-based Network Regulation, 9 June 2009.

Third, the Commission's recommendation is contradictory to its finding that 'existing data are not currently consistent, reliable nor robust'¹⁷. This is the foundation for the Commission's recommendation that a Rule facilitating the collection of required TFP be proposed. The Commission stated that:¹⁸

Crucially, the current lack of a sufficiently robust and consistent data-set means that it could be too problematic to reconstruct existing data for the purpose of a TFP methodology.

We cannot see how back casting of existing data, which are proven to be inappropriate for TFP as it is not robust, can improve on the integrity of the data to such a degree that they would be appropriate to support the application of TFP as a method to determine regulated prices and revenues.

In sum, we consider that existing data should not be used for any TFP purpose nor there be any imposition on business to provide back-cast data or any allowance made for the AER to back-cast data.

AER's ability to adjust data must be tightly constrained

We note that the Commission intends to give the AER powers to adjust the TFP data provided for structural differences so as to 'improve the consistency of the data' and because of exceptional circumstances.¹⁹

We had earlier expressed reservation on this aspect of the AEMC's design of a TFP method as we failed to grasp how this can work properly in practice. We again reiterate some of our concerns.

- How can the regulator adjust the data for structural differences without having intimate and detailed knowledge of each business?²⁰
- What are the criteria for making adjustments?
- If the AER is not in position to make the adjustments, is it then the businesses themselves who make the adjustments in accordance with the guidelines published by the regulator? If so, does this impose another regulatory reporting requirement in addition to the annual regulatory reporting requirement, therefore resulting in two different versions of the same data?
- Does (or should) the adjusted data need to be audited?

If the Commission decides that adjustments to data would be required to 'improve consistency', consistent with our overarching recommendation, the scope and ability of the AER to make data adjustment must be tightly defined and constrained.

Business should not be required to explain and reconcile TFP data with other information provided

We stated above that businesses will ultimately be required to keep two set of 'books'. A further complication is the ability of the AER to adjust the data provided. Because of these factors, we consider that it will very difficult to explain and reconcile TFP data with any other information provided as part of other reporting obligations and therefore there should not be any obligations imposed on businesses to carry out such tasks.

Businesses should have sole discretion to adopt TFP

It has been agreed by businesses that the adoption of TFP should be at the sole and unconstrained discretion of the business. This has been accepted by the Commission.²¹ We consider that this fundamental principle should be enshrined in the Rules for TFP.

¹⁷ Draft Report, p 101.

¹⁸ Draft Report, p i.

¹⁹ Draft Report p 99

²⁰ The following comment by Economic Insights is relevant in this context, Economic Insights stated that "...it will be difficult for the AER to acquire and understand the 'corporate history' behind the previous regimes and resulting characteristics of and inconsistencies in the data". Economic Insights, *Assessment of Data Currently Available to Support TFP-based Network Regulation*, 9 June 2009, p 26.

Confidentiality of TFP data should be in favour of the businesses

The Commission stated that all relevant data supplied by the businesses should be publicly available, that it is unlikely that the relevant data would be of a genuinely commercial in confidence nature and that the bar for any data remaining commercial in confidence needs to be set at a particularly high level.²² That is, TFP data should be made publicly available to the maximum extent possible.²³

We disagree with the position taken by the Commission with respect to the public disclosure of TFP data. Given the data collected is being used for a purpose not directly relevant and applicable to the operation and regulation of businesses, the businesses should have rights to withhold disclosure where disclosure is not consistent with its commercial interests. That is, in determining whether the information should be disclosed, the balance should be tipped in favour of businesses and of non-disclosure.

We note that the current regulatory framework addresses when the AER can disclose confidential information; however, the distinction should be drawn between those circumstances and the disclosure of data provided in relation to TFP. This is because the merits of disclosure under the current confidentiality regime relate to the operation of the NEM (including the economic regulation of network service providers) whereas the benefits of TFP to the operation of the NEM are yet to be determined. Accordingly, this means that the confidentiality of data provided as part of TFP must be protected and preserved given the lack of a nexus between this data and the operation of the NEM.

²¹ AEMC 2009, Review into the use of total factor productivity for the determination of prices and revenues, Preliminary Findings, 17 December 2009.

²² Draft Report pp 97-98.

²³ Draft Report p 98