

Problems with UNGI

The Underwriting New Generation Investments Program has no legislative basis, no guidelines or criteria, and is following no clear process. Despite this the government has already shortlisted projects, made agreements and engaged in detailed negotiations.

**Tom Swann
Richie Merzian
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The Underwriting New Generation Investment (UNGI) proposes to provide public financial support to new dispatchable electricity generation, with the stated goal of increasing competition in the electricity market. Support might be offered through loans, grants, guarantees or other mechanisms. It is unclear what support mechanisms will be used. The program was announced in 2018 but has not yet been finalised.

This briefing note outlines available information regarding UNGI. It finds

- there is no constitutional or legislative authority,
- there are no guidelines and criteria for assessment, and
- program development and implementation are following no clear process.

Despite these problems, the government has already shortlisted projects, made initial agreements and advanced detailed negotiations with proponents, and entered an MOU with the NSW government to support projects under UNGI.

While the government claims the Clean Energy Finance Corporation (CEFC) will be enabled to administer UNGI, how this will work is multiply unclear and problematic, and apparently contradicted by the CEFC itself.

Despite the government having shortlisted and considered a coal project, the legal basis for supporting coal projects through UNGI is especially unclear and problematic.

NO LEGISLATIVE BASIS

On 15 February 2019 legal advice from Fiona McLeod SC found the Federal Energy Minister Angus Taylor does not have constitutional authority over electricity, nor legislative authority to fund projects under UNGI as proposed.¹ Where the Commonwealth has authority may be under the Corporations power,

At present (and without the benefit of a more detailed scheme proposal), it does not appear that the Commonwealth has the ability to fund the Program. Rather, the Commonwealth will need to enact some form of supporting legislation, or alternatively, amend existing legislation, in order to operate and fund the program.²

The legal advice was limited by the fact that the method of implementing UNGI had yet to be determined by the Commonwealth. Subsequent program development provides no additional clarity.

In October 2019 Senate Estimates, officials confirmed legislative instruments would be needed to implement UNGI. Asked about when they would be introduced, the official stated

it depends ultimately on the government. But, if they were to do it on a project-by-project basis, it would be legislative instruments which would presumably be introduced once the government reached agreement with the proponents and was prepared to proceed.³

In other words, officials contemplate legislation or other instruments to implement government decisions to support specific projects, rather than enable a program to assess and select projects on merit.

In October 2019 the government stated the intention to introduce legislation to have the Clean Energy Finance Corporation (CEFC) be the 'lead agency' in running UNGI. As discussed below, this suggestion remains unclear and problematic.

¹ Fiona McLeod SC & Lindy Barrett (2019) *Memorandum of Advice*

<https://www.tai.org.au/sites/default/files/Underwriting%20New%20Generation%20Investments%20Advice%20%255bWEB%255d.pdf>

² Ibid.

³ Hansard (2019) *Senate Environment And Communications Legislation Committee: Estimates*, Page 175
https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/ba6d767d-ef3a-4cb5-8679-103079b0913b/toc_pdf/Environment%20and%20Communications%20Legislation%20Committee_2019_10_21_7278_Official.pdf

STILL NO CRITERIA OR GUIDELINES

Despite being announced in 2018, development of the UNGI program in only two documents to date:

- the October 2018 UNGI *Consultation Paper*,⁴ and
- the December 2018 *Call for Registrations of Interest* (ROI) document.⁵

There are no subsequent program documents.

As recently as March 2020 at Senate Estimates, Departmental officials referred back to the ROI document as the most recent program document.

Both documents state the UNGI program will involve future development of formal guidelines, including eligibility and merit criteria. The ROI document contains merely “indicative” criteria and clearly states that the ROI process is part of developing those criteria:

ROIs will be reviewed for the purpose of informing program design and development. They [proposals under the ROI] will not be assessed against the indicative eligibility and merit criteria at this stage.⁶

Despite this, the ‘indicative’ criteria, which the Department said would not be used for assessment, were used by the Minister to shortlist 12 projects and proceed detailed negotiations, as discussed below.

At the April 2019 hearings, officials further stated that

The eligibility criteria will come as the UNGI program is developed [and] the government will make a final decision on those 12 when the proposals are more fully developed against a set of guidelines and criteria.⁷

⁴ Australian Government (2018) *Underwriting New Generation Investments – Consultation Paper* <https://www.energy.gov.au/sites/default/files/underwriting-investment-consultation-paper.pdf>

⁵ Australian Government (2018) *Call for Registrations of Interest* <https://www.environment.gov.au/energy/underwritingnewgeneration/registration-of-interest>

⁶ Ibid

⁷ Hansard (2019) *Environment and Communications Legislation Committee Budget Estimates* <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/estimate/d156d4b9-a846-46e2-85d3-b0062851dbcc/0000%22>

At the October 2019 Estimates hearing, Departmental officials gave evidence the government had “settled” on “final” selection criteria, which were “released both in the registration of interest process and flagged initially in the consultation papers”.⁸

However in answers to a Question on Notice (Number 173), Commonwealth officials emphasised the indicative criteria for the ROI were not final criteria:

This publication is the selection criteria and guidelines for the shortlist. Any future rounds of the program including the selection criteria and support mechanism is a matter for Government.⁹

Contrary to evidence given at the hearing, there was still no final criteria or developed program as previously promised.

Later, in March 2020 Senate Estimates, officials stated “The registration of interest and the program eligibility criteria et cetera are all publicly available” and referred to the previous answer to Question on Notice (Number 173 from the October 2019 Estimates).¹⁰

However as already noted, that Question on Notice gives no evidence of final guidelines for assessment or indication of when or how they will be developed.

There is still no evidence of UNGI final guidelines and criteria.

FOLLOWING NO CLEAR PROCESS

Both the *Consultation and Call for Registrations of Interest* documents state the call for ROIs would be followed by a ‘Request for Proposals’ (RFP) that would start in early 2019. The documents state the RFP will be open to any proposals, including those that did not submit a ROI. The ROI document also states:

[final] criteria may be weighted. This will be clarified prior to the release of the RFP.¹¹

Yet there is no evidence of a RFP process for UNGI ever occurring, much less evidence of weighted criteria.

⁸ Ibid

⁹ Hansard (2019) *Senate Environment And Communications Legislation Committee – Question on Notice 173* https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/ec/2019-20_Supplementary_Budget_estimates

¹⁰ Ibid

¹¹ Ibid

Despite this, on 26 March 2019 the Minister for Energy announced the decision to shortlist projects chosen from 66 proposals lodged during the ROI process. The 12 short listed projects include:

- 6 pumped hydro projects,
- 5 gas projects and
- 1 coal upgrade.¹²

Neither the *Consultation* nor *Call for Registrations of Interest* documents contain any mention of a ‘shortlist’.

At the April 2019 Senate Estimates, Department officials confirmed the decision to shortlist the 12 projects “was a decision of government”.¹³

GOVERNMENT PUSHING AHEAD REGARDLESS

Despite the lack of legislative basis, guidelines, criteria or clear process, in December 2019 the government announced it had reached

agreement of key initial support terms to underwrite the first two projects from the shortlist ... [and] will now enter detailed underwriting and contractual negotiations.¹⁴

Both of the first two projects are new gas power station projects, one in Dandenong, Victoria, and one in Gatton, Queensland.

The ‘initial support terms’ are not public. Their content and nature are unclear.

Then on 31 January 2020 the Commonwealth signed a Memorandum of Understanding (MOU) with the NSW Government as part of a bilateral agreement. The MOU included a promise that

The Commonwealth will support three NSW projects through the UNGI program. If any of the three NSW projects shortlisted under phase one of the

¹² Minister for Energy and Emissions Reductions (2019) *Delivering Affordable and Reliable Power* <https://www.minister.industry.gov.au/ministers/taylor/media-releases/delivering-affordable-and-reliable-power>

¹³ Hansard (2019) *Environment and Communications Legislation Committee Budget Estimates* <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/estimate/d156d4b9-a846-46e2-85d3-b0062851dbcc/0000%22>

¹⁴ Minister for Energy (2019) *Initial support terms for two new generation projects agreed* <https://www.minister.industry.gov.au/ministers/taylor/media-releases/initial-support-terms-two-new-generation-projects-agreed>

program do not proceed to a final underwriting agreement for any reasons, the Commonwealth will assess alternative NSW based projects of equal or greater reliable generation capacity until three NSW projects are supported.¹⁵

This MOU has been agreed despite UNGI still having no guidelines or legislative basis. The Commonwealth has promised NSW the delivery of UNGI projects, despite UNGI not yet being finalised, and despite it being a putatively merit based program that would not inherently discriminate between states.

The same problem is even more acute with the MOU's promise to "contribute \$450 million of the Climate Solutions Fund to NSW-based projects". The Climate Solutions Fund (CSF) is a program intended to be run by the Clean Energy Regulator (CER), an independent statutory Commonwealth agency, where it buys abatement based on best value, not on the basis of where it is located. It is therefore completely unclear how the Commonwealth government can promise such funding to NSW.

Later in March 2020 Senate Estimates, officials confirmed the government was in "detailed negotiations" over the two gas projects.¹⁶ The ongoing negotiations are unclear, as is the relationship of these negotiations to the development of the UNGI program.

ROLE OF CEFC UNCLEAR AND CONTRADICTORY

In October 2019 the government announced its intention to establish a \$1 billion Grid Reliability Fund (GRF), administered by the CEFC. It would

support Government investment in new energy generation, storage and transmission infrastructure, including eligible projects shortlisted under the Underwriting New Generation Investments (UNGI) program.¹⁷

¹⁵ NSW Government (2020) *Memorandum of Understanding*, page 12

<https://energy.nsw.gov.au/media/2001/download>

¹⁶ Hansard (2020) *Senate Environment And Communications Legislation Committee: Estimates, Monday 2 March 2020*, page 124,

[https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/49226b7b-2438-49b8-8f8a-94857366c5de/toc_pdf/Environment and Communications Legislation Committee 2020 03 02 7594.pdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/49226b7b-2438-49b8-8f8a-94857366c5de/toc_pdf/Environment%20and%20Communications%20Legislation%20Committee%202020%2003%2002%207594.pdf)

¹⁷ Australian Government (2019) *Underwriting New Generation Investments Program*

<https://www.energy.gov.au/government-priorities/energy-programs/underwriting-new-generation-investments-program>

Shortly after the announcement, the Federal Finance Minister stated the government would need to "update the CEFC enabling legislation" to ensure the fund could "support suitable projects".¹⁸

The government states it intends the CEFC to implement the program in "most cases" in the "longer-term" and be the "lead agency".¹⁹

It is unclear how the CEFC could play such a role. The CEFC is an independent agency. While subject to Ministerial mandate, it cannot be directed by the Minister or Department in specific investment decisions.

Moreover, in the March 2020 Senate Estimates, the CEO of the CEFC appeared to contradict the government and Department regarding CEFC's role. Asked about the relationship between UNGI and GRF, the CEFC CEO said

They're two quite separate things. The Underwriting New Generation Investments initiative, the energy program that has been spoken about a bit earlier this evening, is something being undertaken by the department. Our only involvement is seconding a couple of our staff members to the department to assist with that. That's quite a separate thing the department are embarking on.²⁰

The legislation to amend the CEFC to enable the GRF has not yet materialised and there is no clarity on how it will function. The government proposed to introduce the legislation in the Autumn sitting but there is no detail on its content.²¹

THE PROBLEMS WITH UNGI AND COAL

As outlined in the legal advice from McLeod SC, there are legislative constraints on what the CEFC can support, most clearly excluding coal projects.

Coal projects are currently ineligible for CEFC funding according to the CEFC Act (section 60 which defines 'clean energy technologies') and associated Guidelines.

¹⁸ The Australian (2019) *Scott Morrison's \$1bn clean energy bet*
<https://www.theaustralian.com.au/nation/politics/scott-morrison-1bn-clean-energy-bet/news-story/91b7863915845c354a7ec571649fe1f0>

¹⁹ Ibid

²⁰ Hansard (2020) *Senate Environment And Communications Legislation Committee: Estimates, Monday 2 March 2020*, p137

²¹ PMC (2020) *Legislation Proposed for Introduction in 2020 Autumn Sitings*
<https://www.pmc.gov.au/resource-centre/government/legislation-proposed-introduction-2020-autumn-sittings>

The Department's description of the CEFC's role in UNGI makes it clear that "The CEFC will not invest in coal projects".²²

So it is unclear how the Government intends to support the upgrade of a coal power station (the Vales Point power station).

It has been reported publicly that "NSW's Vales Point coal-fired power station is set to receive an \$11 million federal government grant"²³ But in the March 2020 Senate Estimates, Department Officials denied any decision had been made on this proposal.²⁴

The government has considered support for this coal project now for more than a year, without having legislative basis for providing that support or intending to provide one in future legislation.

²² Department of Department of Industry, Science, Energy and Resources (2020) *Underwriting New Generation Investments program*, <https://www.energy.gov.au/government-priorities/energy-programs/underwriting-new-generation-investments-program>

²³ Daily Telegraph (2020) *NSW's Vales Point Coal-fired Power Station to Receive \$11m Federal Government Grant to Upgrade*, <https://www.dailytelegraph.com.au/news/nsw/nsws-vales-point-coalfired-power-station-set-to-receive-11m-federal-government-grant-to-upgrade/news-story/79857dfe00b82e47f78581307b55c3eb>

²⁴ Hansard (2020) *Senate Environment And Communications Legislation Committee: Estimates, Monday 2 March 2020*