

## **AUSTRALIAN ENERGY MARKET OPERATOR (AEMO) MARKET INFORMATION POWERS**

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### **AEMO IMPLEMENTATION STEERING COMMITTEE POLICY POSITION**

#### **INTRODUCTION**

1. The Australian Energy Market Operator (AEMO) Implementation Steering Committee (ISC) undertook comprehensive consultation on the exposure drafts of proposed amendments to the National Electricity Law (NEL) and the National Gas Law (NGL) and their associated Rules prior to finalising the Laws for introduction into the South Australian Parliament.
2. The ISC gave particular consideration to a number of issues raised by stakeholders with respect to the proposed information regime set out in the draft of the legislative package including:
  - AEMO's information gathering powers for its planning functions, using proposed market information orders (MIOs) and market information notices (MINs) (collectively market information instruments);
  - AEMO's power to use information it collects across its functions; and
  - AEMO's power to disclose protected information to particular bodies.
3. Written and oral feedback from stakeholders notes the following opposition to the proposed use of market information instruments:
  - the nature of the instruments as compulsory tools is inappropriate to a market operator;
  - given the experience of the electricity statement of opportunities ('ESOO'), there is no demonstrated need for the instruments;
  - it would be preferable for the information requirements to be provided for in the Rules;
  - once introduced, the instruments are likely to be used as a first, rather than a last, resort tool, thereby potentially upsetting a co-operative working relationship between the operator and businesses;
  - it is inappropriate for information gathered by market information instrument to be used across all of AEMO's functions; and
  - the scope for disclosure of relevant information to other bodies who may have no other means of accessing that information is inappropriate.
4. The purpose of this document is to comprehensively set out the ISC's response to these issues as reflected in the final legislative package for AEMO and the reasoning behind the response. The accompanying table summarises issues raised by stakeholders in relation to the information regime.

## **DISCUSSION**

### **1. SIGNIFICANT MCE REFORM - THE NATIONAL TRANSMISSION PLANNER**

5. The establishment of AEMO heralds the commencement of a key Ministerial Council on Energy (MCE) initiative (in response to a COAG directive), the National Transmission Planner (NTP). AEMO will be the NTP. COAG recognised the importance of the national transmission planning function and agreed to establish an enhanced planning process for the national transmission network to ensure a more strategic and nationally coordinated approach to transmission network development. The COAG noted objective is to assist public and private investors to optimise investment between transmission and generation across the power system. The NTP functions will also inform transmission companies' investment decisions and the Australian Energy Regulator's (AER) determination of revenue for Transmission Network Service Providers (TNSPs).<sup>1</sup>

#### **1.1 The importance of the NTNDP for transmission network development**

6. The National Transmission Network Development Plan (NTNDP) will be a more comprehensive and sophisticated document than the Annual National Transmission Statement (ANTS), providing a broad and deep analysis of different future supply-demand and market development scenarios. The NTNDP will enhance the ability of the market to identify and respond to those investment issues in an economically efficient and timely fashion. It will provide the ability for investors and market participants to assess transmission access and decide on where and when to invest. The revised transmission planning arrangements will play an important role in the energy market in the context of the proposed Carbon Pollution Reduction Scheme and the national 20 per cent renewable energy target.

#### **1.2 MCE and AEMC recognise the NTNDP will require broad information gathering powers**

7. Recognising the information requirements for the NTP function, the AEMC recommended an information gathering facility based on the Regulatory Information Order and Regulatory Information Notice model available to the AER for the purposes of exercising its economic regulatory functions. In formulating its recommendations, the AEMC undertook extensive consultation with industry.
8. The MCE, in its response to the AEMC report, recognised the need for broad and clear information gathering powers for AEMO to effectively perform its national transmission planning function. The MCE noted that the type and quality of the information available to AEMO in undertaking its national transmission planning function is important to ensure that the NTNDP informs the development of the energy market. The MCE also noted the importance of appropriate accountability

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<sup>1</sup> See the MCE response to the AEMC's final report on National Transmission Planning Arrangements available at [http://www.ret.gov.au/Documents/mce/\\_documents/National\\_Transmission\\_Planning\\_Arrangements\\_Final\\_Report20081106104510.pdf](http://www.ret.gov.au/Documents/mce/_documents/National_Transmission_Planning_Arrangements_Final_Report20081106104510.pdf)

mechanisms on the information gathering powers including that regard be had to compliance costs.

### **1.3 The NTNDP will also be linked to AER revenue determinations for TNSPs**

9. Currently, there is no link between the ANTS and the AER's revenue determinations for TNSPs. There is, therefore, no possibility for the information provided by TNSPs for the purposes of the ANTS to have an adverse effect on their profitability. Under the proposed new arrangements the AER will be explicitly required, when making TNSP revenue determinations, to take into account network augmentations suggested by AEMO in the NTNDP. Robust information gathering powers for AEMO will assist in ensuring an accurate picture of network augmentations for the NTNDP and for the AER in regulating a TNSP's revenue.

## **2. SIGNIFICANT MCE REFORM - GAS STATEMENT OF OPPORTUNITIES**

10. The Gas Statement of Opportunities (GSOO) is intended to build on information available via the Bulletin Board to increase transparency in the national gas market and improve decision making and trade by providing readily accessible and up to date information on the market and the transmission pipeline systems.
11. The Bulletin Board commenced operating in July 2008. Experience to date has indicated that information provided under this regime has not always been timely. The GSOO is intended to provide a long term outlook, over 10 years of demand forecast and supply capabilities, highlighting where potential supply shortfalls or transmission constraints may occur in the future.

### **2.1 The importance of the GSOO**

12. Similar to the objective of the NTNDP, the purpose of the GSOO is to assist industry and potential new participants in commercial decisions on investment and contracting. The GSOO will only be a meaningful resource if the information it contains is relevant to its purpose. Providing clear information gathering powers will ensure that the information necessary for the GSOO will be available for AEMO to discharge its responsibilities associated with facilitating the development of the gas market.

## **3. PROPOSED INFORMATION GATHERING POWERS ARE CONSISTENT WITH EXISTING POWERS**

13. Currently, energy businesses are required to comply with both national and jurisdictional information provision requirements for the purposes of assisting with relevant planning.

### **3.1 National framework - existing obligations re ANTS and Statement of Opportunities information**

14. Within the national framework, NEMMCO may request jurisdictional transmission system planning representatives to provide information or documents reasonably available to the TNSP, that NEMMCO reasonably requires for the purposes of the ANTS review [r 5.6.5(f) of the National Electricity Rules (NER)]. In turn TNSPs impose information requirements on businesses through regional transmission system connection requirements. TNSPs use the information to inform the Annual Planning Reports that they are required to produce under the NER.
15. Additionally, r 3.13.3(t) of the NER prescribes the national information requirements associated with the production of the Statement of Opportunities (SOO). That Rule positively obliges Scheduled Generators, Market Participants and Network Service Providers 'as soon as practicable' after they become 'aware of any information required for publication of the SOO, to provide that information to NEMMCO. Rule 3.13.3(t) is a civil penalty provision (Schedule 1 of the *National Electricity (South Australia) Regulations*).
16. On the basis of the agreed minimal change approach to implementing AEMO, the legislative package makes no amendments to the NER arrangements supporting the production of the SOO. However, the ISC does not want to replicate the information gathering regime embodied in r 3.13.3(t) for the purposes of supporting the planning functions AEMO will be required to exercise. Whilst r 3.13.3(t) may have the effect of supporting the production of the SOO, the ISC considers the market information instrument framework to be a more transparent, efficient and targeted way of imposing an obligation to provide information. Although in practice NEMMCO has worked cooperatively with businesses for the purposes of publishing the SOO, there is scope for r 3.13.3(t) to be onerous in its operation.
17. The market information instrument framework is no more onerous than these existing national arrangements.

### **3.2 Jurisdictional obligations supporting jurisdictional planning**

18. Additionally, South Australia and Victoria have dedicated jurisdictional network planning bodies (Electricity Supply Industry Planning Council (ESIPC) and VENCORP, respectively) that have broad information gathering powers through state legislation and licensing arrangements. ESIPC may issue 'persons' with written notice for information to support its planning functions. Victorian electricity industry participants are obliged by a licence condition to provide to VENCORP information it requests. Failure to provide the information exposes the licensee to potential loss of licence.

## **4. CONSOLIDATION OF EXISTING ARRANGEMENTS**

19. AEMO will subsume the functions of the existing dedicated jurisdictional planning bodies, ESIPC and VENCORP. The proposed information gathering powers will be

## 5. CHECKS AND BALANCES

20. The proposed reform has been designed within a relevant accountability framework.

### 5.1 Legislative terms provide an accountability framework for the use of Market information instruments

21. AEMO is only permitted to serve a MIO or MIN if it is 'reasonably necessary' for the performance of the relevant functions.
22. Generally, words used in legislation are given their ordinary meaning. The *Macquarie Dictionary (Online edn)* relevantly defines 'reasonable' to mean 'endowed with reason, agreeable to reason or sound judgement'. 'Necessary' relevantly means 'cannot be dispensed with'. It follows that AEMO may only issue a market information instrument if AEMO, exercising sound judgement, considers it indispensable to the successful exercise of the relevant functions. 'Reasonably necessary' implies that, for AEMO, although issuing a market information instrument need not be essential or critical to the exercise of the relevant functions, it must be more than just helpful or of some assistance or expedient. It also follows from the terms employed that AEMO is not precluded from acting in cooperation with industry when seeking particular information.
23. It is pertinent to the exercise of the 'reasonably necessary' discretion that AEMO's Board is industry and skills based. The composition of the Board is designed to bring a culture to AEMO that will, among other things, inform the judgement to be exercised when deciding whether to make a market information instrument in a particular case. The anticipation is of a commercially aware and pragmatic organisation that nevertheless understands it must successfully exercise its relevant functions.
24. Adapting the Privacy Commissioner's test of what is 'reasonably necessary' in information privacy principle 11.1(e), for the disclosure of personal information for the purposes of enforcing the criminal law, AEMO might, in exercising its discretion to issue a market information instrument, take account of the following factors:
- whether there are other practical and less intrusive measures available;
  - whether the potential benefit to the public interest in having relevant information for the relevant documents outweighs the cost to the proposed recipients of providing the necessary information.
25. AEMO is also required to take account of the 'reasonable costs of efficient compliance' and to consult with the proposed recipient. For a MIO, AEMO must invite submissions from potential recipients about its proposed terms and for a MIN

26. The legislative framework for market information instruments sufficiently addresses stakeholders concerns. Imposing further checks could hamper AEMO's ability to obtain information.

## **5.2 Contrast with RIOs and RINs**

27. A key concern of stakeholders was that market information instruments will be used as a first, rather than last resort. Industry cited its experience with the Australian Energy Regulator's (AER) use of Regulatory Information Orders (RIO) and Regulatory Information Notices (RIN) to support its argument that MIOs and MINs will promote a bureaucratic approach to information gathering. The anecdotal view is that complying with a RIO or RIN can be resource and time intensive.
28. The ISC considers it difficult to make a legitimate comparison with RIOs and RINs. As the economic regulator the AER requires information that businesses can be unwilling to provide and have previously gone to some lengths to avoid providing, for example, in the gas industry, by the use of asset managers. RIOs and RINs were designed, taking into account advice from the Expert Panel on Access Pricing, to address 'the appropriate balance between the risk that regulators may develop requirements for information that is unnecessary for the efficient discharge of regulatory obligation, and the clear need to gather robust and verifiable information on the cost of the services being provided'.<sup>2</sup> The context in which the information is sought via a RIO or RIN is therefore the regulation of revenue of regulated businesses. It is also noted, in this regard, that the AER's capacity to assume matters where the recipient of the RIO/RIN does not provide the information has not been replicated for AEMO (s 28Q of the NEL and s 59 of the NGL).
29. AEMO is in a different position. As a market operator, notably with industry membership and a skills/industry based Board, AEMO will have a different focus in seeking information. It will not be directed to regulation of a business's revenue. Rather the MIO and MIN framework is directed at supporting the administration of AEMO's statutory planning functions. As earlier noted the objective is to provide the market with high quality information to support investment decision making. This is quite different to the role assumed by the AER as economic regulator and its reasons for gathering information. It is therefore expected that the current cooperative approach to information gathering used by the existing market operators will continue.

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<sup>2</sup> Page 131 of the Report of the Expert Panel on Energy Access Pricing available at [http://www.ret.gov.au/Documents/mce/\\_documents/CompleteFinalReportFINAL20060419162032.pdf](http://www.ret.gov.au/Documents/mce/_documents/CompleteFinalReportFINAL20060419162032.pdf)

### **5.3 Information that might be sought by market information instruments**

30. Several stakeholders also noted that market information instruments might be used to gather information beyond the scope of what is required for AEMO's functions. The ISC notes that, given the terms of the Laws, there is no basis on which to found this concern. The legislation is clear in restricting the issuing of market information instruments to relevant functions. AEMO may, for example, only require recipients of market information instruments to provide information that will allow it to produce a GSOO consistent with the content requirements of proposed r 135KB of the National Gas Rules. A failure by AEMO to limit market information instruments to the purposes contemplated by the Laws would potentially expose AEMO to a successful action in judicial review.

### **5.4 Information may have been sought by the Rules**

31. Industry has said its preference is for information requirements to be prescribed by the Rules with the types of information that AEMO can ask for specified in more or less detail. There is a risk, however, that this approach is too limited and may not successfully capture the information requirements for AEMO's planning functions. The collateral is a risk that the relevant documents will fail to meet their objective of being comprehensive documents designed to inform efficient and effective investment decisions. The information requirements for the NTNDP, particularly when viewed in comparison with the requirements for the SOO, lend themselves to the relative flexibility of the market information instruments framework.
32. Further, the form and content of the NTNDP, although broadly set by the proposed amendments to the NER, is anticipated to evolve over time. AEMO can manage the anticipated development and refinement of the NTNDP using, if reasonably necessary, market information instruments.
33. The information gathering regime for the production of the GSOO is unlikely to require the same level of flexibility as that for the NTNDP, although as a new document some evolution may be expected. However, this is no reason to abandon the market information instrument framework for the GSOO. As earlier noted, r 3.13.3(t) of the NER is less than an ideal means of requiring information. Modelling the GSOO on this approach does not, therefore, seem appropriate. It is noted that the Regulations will prescribe the persons who may be subject to a market information instrument for the GSOO (as provided for in the proposed s 91F(3) of the NGL). Recognising that information providers already prescribed for the Natural Gas Services Bulletin Board (BB) are equally relevant to the GSOO function, the Regulation will only provide that persons within the classes of persons set out in s223 of the NGL may be the subject of a market information instrument for the purposes of the GSOO. It is anticipated that the persons that are exempt under the National Gas Rules from providing information to AEMO in its capacity as operator of the BB will not be subject to a market information instrument for the purposes of the GSOO.

34. Accordingly, the proposed scope of the information gathering powers is intended to reflect the breadth of anticipated information needs of the relevant functions. It is also intended to provide AEMO with sufficient flexibility in managing its information requirements for these functions as they develop.

#### **5.5 Instruments will be exclusively authorised by the CEO and AEMO will report on their use**

35. As a final check on accountability, the incoming Chief Executive Officer (CEO) of AEMO has given an undertaking that he will put in place a process requiring that a market information instrument must be approved by a senior member of AEMO, such as the CEO or Chair of AEMO, before it can be issued.
36. MCE will be closely monitoring AEMO's use of market information instruments. The MCE has the ability to require reporting on their use (using s 91C of the NGL and s 51 of the NEL).

### **6. OTHER ISSUES**

#### **6.1 Limiting the use to which information provided under market information instrument may be put**

37. Consideration was given to whether there might be merit in limiting (perhaps as contemplated by the Law, by Regulation) the use to which information provided to AEMO under market information instruments may be put. However, there was a concern that, in adopting this approach, there is a real risk that AEMO will not, in carrying out the functions imposed on it by the Laws, have access to a comprehensive set of information. The potential is for reduced quality decision making and, at its most extreme, ineffective decisions.
38. Such an outcome cuts to the heart of the COAG decision to co-locate AEMO's various different functions in the one body. The outcome sought by COAG is for a single body able to co-optimize its functions where appropriate. Compartmentalised decision making lacking a comprehensive information base has potential to reduce the quality of decision making. In turn this risks compromising efficiencies for the benefit of stakeholders. It therefore seems inappropriate to legislatively dictate to AEMO how it uses information in its possession.

#### **6.2 Disclosure of protected information to third parties**

39. Submissions raised concerns that AEMO may disclose 'protected' information to third parties including the AER and the Australian Competition and Consumer Commission (ACCC). The particular issue was that this facility would allow information that might not otherwise be available to the relevant listed third parties to be provided to them.

40. The argument is misconceived. There is no legitimate capacity for these other bodies to direct AEMO to gather information. As earlier noted, AEMO is only permitted to recover information to assist it to perform the relevant functions.
41. Further, currently NEMMCO is permitted to share information with the AER, Australian Energy Market Commission and ACCC under r 8.6.2(i) of the NER. The ACCC and the AER have very extensive information gathering powers (s 155 of the *Trade Practices Act 1974*, Division 3 and 4 of Part 3 of the NEL and Division 3 and 4 of Part 1 of Chapter 2 of the NGL respectively). Neither the ACCC nor the AER has a need for the facility industry suggests.
42. It follows that it is unlikely the proposed 'protected' information sharing regime will greatly increase the quantity or type of information available to the AER and ACCC. Each of those bodies will also only be able to use the shared information for the exercise of their relevant functions and powers.
43. Nevertheless, consideration was given to whether there might be some scope to amend the exposure draft Laws to provide that information that is given to the relevant bodies in s 54C(2) of the NEL and s 91GC(2) of the NGL is given in confidence. It was considered, however, that this might be too restrictive and that this is something appropriately left to the discretion of AEMO to manage when considering whether to attach conditions to the disclosure.
44. On balance, it was decided that there was no valid reason to change the 'protected' information disclosure regime, which at its heart is designed to maximise the synergies and efficiencies in regulation of the energy sector.