

Ministerial Council on Energy Standing Committee of Officials

SUBMISSION OF A BISITS on MOU, CODE CHANGE AND INDUSTRY LEVY DISCUSSION PAPERS AND ONE CONSUMER ISSUE

7 April 2004

1. AER-AEMC-ACCC Memorandum of Understanding (MoU) Framework discussion paper

At the forum on this paper held in Melbourne on 24 March 2004, it was said that the proposed mou would be underpinned by legislation. The nature of this underpinning legislation is not apparent from the discussion paper, in particular in the parts on 'legislative context' and 'key elements'. Being a 'memorandum' between emanations of the one (mostly – the states may also be involved) government it might be thought that the memorandum will be informal, not binding and unenforceable by third parties.

I submit that in the present case the memorandum be made so as to be enforceable by parties who have to rely on it in their dealings with the new energy regulators and the ACCC. As the purpose of the mou is to ensure the cooperation, coordination and efficiency of these three regulators (see key element 2) parties dealing with these bodies will wish to see the mou adhered to. Eg a code change proponent would not want the kind of double adjudication of code changes that occurred with NECA and the ACCC. Non-adherence would add greatly to cost, particularly in the extreme case of a turf war. The fact that an mou is necessary over the emanations of the one government suggests some weakness in executive or legislative control and direction over them. This is an additional reason for giving third parties having dealings with the regulators the comfort that the mou actually is binding and enforceable by those parties.

My submission only extends to enforceability by parties who have proprietary interests at stake in their dealings with the regulators.

I submit that enforceability be achieved by, for example, the mou having the status of delegated legislation, with appropriate words in the mou or covering legislation.

2. Streamlining of the Code Change Process discussion paper

The discussion paper proposes that a change to the National Electricity Code could be initiated by any person (sec 3.1) and that a code change proposal must include, amongst other things, draft amending clauses, prima facie evidence of 'net benefit' and consistency with the 'Prescribed Criteria' (sec 3.2(2), (4) and (5)). The proponent is also expected to "liaise with the AEMC and where possible reach agreement on the form of words of a code change solution".

I submit that

- a. the code change proponent have the option of *not* drafting the amendment to the code. The reason for this is, first, that the code's special drafting style (on one view it is layered, turgid, a mixture of broad objectives and minutiae; on any view it is complex) would be difficult for most proponents to emulate. The above need to 'liaise' with AEMC on drafting already is recognition of the difficulty of drafting. Secondly, proponents will have their own experience in many cases to know the problem, but less so experience as to what needs to be changed in the code. Thirdly, the code is quasi legislation and as such the drafting of amendments should be done centrally by experts. Accordingly the code change proponent should only be required to indicate the nature of amendments sought, which when approved can be treated as drafting instructions to AEMC or a firm of lawyers retained by AEMC for the purpose, or possibly the Australian Competition Tribunal. The changes could be sought by means of the proponent seeking a declaration that a particular provision of the code needs to be changed.
- b. The code change proponent should not have to prove 'net benefit'. The weighing of a proposal for change for its plusses and minuses on a whole market cannot seriously be undertaken by many a proponent; or alternatively it will be performed in the ritualistic way that the ACCC has assessed code changes in the past (such as the one in late 2000 leading to the establishment of the Advocacy Panel). It is submitted that a proponent should only have to prove what it can from its own experience, and accordingly a code change proposal should instead of the items (2)-(4) in sec 3.2 of the discussion paper, have the following:
 - (2) *a statement of the nature of the changes sought*
 - (3) *evidence that the code provision to be changed has a material adverse effect on the proponent or, if the proponent is an institution or government, on identifiable market participants or retail customers, or classes of such participants or customers.*
 - (4) *evidence that the problem is not isolated.*
 - (5) *evidence that conduct under the provisions to be changed is inconsistent or incompatible with the prescribed criteria.*

It is submitted that provisions such as these direct the proponent and assessing officials to facts and experience as the basis upon which code changes are to be made. This is an objective and so more satisfying form of administration than the subjective form involved in a 'net benefit' assessment.

A consequence of the wording suggested in (3) and (4) above is to raise the bar for code change proposals, from showing a mere 'problem' to showing a non-isolated material adverse effect. This has the advantage of filtering out code change proposals that involve mere meddling or are based on problems that might arise from misinterpretation or problems that may be resolved by appeal.

- c. The prescribed criteria, in sec 4 of the discussion paper, should include a transmission development objective. For example among market objective (c) could have added to it the following words in italics:

“any person wishing to do so should be able to gain access to the interconnected transmission and distribution network or to extend the interconnected transmission or distribution network, or to develop a new such network.”

The terms of the transmission development objective should have regard to the forthcoming ANTS.

The transmission provisions of the National Electricity Code have proved to be most difficult. It is submitted that it would be an omission for the market objectives not to have an objective which is able to guide in the resolution of disputes about transmission.

3. Application of the Industry Levy to fund the AER and AEMC discussion paper

It is submitted that the existing funding mechanism of the NEC be adapted to the new structure. The useful features of the existing mechanism are that it is a market participation fee (as opposed to a levy or tax), it is a fee over which participants have some control and it is a fee arrived at by reference to published budgets (of NEMMCO and NEMCO). I have not encountered opposition to the existing mechanism.

The discussion paper on the other hand reads like a collection of death sentence abstractions (eg "Provide an incentive for energy market participants to behave in a responsible manner within the constraints provided by legislation ...") or jargon (eg "Here the operational metrics are less of an issue."). It contains no specifics of likely future expenditure, which if they were available would provide a fair guide as to who should meet the expenditure.

Sec 3.2 of the paper envisages AEMC and AER earning income from hosting industry conferences. It is submitted that as there is already a plethora of conferences in the power industry it is not necessary to have another source of such conferences. Nor is it compatible with the impartiality to be expected of these bodies to canvass matters within their jurisdiction or the rules they administer. It is submitted that the provision for industry conferences by AEMC and AER should be deleted.

4. Articulation of the consumer viewpoint in the current proposals

At the Melbourne forum the criticism was expressed by Mr John Dick of Energy Action Group, with support from Mr Peter Dobney of Energy Users Association of Australia, that there was no consumer participation in the current proposals.

This criticism needs to be considered for the different categories of consumer. Some can speak for themselves because they are big enough or because they have associations such as EUAA or AMEC. The criticism is not valid in their case. If they need financial assistance then a body such as the Advocacy Panel of the National Electricity Code may be able to provide this.

However the great mass of consumers, domestic and small and medium business consumers, who have no one articulating their viewpoint, have two natural 'champions', namely the respective state governments and the Australian government. State government championing will be limited because of their conflicting interests, that is the state owned monopolies, special deals for industry, regulated retail pricing, the use of the electricity industry for revenue raising and the like. (These conflicting interests may also benefit electricity consumers, but only indirectly.) The Australian government on the other hand does not have these commercial, budgetary or policy conflicts. It is better placed to assess the impact of current proposals on the great mass of consumers.

It is thus submitted that the impact of the current proposals on domestic and small and medium business consumers should be assessed by experts working for the Australian government. There are fledgling bodies capable of representing sectors of the mass of consumers who could be co-opted to work with the experts or those in the Australian government under whom they work. If necessary the Advocacy Panel could also be approached to assist them.

A handwritten signature in black ink that reads "A. Bisits". The signature is written in a cursive, slightly slanted style.

Adam Bisits

12 Marshall Ave, Kew, 3101
03 98177346, 0438405527
adam.bisits@netlink.com.au