

# Energy Market Reform

## Market Consultation Sessions

16-20 August 2004

# Program

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1. Progress Report (Drew Clarke)
2. Legislative and Regulatory Framework (Rhonda Andrieux)

## Break

3. Legal Advice on Electricity Market Rules (Grant Anderson)
4. Proposed National Electricity Rule Change Process (Neville Henderson)

# Progress Report

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- Background
- Governance of Energy Markets
- Economic Regulation
- Electricity Transmission
- User Participation
- Gas Market Development
- Next Steps

# Background

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- COAG (Parer) Review – 12/02
  - 53 energy market reform recommendations
- MCE Report to COAG - 12/03
  - comprehensive reform program
  - accepted by COAG
- Australian Energy Market Agreement - 6/04
  - intergovernmental agreement to implement

# Governance of Energy Markets

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## Decisions

- MCE Policy Role
- Intergovernmental Agreement
- National Legislation

## Progress

- IGA signed June 2004  
“Australian Energy Market Agreement”
  - formal policy role
  - legislative and regulatory framework

# Economic Regulation

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## Decisions

- Australian Energy Market Commission (AEMC)
- Australian Energy Regulator (AER)
- MoU, Levy
- Streamline Code Change
- Implementation Phases:
  - electricity 2004
  - gas 2005
  - distribution & retail 2006
  - access

## Progress

- Establishment legislation passed June 2004:
  - Cw Parliament (AER)
  - SA Parliament (AEMC)
- Key positions advertised
- MoU drafted
- Interim funding
- Proposed code change process developed

# Electricity Transmission

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## Decisions

- Transmission Planning
- Regional Boundaries
- Regulatory Test
- Availability Incentives
- Transmission Pricing

## Progress

- NEMMCO Annual National Transmission Statement (July 2004)
- Regional boundaries process review
- Working with ACCC on regulatory test, incentives, pricing

# User Participation

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## Decisions

- Demand-Side Response
- Interval Metering
- Retail Competition
- (Advocacy)

## Progress

- Discussion paper and workshops (March 2004)
- Draft policy paper:
  - DSR
  - metering
  - retail competition
  - advocacy

# Gas Market Development

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## Decisions

- Productivity Commission Review of Gas Access Regime
- MCMPR Upstream Issues
- (Market Development and Infrastructure)

## Progress

- Final PC Gas Access Report (August 2004)
- MCMPR considering
- Supplementary policy statement (May 2004)
- Draft gas market principles

# Next Steps

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- Distribution and Retail Issues August
- User Participation Policy August
- Gas Market Principles August
- Regional Boundaries Consultation September
- Transmission Reg Test Principles September
- Access Framework Consultation September
- NEL Amendments, Application Acts October
- Electricity Rules Consultation October
- PC Gas Access Review December
- Merit Review, Gas Legislation 2005

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# Legislative and Regulatory Framework

Rhonda Andrieux

# MCE Policy Leadership Role

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The MCE policy setting role for the NEM:

- Initiates reviews of NE Rules by the AEMC.
- Initiates Rule Change Proposals that must be subject to the full Rule Change Process like any other Proposal.
- Publishes Statements of policy principles.
- No general power for MCE to direct AEMC in exercise of its functions.

# AEMC: Rulemaking Body

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The AEMC replaces NECA as rule maker:

- Makes and amends the NE Rules subject to the Rule Change Process.
- Performs reviews of NE Rules and provides advice to MCE as required.
- AEMC may recommend Rule Change Proposals to the MCE.
- AEMC cannot itself initiate a Proposal (other than minor or administrative changes).

# Australian Energy Regulator

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- Economic regulation of wholesale electricity market and transmission networks
- Electricity revenue and pricing determinations
- Develops and publishes:
  - Service standards
  - Statement of Regulatory Principles for electricity
  - Ring fencing guidelines
- Supervises application of the regulatory test
- Enforces the NEL and the NE Rules

# Legislative Scheme

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- AEMC Establishment Act 2004 (SA) –AEMC a SA body with authority in each jurisdiction.
- Trade Practices Amendment (AEM)Act 2004 (C'th) – AER a C'th body takes functions under the NEL.
- The National Electricity Law (SA Act), the NEL Regulations, and the NE Rules  
apply in each participating jurisdiction via Application Acts (States, ACT and C'th (adjacent areas only)).
- Gas reforms to be implemented 2005.

# The NE Rules

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- The NEC becomes the NE Rules made under State laws.
- NE Rules that relate to access may also be an industry access code for the purposes of Part IIIA TPA.
- Initial package of NE Rules to be made by Ministerial order.

# NE Rules (cont)

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- Initial NE Rules existing NEC plus following changes:
- Re-allocation of NECA functions to AER and AEMC.
  - Remove references to NET , reviewable decisions and protected provision status.
  - Remove Code Change Process - New Rule Change Procedure in NEL.
  - Those needed to transition the NEC from consensual arrangements to rules that are mandatory for participants in the market.
  - Consultation on initial NE Rule package.

# Review of Decisions in NEM

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- AER, AEMC & NEMMCO decisions subject to judicial review.
- Dispute Resolution Process retained for participant disputes under the NE Rules.
- Merits review for AER regulatory decisions not precluded.
- Appropriateness of merits review for electricity to be considered in context of gas reforms.

# Enforcement of the NE Rules

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- AER to enforce NEL & NE Rules by seeking an order from a Court.
- Court may impose a civil penalty or make other orders.
- AER cannot impose a penalty itself.

# Provision and Sharing of Information

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- AER as regulator empowered to obtain information ie. compel production for purpose of performing functions.
- AEMC as rule-maker may request but not compel information in reviewing the NE Rules.
- The AER, the AEMC and the ACCC will be able to share information.

# **Conversion of National Electricity Code into Rules under National Electricity Law**

**Grant Anderson**

# Streamlining Rule Change Process

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- Current duplication between ACCC and NECA processes
- Amendments to TPA - ACCC may rely on AEMC consultations
- Memorandum of Understanding
  - AEMC to provide rule change proposal and submissions to ACCC
  - ACCC to advise on any competition or access-related issues
  - AEMC to seek information and submissions and to consult with ACCC
- Conversion of NEC into rules under NEL

# Need For Authorisation

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- Code of conduct - ie. set of arrangements?
  - exclusionary provisions (s.4D)
  - exclusive dealing (s.47)
  - anti-competitive provisions (s.45)
  - price-fixing (s.45A)
- “Statutory instrument”?

# Senior Counsel Advice - Background

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- **Question:** will conversion of NEC (authorised by ACCC) into (non-authorised) rules made under NEL increase risk of breach of Part IV of TPA?
- **Approach:** Specific examples used to extrapolate general principles.
- **Assumption:** NEC assumed to be a consensual arrangement (this is not a view expressed by Counsel).

# Senior Counsel Advice - Answer

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- Part IV TPA prohibitions would not apply to actions taken by Code participants in compliance with mandatory rules under NEL because there will be no contract, arrangement, understanding or transaction:
  - ss. 4D, 45, 45A: contract, arrangement or understanding;
  - s.47:
    - on condition that } supply or acquisition pursuant to a
    - for reason that } consensual arrangement or transaction
- ***Conversion into rules will not increase trade practices risk.***

# Amendments to Code Provisions

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- Rules will be made afresh by Ministerial order:
  - remove any linkage with Code going forward;
  - removal of spent provisions;
  - transitional provisions.
- References to Code will become references to Rules.
- Registration requirements to remain but will cease to be means of Code participants voluntarily binding themselves to comply with provisions. Rules will bind by virtue of being “law”.
- Relevant provisions will be more clearly expressed as mandatory:
  - substance will not be changed;
  - “contractual” language will be modified.

# Agreements Contemplated by Code

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- If rules specify terms then agreement has no proscribed purpose or effect:
  - s. 4D: purpose of preventing, restricting or limiting supply to / acquisition from others
  - s. 45: purpose or effect of substantially lessening competition;
  - s. 45A: purpose or effect of fixing, controlling or maintaining prices
  - s. 47 (other than third line forcing): purpose or effect of substantially lessening competition.
- If rules do not specify terms then agreement will continue to be subject to Part IV of TPA:
  - not previously protected by virtue of Code authorisation
  - parties can still seek separate authorisation.

# Other Aspects of Senior Counsel Advice

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- No inconsistency with TPA (eg. s. 51).
- Not an “industry code of practice”.
- NEMMCO will not contravene TPA (s. 46).

# Other Changes to Rules

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- Abolition of NECA and re-allocation of functions to AEMC and AER.
- Abolition of National Electricity Tribunal and “reviewable decisions”.
- Uplifting of rule change procedure into NEL.
- Uplifting of relevant “protected provisions” into NEL.

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# National Electricity Rule Change Process

Neville Henderson

# Code Change Options

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- **MCE December 2003**
  - “The code change and authorisation process to be streamlined, to avoid duplication.”
- **Proposed Change Process – March**
  - Streamlining objective
  - ACCC discretion to rely on AEMC consultation
  - Concerns that only some NE Code changes would be authorised (TPA Part IV risk)

# Code Change Options

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- **Option 1 - Authorisation of All Code Changes**
  - Streamlining gains would be limited
  - Does not clarify ambiguity about Code legal status
  - Impose delays in process and additional costs
- **Option 2 - Operating Under Umbrella Framework**
  - Unlikely to provide sufficient regulatory certainty - authorisation may not extend to non authorised elements
  - Relies on AEMC deciding on what is (or is not) submitted for authorisation – significant uncertainty
  - AEMC and ACCC both in effect being competition regulators is inconsistent with TPA and new market governance framework

# Code Change Options (cont.)

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## 3. Preferred Option

- NE Code  $\Rightarrow$  NE Rules (statutory rules under the NEL)
- NE Code consensual arrangements  $\Rightarrow$  NE Rules mandatory obligations
- NE Rules not authorised
- ✓ Participant risk profile not materially changed from existing TPA risk profile under authorised NE Code
- ✓ No change to legal rights of participants to seek authorisation of their own conduct or arrangements.

# Functions of AEMC in Rule Making

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- **Market Development**
  - Reviews and make recommendations arising from reviews
- **MCE References to AEMC for a review**
  - MCE discretion to consult on ToR
  - MCE to determine ToR
- **Rule Making Functions of AEMC**
  - Efficient performance of, and integrity of, the Rules

# Rule Making Criteria

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- **In deciding on a Rule Change, AEMC to:**
  - apply net benefit test based on the achievement of the Market Objectives.
  - have regard to Market Objectives and any MCE Statement of Policy Principles
- **Net benefit test based on “with” and “without” analysis**
- **Market Objectives to be included in NEL**

The primary market objective of the NEM is to promote the long term interests of consumers of electricity with respect to:

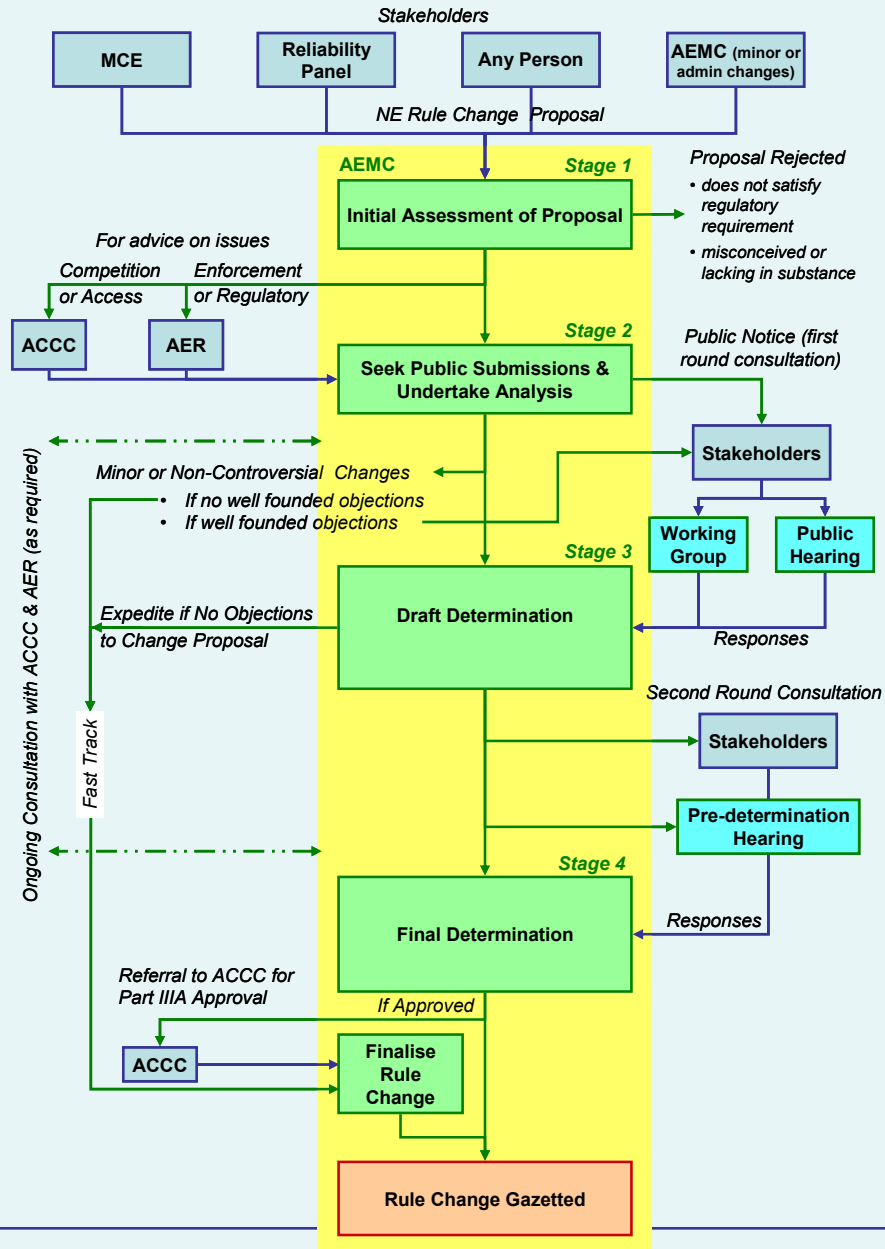
  - price, quality and reliability of electricity services, and
  - economically efficient investment and innovation.

## **In seeking to achieve primary Market Objective, regard is to be had to:**

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- a) The market should be competitive
- b) Economically efficient operation and investment in electricity infrastructure
- c) Supplier choice for customers
- d) Open access to networks
- e) Market entry equality for new and existing participants
- f) Equal treatment of energy source or technology
- g) Equal treatment of intrastate and interstate trading of electricity.

# Overview of the Process



# Stages in the Process

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## 1. Initiation & Preliminary Assessment

- Any person as well as MCE and Reliability Panel can initiate a Rule Change Proposal
- AEMC initiate only “minor” changes
- Requirement for “Developed” Rule Change Application
- AEMC as “**gatekeeper**”
  - reject proposal if misconceived, lacking in substance or not adequately developed
  - responsible for Rule wording

# Stages in the Process (cont.)

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## 2. Publication and Call for Submissions

- Consultation with AER, ACCC & NEMMCO
- Process to expedite Rule change proposals
- AEMC required to issue Public Notice describing proposed Rule Change & invite submissions
- AEMC can convene Working Groups and Public Hearings
- AEMC can expedite a Rule Change Proposal
  - Where it is of minor or administrative nature or to correct manifest error or is likely to be unopposed
  - 14 days for any person to lodge objection
  - No well founded objection ⇒ AEMC makes final determination
  - Well founded objection ⇒ Submitted to full Rule Change Process

# Stages in the Process (cont.)

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## 3. Draft Determination

- Content of Draft Determination prescribed
- Published within 28 days of submissions closing
- Draft Determination to become Final if within 14 days no party advises of intent to make a submission
- Pre-determination Hearing – procedures set out

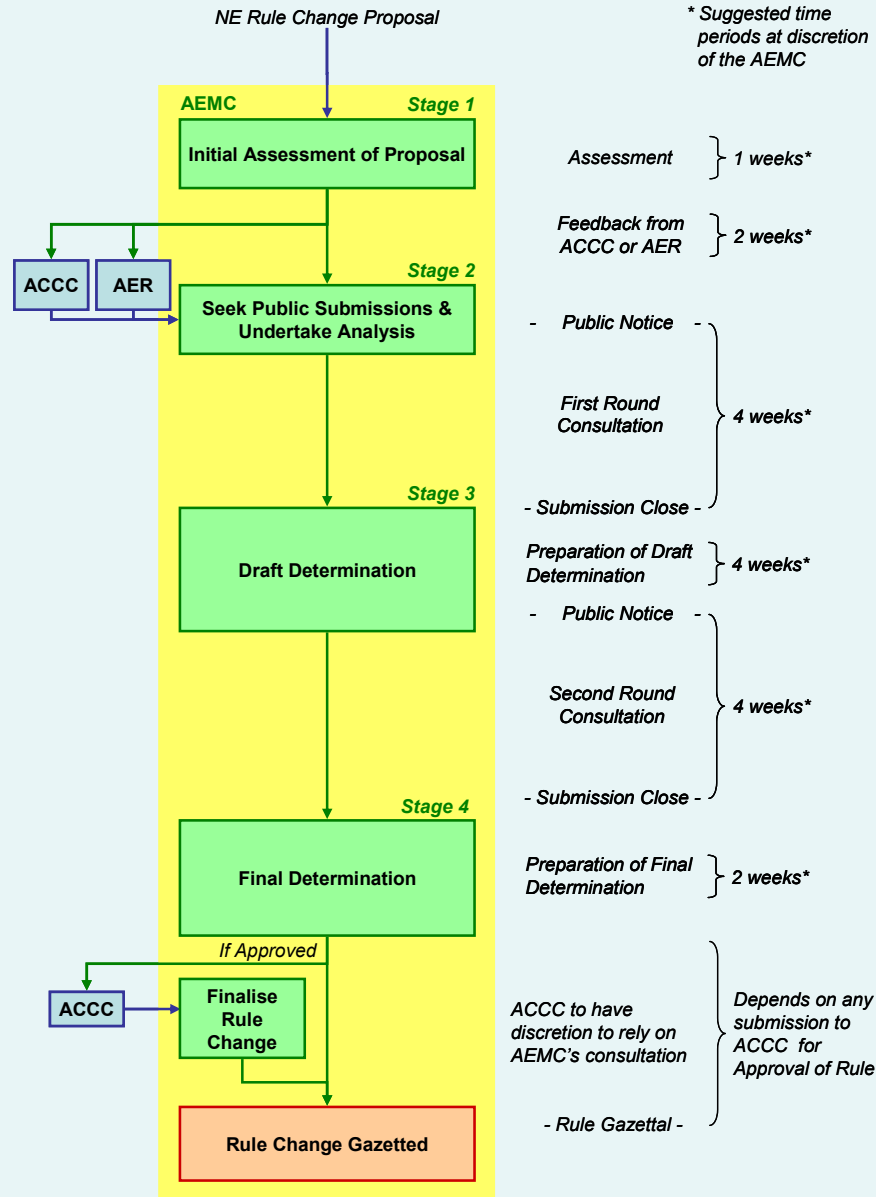
# Stages in the Process (cont.)

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## 4. Final Determination

- Content of Final Determination prescribed
- If Rule Change relates to access, then AEMC submits to ACCC for approval
- AEMC to publish any change to NE Rules in SA Gazette

# Indicative Process Timeframe



# Other Matters

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- **Protected Provisions**
  - Not to be included in NE Rules
- **Jurisdictional Rule Derogations**
  - Proposed by jurisdiction
  - AEMC to process in accordance with NE Rule Change Process
  - Assessment by AEMC to consider need for orderly transition from existing arrangements
- **Participant Derogations**
  - Processed in accordance with NE Rule Change Process

# Submissions

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Submissions on Proposed Rule Change Process should be lodged by Friday 27 August 2004.

Addressed to:

NE Rule Change Process

c/- MCE Market Reform

Department of Industry, Tourism & Resources

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