

30 January 2009

Mr Steve Rodgers, ISC Secretariat
Governance and Institutions Section
National Energy Market Branch
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Dear Steve

ENA Response to the Ministerial Council on Energy, AEMO Legislative Amendments
Explanatory Material: AEMO Exposure Drafts

The Energy Networks Association (ENA) welcomes this opportunity to respond to the Ministerial Council on Energy (MCE) paper on the *Australian Energy Market Operator (AEMO) Establishment – Explanatory Material: AEMO Exposure Drafts*.

ENA is the peak national body for Australia's energy networks which provide the vital link between gas and electricity producers and consumers. ENA represents gas distribution and electricity network businesses on economic, technical and safety regulation and national energy policy issues.

In theory, ENA supports the creation of a single national operator for electricity distribution services. A number of issues, however, need to be addressed to ensure the creation of a cost-effective and responsive operator delegated with an appropriate set of legislative powers. The key issues relating to electricity are:

- preventing the unnecessary introduction of intrusive and burdensome information gathering powers,
- ensuring that on-going cost minimisation is a priority,
- the preservation of confidentiality of information, and
- restricting the use of information to the purpose for which it was collected.

If you should have any questions about the attached submission, please contact Tim Kane on (02) 6272 1520 or tkane@ena.asn.au.

Yours sincerely



Andrew Blyth
Chief Executive



ENA Submission - Ministerial Council on Energy AEMO Implementation Steering Committee, *Explanatory Material: AEMO Exposure Drafts*

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Key messages

- Costly and intrusive regulatory information powers modelled on those provided to the Australian Energy Regulator are inappropriate for the objectives and role of a national energy market operator and should only be used as a last resort after exhaustive consultation between parties
- A more defined framework needs to be established to provide assurances regarding the confidentiality of information in relation to third party access other than excessively costly judicial review
- Consultation with participants needs to be employed to ensure that AEMO budgets are set in the most cost effective way

Executive Summary

The Energy Networks Association (ENA) welcomes the opportunity to respond to the Australian Energy Market Operator (AEMO) Implementation Steering Committee (ISC) Paper Explanatory Material, AEMO Exposure Drafts released in December 2008.

The ENA is the peak national body for Australia's energy networks which provide the vital link between gas and electricity producers and consumers. ENA represents gas distribution and electricity network businesses on economic, technical and safety regulation and national energy policy issues.

Energy network businesses consider many elements of the Exposure Drafts are appropriate such as the intent to keep many existing arrangements unchanged and a minimum two year preservation of existing fee structures, providing for consultation upon the expiry of the transitional period. Other elements of the draft, however, require further consideration if the

goal of a cost-efficient, responsive AEMO delegated with an appropriate set of legislative powers is to be achieved.

Ensuring adequate processes and incentives for cost efficiency in AEMO is a critical issue for the entire energy market. While the Exposure Drafts states, under Rule 2.11, that AEMO must have regard to the National Energy Objective (NEO) in setting participant fees, this does not guarantee strong ongoing pressure for cost minimisation. This pressure for cost minimisation could be better achieved if, in addition to consultation for fee arrangements with participants, there was provision for consultation when setting the budget. Through enhanced transparency provided by this consultation, energy network businesses can be more confident that cost minimisation is an ongoing priority.

Energy network businesses are strongly opposed to the proposal to model AEMO's information gathering powers on costly and exceptionally intrusive regulatory information gathering powers designed to apply in the context of access to pricing determinations by the AER. This approach is disproportionate to the objectives and functions of the AEMO. Although the AEMO will be required to engage in consultation with the recipient on the proposed terms of the instruments, these instruments need to be used only as a last resort after exhaustive consultation.

Background

Energy network businesses deliver electricity and gas to over 13 million customer connections across Australia through approximately 800,000 kilometres of electricity distribution lines. There are also 76,000 kilometres of gas distribution pipelines. These distribution networks are valued at more than \$40 billion and each year energy network businesses undertake investment of more than \$5 billion in distribution network operation, reinforcement, expansions and greenfields extensions. Electricity transmission network owners operate over 42,000 km of high voltage transmission lines, with a value of \$10 billion and undertake \$1.2 billion in investment each year.

Comments on Key Areas of Exposure Drafts

Cost recovery

Energy network businesses are concerned to ensure a framework that not only provides for cost recovery, but which promotes ongoing cost efficiency in AEMO's operations and the realisation of the material efficiency benefits that should arise from movement to a single energy market operator.

The Exposure Drafts appear to lack an adequate mechanism by which these aims can be achieved. ISC states that AEMO will not be required to undertake broad consultation on its budget.¹ Despite consultation for setting the fees structure, energy network businesses are

¹ MCE AEMO Implementation Steering Committee *Response to Stakeholder Submissions– Legislative Framework: Statement of Proposed Approach*, December 2008, no.11

concerned that without consultation on the budget the level of transparency and accountability will be inadequate to ensure robust ongoing cost minimisation.

Furthermore, transparent and efficient cost allocation is essential for ongoing cost minimisation. It is crucial that there is transparency in the way that costs are apportioned, particularly when these costs are incurred by specific market participants.

AEMO will operate in a number of its functions in a position akin to a 'natural monopoly' firm. This status makes adequate incentives for cost control important. Energy networks businesses believe that while a Board composed of both industry and government is in theory an effective way to create a strong corporate governance framework, it will only be as effective as the level of involvement the Board has in cost and budgeting projections. This suggests that greater emphasis should be placed on ensuring strict oversight of costs and operating efficiency by the industry members liable for AEMO's operating budget, as well as Board involvement in budget consultation.

Recommendation 1

Greater Board and participant involvement is required in the setting of budgets. This should take place in the form of a formal consultation process.

Information gathering powers

Applying an inappropriate model for information powers

The Ministerial Council on Energy (MCE) AEMO ISC proposes the creation of new market wide information collection devices modelled on Regulatory Information Notices and Orders currently applied by the Australian Energy Regulator (AER) to regulated network service providers.²

The use of these instruments undermines the consultation proposed with participants. As energy networks businesses have clearly seen from the regulatory side, the use of these instruments can easily become a generic way of gathering information and be used as the primary tool for information collection. Applying Regulatory Information Instruments under the National Electricity Law has created quite onerous information compliance requirements that were not previously required for business planning processes or normal operations. The experience to date has not been favourable.

Using the same intrusive and detailed information gathering mechanisms for distinct system operation or national transmission planning functions would be disproportionate to the relevant objectives and risks. The approach fails to account for the different roles of the AER and AEMO, which is not an economic regulatory or enforcement body.

In addition, industry considers the use of these instruments in the regulatory access pricing context has been costly and inefficient and does not provide a sound default model for how market-wide information gathering should operate. While energy network businesses

² MCE Explanatory Material *AEMO Exposure Drafts*, December 2008, no.45

recognise that ISC has made provisions that AEMO will be guided by an accountability framework and give regard to costs³, it would be prudent to examine in detail the operation of Regulatory Information Notices and Orders applying to network service providers and reconsider whether these are appropriate powers to introduce for the functions of AEMO.

As yet there has been no strong case presented for the use of these instruments. Industry is not convinced that the current consultation process for information gathering under National Electricity Market Company (NEMMCO) arrangements has proven to be unsatisfactory or flawed. As such energy network businesses see no reasonable requirement to employ these new powers of information into AEMO's functions. The provision for these intrusive information gathering instruments is highly contentious and if employed should only be used sparingly and with great discretion as a last resort only.

If participants are exposed to these information instruments, consideration must be given to the use of appropriate timelines for the provision of data. Under the current data collection framework for the Statement of Opportunities, energy network businesses regularly find it difficult to provide all necessary information within the allotted timeframe. Without due consideration into the appropriateness of timeframes allowed for the provision of information under these instruments, market participants are exposed to civil penalties in situations where they have taken all reasonable steps to meet the reporting obligations.

Rather than the use of an inappropriate model for market wide information powers required by AEMO, energy networks consider a better approach would be specification by ISC of the particular types of information likely to be necessary for the conducting of AEMO's functions. This could allow legislation and rules to include tailored, less intrusive, and more specifically limited powers linked directly to AEMO's functions.

Recommendation 2

Rather than the use of Market Information Orders (MIO) and Market Information Notices (MIN) a tailored approach to the legislation is suggested. This approach should specify the types of information AEMO will need to collect for each purpose.

Recommendation 3

If participants are exposed to the MIN/MIO framework, careful consideration must be given to the use of appropriate timeframes for information provision to AEMO.

Providing for extension of information powers by rules and confidentiality

The ISC proposes that the legislative framework should provide for the extension of the range of parties subject to legislatively granted information powers by rule-making.⁴ Energy network businesses are opposed to this proposal, as it is inconsistent with the MCE's established market governance arrangements, which provide that significant obligations on parties should be placed directly in the Laws. This issue was not adequately addressed in the *ISC Response to*

³ MCE Explanatory Material *AEMO Exposure Drafts*, December 2008, no.70

⁴ MCE AEMO Implementation Steering Committee Australian Energy Market Establishment – Legislative Framework: Statement of Proposed Approach, August 2008, p.22-23

Stakeholder Submissions and the framework should be carefully crafted to ensure that information does not flow to parties that would normally not be able to access it in usual operation.

These amendments to the NEL⁵ should not allow to extend the range of third party access to this information. However, in lieu of denying these parties access altogether, the detriment caused by this access may be partially mitigated if the provisions were carefully constructed to ensure that the information is used by third parties only for the purpose that AEMO originally collected it.

Energy networks businesses recognise that although the flow of information between different functions of AEMO may, in theory, assist with informed decision making⁶, careful guidelines must be constructed to ensure this information flows only to assist AEMO in efficient decision making relating to purpose for which the information was gathered. Whilst information gathering powers for the AER allow them to use information for other functions, this model is inappropriate for AEMO, who is not a regulatory body. The information gathering is confined to a particular purpose, and this purpose is all it should be used for.

Energy network businesses consider the best course of action is to legislate that information collected by the AEMO should only be able to be used for the purpose for which it was collected. To allow greater scope would set a dangerous precedent whereby information can be collected without specific purpose or outside of what is required for the body's efficient functions.

Recommendation 4

Information should only be used for the purpose that it was collected.

Recommendation 5A

Information collected by AEMO should not be available to third parties that would normally not have access to this information, had it not been collected as a function of AEMO.

Recommendation 5B

In lieu of the above recommendation, if information is provided to third parties, this information should only be used by these third parties for the purpose for which it was collected.

⁵ National Electricity (Australian Energy Market Operator) Amendment Bill 2009, pp. 24-25

⁶ MCE AEMO Implementation Steering Committee *Response to Stakeholder Submissions– Legislative Framework: Statement of Proposed Approach*, December 2008, no.36