



**Submission to the Ministerial Council on Energy
Standing Committee of Officials**

**Proposed National Electricity Rule Change
Process**

Response to Consultation Paper

**(and comments on the Legislative and Regulatory Framework
Information Paper)**

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Level 3, 40 Blackall Street, Barton ACT 2600
Telephone: +61 2 6272 1555 Facsimile: +61 2 6272 1566
Email: info@ena.asn.au Website: www.ena.asn.au

Overview

The Energy Networks Association (ENA) welcomes the release by the Ministerial Council on Energy Standing Committee of Officials of the *Proposed National Electricity Rule Change Process – Consultation Paper* (the Consultation Paper) and the opportunity to comment on the paper. The ENA is also taking this opportunity to comment on some aspects of the Information Paper, *Legislative and Regulatory Framework* (the Information Paper), released with the *Consultation Paper*.

The Ministerial Council on Energy December 2003 Report to COAG commits Australian governments to strengthening the role of industry participants in electricity and gas code change processes, consistent with recommendations of the Council of Australian Governments Energy Market Review.¹ The agreed reforms were also intended to improve the quality, timeliness and national character of governance of the energy markets, and lower the cost and complexity of regulation facing investors. The ENA response to the *Consultation Paper* has been developed in light of this commitment.

In assessing the Rule change model outlined in the *Consultation Paper*, the ENA considers that care must be taken to ensure that the remaining ACCC role in approving changes to the Electricity Industry Access Undertaking does not slow down the streamlined Rule change process. The ENA understands that this issue will be the subject of later consultation on the national energy access framework.

The recent work of the Productivity Commission in its *Review of the Gas Access Regime* raises policy issues, including increased uncertainty and regulatory discretion, which may arise from multiple and conflicting objectives for regulatory decision making. Officials are encouraged to consider a single objective for the AER in light of these findings.

It appears the proposed Rule change approach may not in practice increase industry consultation and involvement in the Rule change process, as it allows considerable discretion on the part of the AEMC as to the consultation process that it will follow for a particular rule change. For example, the AEMC has considerable discretion as to whether it will form industry working groups, or conduct public hearings and pre-determination conferences with regard to proposed Rule changes. The proposed process also allows the AEMC discretion on how it will conduct particular consultation processes (expedited or otherwise), whether it will progress a proposed Rule change, and the drafting of that Rule change. The ENA considers that many of these issues can be addressed through a more robust and defined consultation process, amended to:

- increase AEMC accountability on a decision to amend or reject a proposed Rule change;

¹ Ministerial Council on Energy *Report to the Council of Australian Governments – Reform of Energy Markets*, December 2003, p.5 and see also Council of Australian Governments Energy Market Review *Towards a Truly National and Efficient Energy Market – Final Report*, December 2002, p.92

- allow a Rule change proponent to comment on or withdraw a proposed Rule change before wider industry consultation if AEMC amendments are not acceptable;
- ensure that the outcomes of initial consultations with market and regulatory bodies on a proposed Rule change are clearly outlined with the release of a proposed Rule change for public consultation;
- remove the requirement that objections be accompanied by reasons under the 14 day trigger to stop the expedition of a proposed Rule change; and
- make Working Groups, Public Hearings and Pre-Determination Conferences compulsory if requested by two or more stakeholders.

The ENA is concerned that the extension of this process to Gas Code changes may be overly complex for what is a simpler Code that does not give rise to authorisation issues. The specific process adopted for Gas Code changes should reflect the different nature of that Code and the strong industry involvement in the Code change process to date.

Access to merit review of regulatory decisions is critical to ensure accountability and the ENA understands that this issue will be the subject of a separate consultation process in the months to follow.

Proposed National Electricity Rule change process

The ENA supports efforts to streamline the approval process for National Electricity Code amendments. There is a balance to be struck between ensuring that a proposed Code change is subject to vigorous and comprehensive consultation, and that the process is timely and efficient. An appropriate, accountable and timely Code change process should ensure that the rules that govern the national electricity market can evolve to meet the changing nature of the market.

As noted in the *Consultation Paper*, the proposed Rule change process does not address the ongoing need for the ACCC to approve proposed changes to the Electricity Industry Access Undertaking on access related Code changes. As noted in the stakeholder workshops held in conjunction with the release of the *Consultation Paper*, the ENA understands this issue will be addressed in the context of the foreshadowed development of a national approach to energy access. As such, the ENA does not at this stage propose to comment on this unresolved aspect of the proposed Code change process except to note that the ENA does not expect that the change in the legislative status of the Code will limit the options available for developing a new approach to energy access regulation.

The ENA supports efforts to resolve inefficiencies contained in the possibility of a dual consultation process performed by the AEMC and the ACCC in respect of competition-related changes to the industry access undertaking. The ENA is keen to ensure that any remaining ACCC approval role does not slow down the Code change process.

The ENA understands that the MCE SCO preferred Rule change process outlined in the *Consultation Paper*, which changes Code specified consensual arrangements to mandatory rules that do not require authorisation, is intended address a perceived *Trade Practices Act 1974* (TPA) risk contained in complying with the Code where the AEMC has discretion as to whether it seeks authorisation of Code changes. It is a matter for governments and other interested participants who are most directly affected by TPA compliance issues to resolve the precise legal solution on issues of potential liability. The ENA understands, however, that there is conflicting legal advice as to whether the approach outlined in the *Consultation Paper* adequately addresses this issue.

Powers of direction and functions of the AEMC in rule making

The ENA supports the approach outlined in the *Consultation Paper* which seeks to clearly define the limits of Energy Ministers' power to direct the AEMC, but seeks clarification of how the process relates to that outlined in the *Australian Energy Market Agreement*, which suggests a more unfettered power of direction for Ministers.² The ENA queries if and how this more circumscribed role for Energy Ministers will be embodied in legislation.

² *Australian Energy Market Agreement*, 30 June 2004, clause 4.4(a).

The ENA also supports circumscribing the ability of the AEMC to initiate Rule changes. Linked to this issue, the ENA also supports the previously announced policy position that the AER will also be limited in its ability to initiate Rule changes.

Providing clear objectives to regulatory and market bodies

The *Consultation Paper* sets out a primary objective, and a series of secondary objectives, to apply to the AEMC. The *Information Paper* released at the same time states that identical objectives will apply for the AER. The ENA is concerned that the approach of multiple and identical objectives for these bodies may:

- potentially allow the AER and AEMC to overstep their functional boundaries, particularly given the broad application of the proposed objectives;
- give these bodies broad discretionary powers through the balancing of multiple and conflicting objectives; and
- create regulatory and market uncertainty through these discretionary powers that allow decision makers considerable scope in how they balance a series of ‘primary’ and ‘secondary’ objectives. This approach may also undermine the scope and ability of stakeholders to seek judicial review of decisions.

The recently released Productivity Commission *Review of the Gas Access Regime* Final Report highlighted the importance of clear objectives in providing guidance to Ministers, regulators, tribunals and the judiciary in implementing and enforcing regulatory arrangements.³ This guidance is equally important for the AEMC, to ensure that it performs its market development role within the boundaries delineated by Ministers.

The ENA is concerned that the combination of primary and secondary objectives for the AEMC and the AER may create uncertainty and increase the risk of conflicting objectives leading to greater AER and AEMC discretion. These broad objectives may also give scope for the AER to overstep its functional boundaries into market development and vice versa. As pointed out by the Productivity Commission;

Decision makers facing conflicting objectives need to exercise discretion to assess the tradeoffs. In matters of law, the judiciary often has to weigh up a range of factors in making a judgment. However, the larger the number of conflicting objectives, the greater is the discretionary element involved in their resolution. As this tends to increase the potential for inconsistent judgments, there are advantages in narrowing the range of, and clearly specifying, objectives.⁴

The Productivity Commission also differentiated between what are appropriate objectives for a regime, and what are more accurately described as characteristics of a regime.⁵ For example, market objectives such as the ability of consumers to choose suppliers are a characteristic or principle governing the regime, rather than an objective for rule enforcement or rule-making bodies under the regime.

³ Productivity Commission *Review of the Gas Access Regime*, Final Report, p 161.

⁴ Productivity Commission *Review of the Gas Access Regime*, Final Report, p 162.

⁵ Productivity Commission *Review of the Gas Access Regime*, Final Report, p 185.

While the broad set of objectives proposed in the *Consultation Paper* may not give rise to problems with regard to market development, multiple objectives for the AER may contribute to regulatory uncertainty. The ENA recommends that consideration be given to developing a single objective for the AER, possibly in line with the primary objective outlined in the *Consultation Paper*, taking into account the findings of the Productivity Commission's *Review of the Gas Access Regime* on the need to provide clear and effective guidance to regulatory bodies.

Proposed refinements to the rule change process

In moving to a single process and body for approving proposed Rule changes, it is important to ensure that the process followed by the AEMC has integrity, contains adequate opportunities for industry and consumers to contribute to the decision-making process, and is backed by a strong objective and guidance from legislative instruments and the MCE. The availability of judicial review for the decisions of the AEMC is critical to ensure its accountability, but for this to offer protection for industry, the AEMC must be subject to strong and clearly defined obligations for consultation and decision-making, which can provide a backstop for any judicial consideration, should this occur.

Discretionary powers of AEMC under proposed process

The ENA is concerned that the Rule change process outlined in the *Consultation Paper* requires the AEMC to make several judgments as to merits or appropriateness of a proposed Rule change, in a process that is not subject to external consultation or discovery. For example, in Stage 1 of the proposed Rule change process, the AEMC must assess a proposed Rule change and decide whether the application is “misconceived” or “lacking in substance”, or is “not adequately developed”. The AEMC is only required to give written reasons to the Rule change proponent if it decides to reject a proposal. The AEMC also has the power to redraft a proponent's Rule change, and is the arbiter of whether this redrafting reflects the “substance” of the original proposal. In stage 2 of the Rule change process, the AEMC can also reject a request to subject a proposed Rule change to a full consultation process if it considers the Rule change to be “minor or administrative in nature, or to correct a manifest error” or is “likely to be unopposed” and that stakeholder objections to the expedited process are “misconceived” or “lacking in substance”.

This level of discretion could leave the AEMC open to criticism as to how it manages the Rule change process, and could create significant uncertainty for industry and users. It may also limit the ability of interested parties to seek judicial review of AEMC decisions, as a degree of discretion, as outlined in the previous section, creates ambiguity over the obligations on parties as to process.

Proposed safeguards to strengthen the accountability of the rule change process

The ENA considers that some further safeguards are required in the proposed Rule change process to ensure that the AEMC has a clear consultation process to follow, and that industry and users have an appropriate opportunity to contribute to the Rule change process.

These proposed safeguards are:

Stage 1

- **AEMC decision to reject a proposed Rule change** – To provide adequate accountability on the AEMC in the initial screening of proposed Rule changes, the AEMC should be required to report annually on the total number of Rule change proposals its receives, the number it amends (with reasons why amendments were necessary), the number it rejects (with reasons why the proposal was rejected) and the number withdrawn by the proponent after amendment. This reporting should be available for public scrutiny.

To ensure that proponents are not blocked from the Rule change process through a lack of understanding as to the process, the AEMC should also be obliged to advise the proponent on how to bring a proposed Rule change in line with the criteria.

- **AEMC drafting of Rule change proposal** – To ensure that the initial meaning of a proposed Rule change is reflected in any AEMC redrafting of a proposal, the proponent should be allowed opportunity to comment on and, if necessary, withdraw a proposed Rule change if it considers that the drafting approach adopted by the AEMC does not adequately reflect the intent or “substance” of the original Rule change proposal.

Stage 2

- **Initial involvement of market and regulatory bodies in the Rule change process** – To ensure a transparent consultation process is maintained, the AEMC should outline the advice received in initial consultations with market and regulatory bodies on issues of operability, enforceability and competition in the market, when it publishes a proposed Rule change for initial consultation.
- **Process to expedite Rule change proposals** – The ENA agrees that there should be an avenue for expediting a proposed Rule change, but considers that this process should not sacrifice the opportunity for parties to comment on a proposal. In this regard, the ENA considers that 14 days is not sufficient to allow industry or users to object to the decision of the AEMC to expedite a proposed Rule change, if that objection must be accompanied by well developed reasons on why an expedited process is not appropriate. A 14 day deadline may be appropriate if all that is required to trigger a full consultation process is an objection without reasons, or, with reasons to follow.

The ENA considers that the requirement that objections to an expedited Rule change be accompanied by reasons should be removed or that the timeframe to provide reasons be extended.

- **Working Groups and Public Hearings** – Allowing the AEMC discretion as to whether it will conduct Working Groups and Public Hearings may limit the ability of industry and users to understand the issues involved in a particular Rule change, and the likely approach of other parties. Under the proposed process, it would be possible for a proposed Rule change to move from a draft decision to a finalised rule (through an expedited process) without parties having been able to respond to a proposal with knowledge of the views of other parties.

This approach would be inconsistent with the MCE undertaking in the December 2003 Report to CoAG to strengthen industry consultation in Code changes.⁶ The ENA also notes that allowing the AEMC discretion on whether to conduct Working Groups is inconsistent with the statement contained in Appendix 2 of the MCE Report to COAG that “[t]he AEMC will be *required* to establish working groups to achieve maximum stakeholder agreement on contentious aspects of rule changes” (emphasis added).⁷

The ENA considers that the AEMC should be obliged to hold Working Groups and Public Hearings if they are requested by two or more interested parties. By holding these Working Groups and Hearings within the time granted for submissions, interested parties are able to comprehend to approach likely to be taken by other parties and therefore tailor submissions accordingly. This is also unlikely to extend the decision making process.

Stage 3

- **Pre-determination Hearings** – In line with the arguments outlined above, the ENA considers that the AEMC should be obliged to hold a Pre-Determination Hearing if requested to do so by two or more parties.

AEMC powers to amend proposed rule changes in light of consultations

The ENA seeks clarification on whether the AEMC will be able to amend a proposed Rule change in light of consultations. Allowing the AEMC this power is important to ensure that the collective knowledge and understanding of the industry can contribute to electricity Rule change development and that a proposed Rule change achieves its desired objectives and is appropriate. In allowing the AEMC this power, it is important that it be limited to amendments that can be directly related to the outcomes of the consultation process, to ensure that this power does not translate to an effective power of the AEMC to initiate or arbitrarily amend proposed Rule changes.

Clarification of Legislative and Regulatory Framework – Information Paper

Appeals

The ENA understands from the stakeholder consultation workshops that the statement on appeals outlined in the *Information Paper* relates only to the maintenance of current merit and judicial arrangements in the context of the abolition of the National Electricity Tribunal. The ENA considers the matter of the future application of merit appeal to energy regulatory decisions to be critical to the accountability and effectiveness of the arrangements in the future and looks forward to discussing these matters with officials at the appropriate time.

⁶ MCE *Report to the Council of Australian Governments – Reform of Energy Markets*, December 2003, p.5

⁷ MCE *Report to the Council of Australian Governments – Reform of Energy Markets*, December 2003, p.17

Information sharing and gathering

The ENA also understands from the stakeholder consultation workshops that, despite the text in the *Information Paper*, the AEMC will *not* have the power to require information from industry participants, in line with its role as a market developer and not a regulator. The ENA supports this approach as appropriate and again queries the information sharing provisions between the AER and AEMC in light of this decision.

Energy Networks Association
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