

4 February 2005



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By e-mail to [MCEMarketReform@industry.gov.au](mailto:MCEMarketReform@industry.gov.au)

Dear Sir or Madam

**Re: Consultation – National Electricity Rules**

The Energy Retailers Association of Australia (ERAA) is pleased to respond to the Standing Committee of Officials (SCO) consultation on the Exposure Draft of the National Electricity Rules (the Rules). The ERAA represents thirteen retailers that trade in the National Electricity Market (NEM) states and Tasmania.

***General comments***

The consultation on the Rules has been conducted in a short timeframe and without release of all relevant documents. The ERAA considers that, to have effective consultation on the new governance regime on the NEM, all relevant legislation, regulations and transitional provisions need to be available to participants since the Rules document contains many references to other processes (eg the review of access principles) and documents (eg regulations under the AEMC Act). It is also essential that, in setting timeframes, recognition needs to be given to the complexity of the issues being addressed.

The Rules and the associated consultation paper also refer to the MCE review into access arrangements stating that the outcomes of the review will be available at the time the rules are finalised and will be incorporated into the Rules. The ERAA is concerned that these statements indicate that no consultation will occur on the access arrangements and the changes to the Rules. It is essential that all changes are fully consulted and assessed by the market.

***Unnecessary changes***

The purposes of the proposed amendments as stated by the Information Paper which was released by the SCO are to:

- reflect policy decisions of the Ministerial Council on Energy (MCE);

- allocate NECA functions between the Australian Energy Market Commission (AEMC) and Australian Energy Regulator (AER); and
- convert the National Electricity Code (the Code) into a form suitable to be a statutory instrument.

The Rules documents have changes that are unnecessary to achieve these purposes. These changes are stated to be to improve wording, remove outdated clauses and correct manifest errors. The changes, however, make review of the Exposure Draft more complex by introducing “noise” which has to be filtered out by reviewers. The markup, particularly in chapter 6, was also deficient with some unchanged clauses marked as changed and some changed clauses not marked (eg cl 6.2.4(c)(2)).

### ***Potential to introduce errors by making unnecessary changes***

These unnecessary changes create the possibility of introducing errors into the Rules where the drafters do not fully understand the significance of the changes they have made. For example, changes to clauses 3.12A.2 and 3.12A.7(b1) were listed simply as “drafting changes” but significantly change the operation of mandatory restrictions payments.

Another example of an error introduced is the removal of a “not” in clause 6.4.3C, apparently to make the drafting clearer. The change has the effect of allowing a TNSP to “claw back” monies in future years that they were not entitled to in a particular year.

Changes to Schedule 6.8 (clauses S6.8.1 and S6.8.2) incorrectly remove obligations on generators to pay for usage charges for transmission assets. The purported reason for the change is that it “represents the current situation”. While it may represent transmission network service providers current actions, the change ignores obligations currently in clause 5.5 of the Code and new obligations included in the Code after the NECA review into Transmission and Distribution Pricing to require beneficiaries of investments to pay a share of the cost. Only the jurisdictional moratorium on transmission issues has prevented these changes from being finalised<sup>1</sup>.

### ***Removal of necessary reviews***

Throughout the Exposure Draft reviews that were contained in the Code have been deleted. The ERAA considers that these reviews are important where they relate to matters such as ancillary services, beneficiaries pays and information provision. It is essential that these reviews be completed<sup>2</sup> where they verify that earlier Code changes are achieving their desired purposes or where they complete earlier changes. The ERAA considers that a mandate for these reviews should be retained in the Rules. To the extent that the dates for the reviews have passed or would

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<sup>1</sup> The ERAA wrote to jurisdictions seeking this matter be progressed but received no response. The final review into allocation of costs to beneficiaries was substantially complete (and NECA had forwarded its report to the jurisdictions) when work on transmission issues was halted.

<sup>2</sup> Some reviews, like the beneficiaries pays allocation methodology and the review into ancillary services, are essentially complete.

now be difficult because of the delay introduced by the MCE process, the dates should be adjusted.

### ***Changes to obligations and rights of participants***

The documents accompanying the Exposure Draft of the National Electricity Law (the Law) and the draft of the Rules state that the changes reflected in these documents are not to substantially change obligations or rights of participants. However, the ERAA believes that in some instances the changes do substantially change the obligations or rights of participants. This is particularly so in the case of provisions relating to enforcement and use of information.

For example, Clause 8.5.4 of the Code, which has been deleted in the Rules, contains a process that NECA must follow in performing its enforcement functions. The transfer of this role to the AER provides no basis for deleting this clause, fundamentally changing the rights of participants. The ERAA considers that that this clause should be reinstated.

Provisions relating to confidentiality of participant information (cls 8.6.1, 8.6.4 & 8.7.3) have been changed to remove protection of participant information. While these changes may be the response to a policy decision relating to information sharing, the ERAA considers that it does not reflect the commitment to not substantially alter participants' rights. The ERAA recommends that the SCO reconsider their stance and reinstate these protections.

### ***Separation of powers and allocation of NECA functions between the AER and AEMC***

While generally, the ERAA agrees with the proposed allocation of functions and powers, in some cases, the allocation does not appear to reflect the policy decision to separate rule making from regulation and enforcement. The ERAA has identified cases where NEMMCO has effectively retained or been given rule making functions (for example 7.2.8(a)), AEMC enforcement powers (for example cl 3.15.10) and the AER rule making functions (for example cl 2.5.1). The ERAA considers that all rule making functions, including developing guidelines and procedures that have substantive policy implications (such as where they further define powers of relevant bodies), should be made by the AEMC. The AER and NEMMCO should only have powers to define operations, processes or procedures in relation to those guidelines.

At the same time, the AEMC should not have any operational function that requires interpreting the rules that it makes. Thus we believe such functions as determining compensation to participants (3.14.6) should reside with AER.

Clarity regarding this split would be beneficial to facilitate appropriate staffing of the two bodies. It would appear that the skills required to perform AER's functions will necessarily be broader than those of economic regulation. For example, the AER will assess the software used by TNSPs (cls 3.17.1 & 6.8.1) and make time-critical operational judgements on the application of spot market price caps (3.14.2).

## ***Separation of AER and ACCC***

ERAA understands the MCE's policy is such that AER and ACCC maintain an effective separation. Thus it queries why the reasoning for removal of clause 8.7.5, which would have required the AER (in place of NECA) to report compliance with the Code to the ACCC, was that the AER is a constituent part of the ACCC. In any case, such a report to the market would still seem a good idea.

## ***A way forward***

A table which sets out more detailed comments is attached. Given the time available, the ERAA can not be confident that all issues with the Exposure Draft have been identified. The ERAA therefore strongly recommends to the SCO that:

1. all changes not necessary to achieve the stated purposes be removed except those of the most superficial nature;
2. the remaining changes be checked by a working group of participants to verify that they are both necessary and correct; and
3. the changes removed from this process be referred to the Rule change process administered by the AEMC.

Steps one and two of this process could be done quite quickly using a representative group of participants, which could be established reasonably quickly. The third step would follow the establishment of the AEMC but could still be quite fast for non-controversial changes under the new Rules change process.

If you have any queries on the content of this submission, please contact me or Diane Campbell at the ERAA Secretariat on (02) 9369 4296.

Yours sincerely,

*Signed, Deane Russell*

Deane Russell  
Executive Director