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Manager, MCE Secretariat
Department of Resources, Energy and Tourism
GPO Box 1564
CANBERRA ACT 2601

By Email: MCE@ret.gov.au

Australian Energy Market Operator Establishment – Legislative Framework: Statement of Proposed Approach

The Energy Supply Association of Australia (esaa) welcomes the opportunity to comment on the Ministerial Council on Energy (MCE) Implementation Steering Committee's (ISC) proposed statement of approach for the legislative framework to establish the Australian Energy Market Operator (AEMO).

esaa is the peak industry body for the stationary energy sector in Australia and represents the policy positions of the Chief Executives of over 40 electricity and downstream natural gas businesses. These businesses own and operate more than \$120 billion in assets, employ 49,000 people and contribute \$14.5 billion directly to the nation's Gross Domestic Product.

esaa supports the ISC's proposed approach for the establishment of a single national legislative framework for the AEMO. However, esaa has significant concerns with the scope and application of the information gathering powers and confidentiality provisions to apply to the AEMO. As a broad observation, such powers are modelled on provisions that currently apply to the Australian Energy Regulator (AER) and their use has the potential to be highly intrusive without careful consideration of their application, particularly to the competitive elements of the energy supply sector.

Information Gathering Powers

The ISC proposes that a single set of broad powers may be appropriate for the AEMO in undertaking its functions. The model proposed is based on Regulatory Information Instruments currently used by the AER in the context of the economic regulation of network monopolies. The AEMO would be able to issue similar Market Information Orders and Notices (MIO/MIN), primarily in undertaking its National Transmission Planner (NTP) functions and developing the Gas Statement of Opportunities (GSOO).

The Australian Energy Market Commission (AEMC) made recommendations in its final National Transmission Planner (NTP) report that information instruments should apply to the NTP functions but only to seeking information from Transmission Network Service Providers (TNSPs). However, ISC's view is that MIO/MIN's should apply more widely to generators, given the information requirements for the national transmission plan. Further, ISC proposes that the provisions be introduced to 'allow for rules to be made for the use of MIO's and MIN's in other instances.'

esaa has significant concerns with this approach. Regulatory information instruments have proven to be highly intrusive and onerous measures in the context of network economic regulation. esaa network member businesses have reported having to allocate substantial resources to comply with information requests. The need for such instruments was heavily contested by industry prior to their introduction and esaa understands that the policy intent at the time was that they would only apply to network regulation. esaa notes that, coupled with recent proposals put forward in the National Energy Consumer Framework (NECF), information instruments are currently proposed to apply in some form to the entire energy supply sector.

Given the intrusive nature of such instruments, esaa proposes that their application should be considered as a last resort measure and constrained only to obtaining the minimum information required to undertake a specified purpose. The Rules should be explicit as to the specific circumstances in which MIO/MINs are to be applied and the types of information that can be requested.

esaa notes that, in terms of the extension of such information powers to generators, the findings of the AEMC's Final NTP report are instructive. The AEMC's strong view was that such powers should only apply to TNSPs. This was justified on the grounds that the information already provided to NEMMCO by non-TNSP participants under existing provisions was sufficient for it to undertake its system operation functions. In addition, as TNSPs already have powers under the Rules to obtain information as part of their planning functions, it was considered best practice for the NTP to obtain such information from TNSPs, rather than impose additional costs on market participants to comply with separate information processes.

In relation to the preparation of the GSOO, esaa notes that the AEMO will have access to a wide range of information via sources such as the Gas Bulletin Board and Short Term Trading Market once established. Relevant information will also be publicly reported under the National Energy and Greenhouse Reporting Scheme. esaa therefore questions the need for information powers to apply to the AEMO's GSOO functions without further analysis of whether such information is already available and required. An industry consultation process is currently underway to determine the appropriate scope of the GSOO which could address this issue.

esaa's preferred approach is that the proposed MIO/MIN framework should only apply in relation to the NTP function consistent with the recommendations of the AEMC's final NTP report. The use of information instruments should not be able to be easily expanded to areas outside of their original intent without robust policy

justification and appropriate consultation with affected entities. Their use should also be subject to a dispute resolution process and access to court proceedings given the civil and criminal penalties associated with their application.

Confidentiality Arrangements

ISC proposes that the confidentiality provisions for the AEMO should be modeled on those currently applying to the AER under the Trade Practices Act (TPA). A similar provision to that in s 44AAF(3) of the TPA is proposed that would 'allow a free exchange of confidential information between AEMO, AER, the AEMC, the ERA, ESPIC, relevant jurisdictional regulators, relevant energy industry ombudsman and any other person prescribed by regulation.'

Applying S 44AAF of the TPA would also mean there would be no basis for limiting the use for which AEMO may put information. Authorised persons under the law, would be permitted to use the disclosed information for any purpose connected with their functions or powers.

esaa has serious concerns about such an approach. As a system operator, it is unclear why the AEMO would be subject to similar provisions that apply to an economic regulator such as the AER. Further, both the NEL and NGL contain existing provisions covering the confidentiality of information. The need for these powers to be expanded has not been sufficiently demonstrated.

The AEMO will have access to a range of commercially sensitive information relevant to its functions as both system operator and NTP. Under the proposed provisions, such information could be disclosed to external agencies. As a general principle, the AEMO should only be able to use information for the purpose for which it was provided, that is in enabling it to undertake its statutory role and functions. This will provide market participants with confidence that commercially sensitive information will be protected and not disclosed for any purposes other than intended.

Accountability Framework

ISC proposes that the AEMO should be subject to the existing NEL and NGL compliance and dispute resolution frameworks currently applied by the AER. In addition, ISC proposes the frameworks should be supplemented by the additional powers proposed for the AER under the NECF.

esaa supports the application of the current NEL and NGL compliance and dispute resolution framework to the AEMO. However, the enhanced regulatory powers proposed under the NECF have not been agreed to and are still subject to consideration by the MCE Standing Committee of Officials.

esaa raised concerns in its response to the NECF about the willingness to expand the compliance and enforcement framework without a thorough assessment of whether such powers are warranted and whether the benefits would outweigh the

obvious costs. esaa's strong view is that any enhancement to the current regulatory compliance framework should be developed in response to a demonstrated need and in direct consultation with affected entities.

Cost Efficiency

esaa supports the principles that participant fees should be set in such a way as to avoid cross subsidies across industry, be competitively neutral and foster economically efficient outcomes in the National Electricity Market. However, the framework makes no mention of any requirements for the AEMO's costs to be efficient. esaa considers that an efficiency objective should be included in the AEMO Statement of Corporate Intent and that AEMO's budget should be subject to consultation.

Retaining the cost recovery frameworks of the existing market operators for up to three years is an appropriate measure to ensure a smooth transition to the new arrangements. esaa also supports the longer term intention that the fee recovery structure will be subject to consultative and dispute resolution processes.

ISC proposes setting fees on a rolling 3 to 5 year basis to ensure that there are no cost shocks to participants. The introduction of the Carbon Pollution Reduction Scheme by 2010 could have material impacts on energy market participation which may require more frequent evaluation of AEMO's fee structure. esaa considers that affording the AEMO Board the discretion to determine the period over which to set fees is a more appropriate and flexible measure to avoid unnecessary cost shocks to market participants.

Anticipating Budget Requirements

ISC proposed that the AEMO should have powers to anticipate budget requirements for functions associated with energy market reform and declare an energy market reform project. esaa considers that the existing provisions for NEMMCO which allow it to pass through costs associated with a major development to the market are sufficient and that additional anticipatory powers are unnecessary.

Accurately anticipating energy market reform projects and their associated costs is likely to be an inherently uncertain process and may impose unnecessary costs on market participants. Retaining the current mechanisms will also preserve the statutory role and function of the AEMO as system operator rather than encroaching into policy development.

Cost Allocation

esaa supports ISC's proposal that:

'Budgeted revenue must take into account and separately identify projected revenue requirements for AEMO's identified lines of business including in relation to its proposed new functions such as the NTP function.

Costs attributable to AEMO's functions will be allocated where possible and recovered through the fees for each function. Shared overheads will be budgeted in accordance with the relevant share of each function to the whole.'

esaa considers that as a general principle, Governments should be required to fund the costs associated with any request or proposal to the AEMO where such costs are considered significant or material.

Gas retail market functions

esaa supports ISC's 'minimalist change' approach to the transfer of the existing gas retail market operator functions. This will mean, in the short-term, the existing jurisdictional rules and procedures will continue to apply but will be incorporated into the national framework as part of the National Gas Rules (NGR). Consistency across the NGR will then be sought over time.

However, the initial transfer will require some judgement as to the appropriate demarcation between rules and procedures in the national framework. esaa acknowledges that reflecting the current balance of the various jurisdictional arrangements in the national framework is a challenging task that will require close consultation with existing market operators and participants. esaa understands that the MCE Legal Working Group has established such a process and that many esaa members are providing input via the relevant gas market operators in the jurisdictions within which they operate.

esaa considers that rather than seeking to establish a single national procedure change committee during the initial transfer period, the existing procedure change bodies in each jurisdiction should be retained. Such entities are well established with appropriate levels of expertise and industry experience. Alternatively, a national procedure change committee could be established comprising the existing jurisdictional bodies as sub-committees. However, over time as greater consistency across the national framework emerges, a single body should be implemented as a priority.

Conclusion

esaa commends the ISC for the work undertaken to date to develop the legislative framework for the implementation of the AEMO. Further consideration should be given to the concerns raised in relation to the proposed information gathering powers and confidentiality arrangements to apply to the AEMO. Such powers should only be expanded where a clear need to do so can be demonstrated to avoid adding any unnecessary costs to the energy supply industry.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brad Page', with a stylized flourish at the end.

Brad Page
Chief Executive Officer