

7 April 2004



Streamlining of the Code Change Process
C/- MCE Market Reform
Department of Industry, Tourism and Resources
GPO Box 9839
CANBERRA ACT 2601

By e-mail to MCEMarketReform@industry.gov.au

Our Ref: BN008/0849/0025

Dear Sir or Madam,

COMMENTS UPON MCE DISCUSSION PAPER "STREAMLINING OF THE CODE CHANGE PROCESS"

Ergon Energy Pty Ltd ("Ergon Energy") welcomes the opportunity to comment upon the "Streamlining of the Code Change Process" discussion paper ("Discussion Paper") recently released by the Ministerial Council on Energy's Standing Committee of Officials ("SCO").

Ergon Energy generally supports the proposed code change process amendments as they have the potential to streamline the existing process by avoiding duplication through reducing the number of code changes that require authorisation by the ACCC, subject to the specific concerns we outline below.

1. Role of the ACCC in the Code Change Proposal

The proposal seeks to ensure that the ACCC is only required to authorise code changes where there are competition or access issues. Ergon Energy is however concerned that this will only occur in practice where:

- The ACCC does in fact rely on the assessment of the AEMC that the code change has no competition or access issues; and
- The ACCC does in fact comply with the intention of the proposal and will not seek to intervene in the code change process where there are no competition or access issues.

Ergon Energy considers that the concerns expressed above are legitimate, despite the wording of the Discussion Paper and representations made by SCO officials at the industry forum where it was confirmed that the intention of the proposal is that the ACCC will only intervene where there are competition or access issues. Under the existing code change arrangements the ACCC can decide that a Code change does not require authorisation, however it has rarely (if ever) chosen not to authorise a code change. The success of this code change proposal will be dependent on the ACCC changing its current view on its role in the code change process. In this regard, Ergon Energy also considers that the wording of the Memorandum of Understanding ("MOU") between the ACCC, AER and the AEMC may influence the behaviour of the ACCC within the proposed code change process. Increased transparency of the MOU, through publication for consultation would assist industry to

understand the agreements between the parties and their influence on the code change process.

2. The Code Change Process Generally

2.1 Initiation of the Code Change Process

We note that there is in effect no limitation in the code change proposal with respect to who may initiate a code change, and no requirement for a minimum number of proponents to endorse the code change prior to its acceptance for consideration by the AEMC. This is a clear change to the current regime. Ergon Energy queries the need for such a broad definition when it could be expected that if a proposal is sound a number of market participants would in fact advocate the proposal. Indeed we consider that this provides a sound minimum threshold and would have the benefit of ensuring that code changes do not get bogged down with multiple minor or spurious changes.

The Discussion Paper appears to be unclear with respect to whether the AER can initiate code change proposals. Whilst the AER is not listed as an “energy market institution” in paragraph 3.1 it also is not clearly excluded. We seek clarification on this issue and consider that the AER should be specifically excluded from initiating code changes.

In accordance with the proposal, the AEMC will have the discretion to fast track code changes of a minor or administrative nature, or where a code change is required to correct a manifest error. We recommend that “minor or administrative error” needs to be defined to ensure that this discretion is exercised appropriately and to exclude this route from being used to make changes that have policy change implications.

2.2 Minimum Criteria for Lodging a Code Change Proposal

Criteria 4 provides that the “proposal fails to demonstrate a prima facie net benefit”. “Net Benefit” is only vaguely defined in the Discussion Paper as being “based on the achievement of the market objectives, including the long term interests of consumers”. It is our view that this test needs to be more precisely defined to ensure that the AEMC can appropriately apply this test. The market has seen first hand from the Regulatory Test debates that open-ended definitions of net benefit can lead to dispute about how such benefits are calculated. We suggest that further consultation is required on this matter to determine what categories of code change require this test to be met.

3. Consultation Process

The discussion paper only considers the issues at a high level. Ergon Energy is of the firm view that there should be further consultation with industry once the code change process has been drafted. Ergon Energy’s concern is that until the actual draft wording is prepared it is very difficult to assess the detail of the proposed changes. Through discussion with jurisdictional representatives, Ergon Energy understands that one possible mechanism for implementing the revised code change process would be through passage of code changes via Regulation. This process raises concerns given the risk that participants may not see the wording of the changes prior to gazettal. It also sets a dangerous precedent to change the Code in this way, particularly as we consider this a policy matter rather than purely

administrative. Whilst we recognise that the SCO is operating under tight timeframes, we consider it imperative that there is further industry consultation on the detail of this proposal.

We would be pleased to discuss the comments contained in this submission if required. In this regard, please do not hesitate to contact me on 07 3228 8134 or Michael Callow on 07 3228 8259.

Yours sincerely

Rebecca Pickering
Manager Regulation