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NE Rule Change Process
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Department of Industry, Tourism and Resources
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Energy Market Reform

Proposed National Electricity Rule Change Process

Thank you for the opportunity to comment on the August 2004 consultation paper on the proposed national electricity rule change process. esaa is appreciative of this, along with the various information sessions which have been held for associations and wider interested parties.

Overall, esaa is supportive of the proposed national electricity rule change process. We endorse the overall objective of streamlining the National Electricity Code (NE Code) change process to avoid duplication, together with clarity of authorisation issues under the Trade Practices Act (TPA). As esaa has previously put forward, we believe that an efficient, clear and timely code change process is essential to reduce regulatory risk in the industry, which in turn is a key component in attracting the investment our sector will require in the years ahead.

Consequently esaa supports amending the National Electricity Law (NEL) so that the NE Code is clearly a set of statutory rules made under the NEL. We feel that the change in status of the NE Code to NE Rules will go a significant way towards clarifying the roles of the ACCC and AEMC respectively. This was one of the key concerns of an earlier esaa submission on this issue, dated 7 April 2004.

esaa's support for amending the NEL is on the proviso that, under the new Rules, the risk profile for participants in the market will not be materially changed from their existing TPA risk profile under the currently authorised National Electricity Code. esaa has reviewed the "Hutley advice" provided to stakeholders and is aware that some other parties believe it to be open to question. esaa urges officials to ensure the robustness of the Hutley advice, perhaps by obtaining a second opinion.

Whilst esaa is supportive of the overall direction and objectives of these amendments, there are some areas of both policy and detail where the Association remains concerned, and believes that significant improvements can be made. These are detailed below.

1. Net benefits test

The consultation paper states that, in making a decision on a Rule Change Proposal, the AEMC will apply a net benefit test based on the achievement of the Market Objectives, and that the assessment process for the net benefit test will be through a “with or without” analysis. However, apart from this, there are no details specified as to how the net benefits test will be carried out.

It would appear from the consultation paper that the AEMC would have significant discretion in carrying out a net benefits test. esaa would counsel against this and believes that a clear and robust assessment process should be laid out. The net benefits test is at the core of AEMC decisions and as such should be transparent and clearly defined. A discretionary net benefits test such as that currently proposed has the potential for inconsistencies to emerge, and esaa would thus propose limiting the AEMC’s discretion in this area by defining more clearly the process to be followed.

2. AEMC grounds for rejecting proposals

Paragraph 7.1.6 of the consultation paper enables the AEMC to reject an application for a Rule Change Proposal

- a. where the application is misconceived or lacking in substance or
- b. where the proposal is not adequately developed.”

Whilst esaa understands that these clauses are in place to prevent “frivolous” rule change proposals, they also provide the AEMC with significant discretion to reject a valid proposal. esaa proposes that this concern be resolved by adding a further clause which indicates that regardless of sub-clauses (a) and (b), should a code change proposal be sponsored by five or more stakeholders of standing, then the AEMC is obliged to follow the full consultation process.

3. ACCC approval on access related changes

esaa remains concerned that rule changes which affect the third party access regime are still required to be submitted to the ACCC for approval under Part IIIA of the TPA. Further, the ACCC would still have the discretion of undertaking its own consultation process, if it so desired.

esaa understands via the SCO information sessions that the exact powers of the ACCC under these circumstances are considered a “grey” area. esaa believes that access related rule change proposals should be treated in the same manner as other rule change proposals and remove the ACCC from the approval process. If necessary, this should be achieved by amending the relevant legislation. To do otherwise leaves in place a two-step rule change process for access related changes, with the potential for duplicative and lengthy consultation.

4. Sharing of information

The August 2004 information paper on the legislative and regulatory framework maintains the previously-stated MCE position empowering each of the AEMC, AER and ACCC to share information with each of the other regulatory bodies where it believes that information is relevant to the functions of those other bodies

(in which case those other bodies may use that information for any purpose connected with their functions).

esaa repeats its concerns expressed in previous submissions on this matter, which relate to information being used only for the purpose for which it was intended. In the course of their day-to-day business, regulators will be provided with access to significant detail on the inner workings of energy supply companies. We believe that confidential information provided to a particular regulator for a specific purpose should be used only for that purpose, and should not be available for use any more widely. Any proposal to share information should only occur with the express permission of the affected companies.

In conclusion, esaa is pleased to see the movement towards streamlining the code change process and greater clarity of authorisation issues under the TPA. We believe however, that there are still improvements to be made, which relate to limiting the discretion of the AEMC, making the net-benefits process more robust, clarifying the role of the ACCC with respect to access related changes along with regulators being obliged to use information only for the purpose for which it was intended, and not being able to share it with their regulatory peers.

The establishment of an efficient, timely and robust code change process will be a significant improvement on the current regulatory regime, and plays an important role in reducing regulatory risk in the NEM.

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