

# **PROPOSED NATIONAL ELECTRICITY RULE CHANGE PROCESS**

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## **CONSULTATION PAPER**

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**Ministerial Council on Energy  
Standing Committee of Officials**

**AUGUST 2004**

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**Energy Market Reform**  
**Proposed National Electricity Rule Change Process**

The Ministerial Council on Energy Standing Committee of Officials (**SCO**) is issuing this paper as part of its process for providing information on and consulting in relation to the Rule Change Process that is being proposed for the National Electricity Market.

The consultation process will comprise information sessions from 16 to 20 August 2004 to be held in Brisbane, Sydney, Melbourne, Adelaide and Hobart as advised in Bulletin No. 18. These sessions will provide an opportunity for stakeholders to ask questions and raise issues.

Submissions on the Proposed National Electricity Rule Change Process should be received by Friday 27 August 2004 and addressed to:

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c/- MCE Market Reform  
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Please direct any enquiries regarding the consultation process to Neville Henderson, on (03) 8603 3765.

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## ENERGY MARKET REFORM

### PROPOSED NE RULE CHANGE PROCESS

#### 1. INTRODUCTION

In December 2003 the Ministerial Council on Energy (**MCE**) announced a program for major reforms to the Australian energy market to be implemented in the period 2004 to 2006.<sup>1</sup> This reform package, which was subsequently endorsed by the Council of Australian Governments (**COAG**), is intended to strengthen competition and encourage investment in the Australian energy market.

A critical element of the endorsed reform package included decisions relating to the process of making changes to the National Electricity Code (**NE Code**).

1. The Australian Competition and Consumer Commission (**ACCC**) to retain responsibility for competition regulation under Part IV of the Trade Practices Act (**TPA**), for competition-related NE Code change authorisations under Part VII, and for industry access NE Code approvals under Part IIIA.
2. The new regulatory arrangements to provide for consultation and cooperation between the Australian Energy Market Commission (**AEMC**), the Australian Energy Regulator (**AER**) and ACCC. The NE Code change and authorisation process to be streamlined, to avoid duplication. AEMC and AER to have specific consultation obligations. End-user and industry consultation in developing NE Code changes to be strengthened.
3. Agreement in-principle to the development of a national approach to energy access under the TPA, covering electricity and gas transmission and distribution, to be considered by the MCE in 2004. Streamlined procedures for ACCC approvals and acceptance of access-related NE Code changes under Part IIIA of the TPA to be developed and agreed by the MCE.
4. The AEMC will not itself be able to initiate NE Code changes other than of a minor or administrative nature.

In March 2004, the Ministerial Council on Energy Standing Committee of Officials (**SCO**) agreed on a proposed model for streamlining the NE Code change process as a basis for undertaking consultation with industry. The proposed model was outlined in the Discussion Paper - Streamlining of the Code Change Process, issued in March which was the subject of public presentations on 23 and 24 March 2004.

A number of responses were received from industry and interested parties on the proposed model. A key concern expressed in the responses related to the NE Code authorisation issue.

The SCO has considered these responses and has revised the proposed code change model with the objectives of addressing the concerns about authorisation of the NE Code, maintaining a streamlined code change process and being consistent with the revised electricity market legislative and regulatory framework which has been developed over recent months (this framework is the subject of a separate information paper – Legislative and Regulatory Framework).

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<sup>1</sup> Ministerial Council on Energy Communiqué, 11 December 2003.

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This consultation paper on the Proposed NE Rule Change Process is being provided as a basis for industry and interested parties to consider and provide feedback on the revised model. It will also provide background to proposed changes to the National Electricity Law (**NEL**).

The paper is structured as follows:

- **Proposal for NE Code Change Process (March 2004)** – describes the NE Code Change Process as proposed by the SCO in March 2004 together with key concerns raised by industry and interested parties.
- **Authorisation Issues with the NE Code** – discusses the rationale for seeking authorisation by the ACCC, of the NE Code and the legal status of the NE Code.
- **Potential Options to Streamline and Manage TPA Risk** – considers options to address industry and stakeholder concerns and a preferred approach (based on making the NE Code as a set of “statutory rules” under the NEL – the NE Code would become the “NE Rules”).
- **Functions of the AEMC in Rule Making** – outlines the AEMC’s market development and rule making functions.
- **Rule Making Criteria** – covers the net benefit test, market objectives and MCE Statement of Policy Principles to be considered by the AEMC in making a Rule.
- **The Proposed Rule Change Process** – describes the stages in the process covering initiation, consultation on and making a determination on a Rule Change Proposal.
- **Other Matters** – covers the removal of the concept of protected provisions and how jurisdictional and participant rule derogations are to be initiated and processed.

The process for making changes to the Gas Code will be considered by the MCE in its response to the Productivity Commission review of the National Gas Access Regime. Consideration will be given to the extent to which the NE Rule Change Process for electricity could be applied to Gas.

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## **2. PROPOSAL FOR NE CODE CHANGE PROCESS (MARCH 2004)**

### **2.1 Summary of NE Code Change Model Proposed in March 2004**

One of the key elements of the proposed model was to replace the current processes in which the National Electricity Code Administrator (*NECA*), as NE Code administrator, approves a NE Code change, and the ACCC carrying out its functions under the TPA, then carries out a further process for authorisation/access approval. The intention of the proposed model was to eliminate the current duplication in the NE Code change process.

The proposed model required the newly created AEMC to follow a transparent procedure with opportunity for stakeholder consultation prior to and after the AEMC had issued a draft determination in respect of the proposed NE Code change. The model provided for early referral of the proposed NE Code change for informal consideration by the ACCC on competition and access issues and by the AER on enforcement and regulatory issues.

After arriving at a final determination, the AEMC would have discretion to formally refer competition related NE Code changes (those which might involve a breach of Part IV of the TPA) to the ACCC for authorisation under Part VII of the TPA. Access related NE Code changes (to any chapter of the NE Code except for possibly chapter 3 – the Market Rules) would need to be submitted to the ACCC for approval under Part IIIA of the TPA.

It is generally recognised that few of the proposed NE Code changes made since market commencement in December 1998 have raised competition issues and, except for the current requirements under the NE Code to refer changes to the ACCC for authorisation, relatively few would have needed to be referred to the ACCC for authorisation.

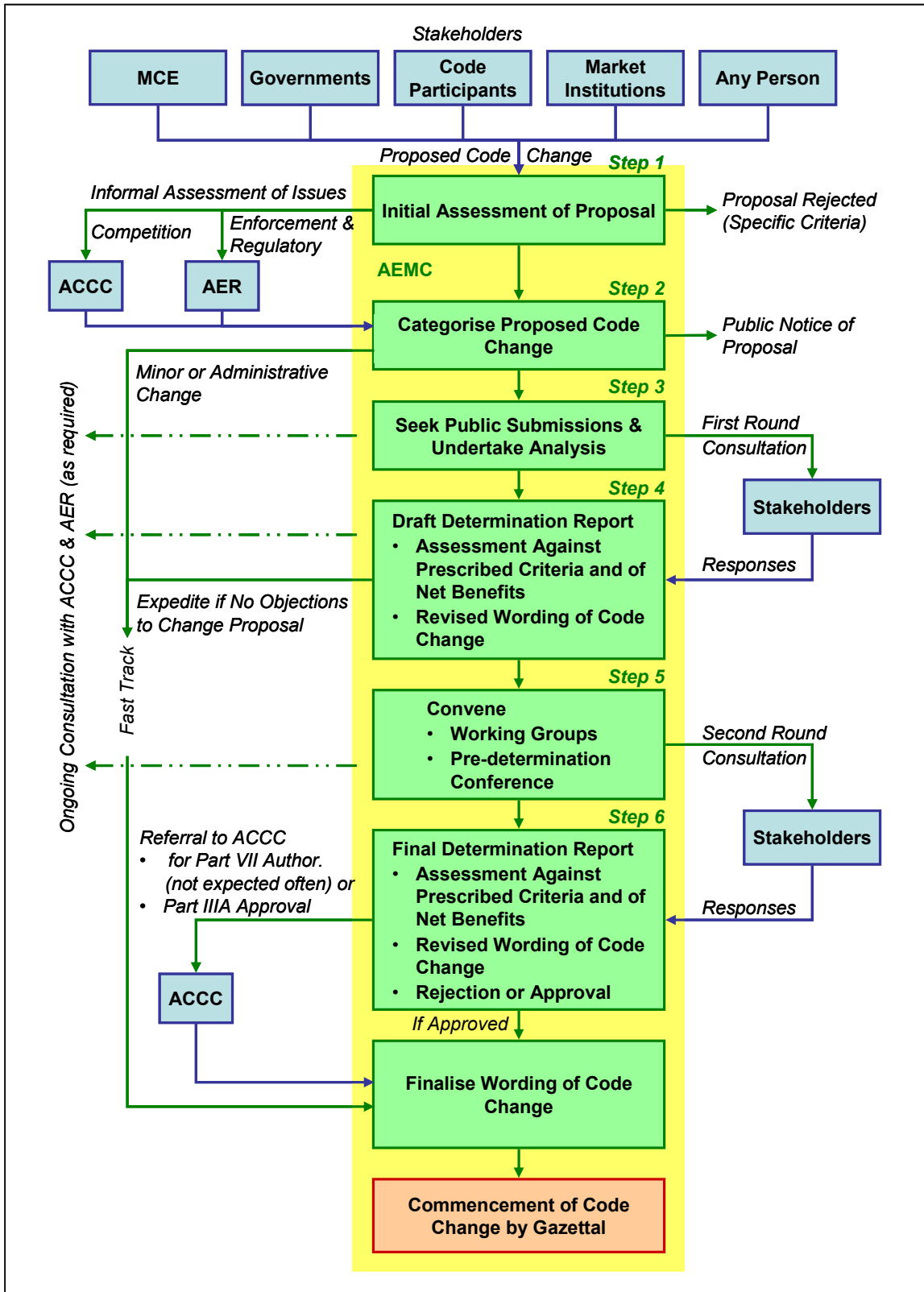
The proposed model included proposals to amend the TPA to enable the ACCC to rely on consultations carried out by the AEMC. These amendments to the TPA were passed by the Commonwealth Parliament in June 2004.

The proposed Code change process (as at March 2004) is shown schematically in Figure 1.

Consistent with the MCE policy position arrived at in December 2003, it was proposed that the decision making of the AEMC on a proposed NE Code change will be subject to judicial review.

The referral of the AEMC's determination of a NE Code change to the ACCC would be for authorisation under Part VII for competition related changes and for acceptance under Part IIIA for access related changes. The expectation was that generally, proposed NE Code changes would not as a matter of routine be referred to the ACCC for authorisation as is the current practice under the current NE Code. The ACCC, in authorising particular provisions that might involve a breach of Part IV, would *have regard* to the NE Code as a whole in applying the net public benefit test without authorising the NE Code as a whole.

Figure 1 – Proposed Code Change Process (as at March 2004)



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## **2.2 Responses to Consultation on Proposed Process**

The key concern of industry raised in their responses to consultation on the proposed model related to the NE Code authorisation issue. Many respondents raised the concern that the proposed process, where only certain provisions of the NE Code are authorised and authorisation of a proposed NE Code change is discretionary, would not protect participants.

Participants were concerned that they would be open to the risk of prosecution for contravention of Part IV of the TPA and therefore that the proposed NE Code change process would not provide industry with the level of regulatory certainty they perceive as necessary to invest and operate effectively in the National Electricity Market (*NEM*).

## **2.3 Other Concerns**

Other key issues of concern to industry in relation to the proposed model can be summarised as follows:

### **2.3.1 ACCC role in Market Development**

There was doubt that the proposed process would prevent the ACCC from engaging in market development, when considering an application for authorisation/acceptance of a proposed NE Code change.

### **2.3.2 AEMC role as developer of the Market Rules**

There was support for a separation of responsibilities where rule development involves complex market and system issues. Various submissions argued that rule development could rest with the National Electricity Market Management Company (*NEMMCO*).

### **2.3.3 Industry involvement in NE Code Change Process**

There was a general view that the preliminary assessment stage of the NE Code change process was unclear. Protocols were suggested, with further restrictions on ACCC/AER involvement.

Some submissions argued that under the proposed NE Code change process, direct participant involvement was not adequately provided for, with the exclusion of industry from the preliminary assessment stage, lack of avenues of industry appeal against AEMC rejections, and no explicit inclusion of industry bodies as eligible to initiate NE Code change.

There was broad criticism that industry has not been granted opportunity to comment on the stated objectives ('objectives clause') of the AEMC.

There was also some opposition to "any person" being able to initiate a NE Code change, including the suggestion that only NE Code participants should be able to initiate NE Code changes.

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### 3. AUTHORISATION ISSUES WITH THE NE CODE

The NE Code was originally conceived as code of conduct (a set of “arrangements”) between NE Code participants in the electricity industry. As such, certain provisions of the NE Code potentially gave rise to breaches of Part IV of the TPA which deals with restrictive trade practices. The areas of concern related to anti-competitive arrangements (s.45), price fixing (s.45A), exclusionary arrangements (s.4D) and exclusive dealing (s. 47).

Part VII of the TPA allows applications to be made to the ACCC by corporations (or by another body on behalf of a corporation) to engage in conduct which would involve a breach or possible breach of certain provisions of Part IV of the TPA (not including misuse of market power: s. 46). The ACCC is empowered to grant authorisation where it determines that the anti-competitive conduct will deliver benefits to the public that outweigh any anti-competitive detriment.

Since 1997, the NE Code and amendments to the NE Code have been submitted to the ACCC for authorisation. NECA sought authorisation from the ACCC for the *whole* NE Code in the first instance and its practice has since been to seek authorisation from the ACCC for all subsequent amendments to the Code on behalf of current and future NE Code participants. These authorisations have been understood by industry to provide assurance to participants that they will not breach Part IV of the TPA simply by engaging in conduct expressly required or permitted by the NE Code. These authorisations do not extend to conduct that may be associated with, but not specifically covered in the NE Code. Participants can seek separate authorisations for any conduct they think may breach Part IV.

However there is no legal reason why the ACCC, when considering whether to authorise a proposed provision of the NE Code that might involve a breach of Part IV of the TPA, needs to authorise the NE Code as a whole. Moreover such an approach, under which the ACCC would only grant authorisation for those provisions that were considered to potentially breach Part IV, would not be inconsistent with assessing the “net public benefit” of such a provision in the context of the net public benefit arising from the NE Code as a whole. Indeed, the ACCC has found that, while the NE Code contains anti-competitive arrangements, the public benefit deriving from the arrangements under the NE Code as a whole helps outweigh any such detriment. This was the basis of the NE Code change process proposed in March.

Since March, SCO has reconsidered the authorisation question and sought to address duplication in the Code Change process by removing the core element on which Part IV TPA operates: consensual arrangements.

It is worth noting that even before NEM commencement in December 1998, it was clear that an exclusively consensual model would not be sufficiently robust to form the basis for the NEM going forward. Many NE Code provisions were expressed in the language of mandatory obligations, and in the years since NEM commencement, NECA, as Code administrator, has adopted a strategy for drafting amending NE Code provisions using a “rule-based” approach.

One of the underlying problems since NEM commencement has been the lack of clarity about the legal status of the NE Code. Many industry legal advisers have taken the view that the NE Code is a “statutory instrument” within the meaning of the NEL, because it is an instrument “made under or in force under or for the purposes of the NEL”. On this view, the current practice of seeking ACCC authorisation for NE Code changes is arguably not necessary.

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Other legal advice is to the effect that the status of the NE Code is not clear and that it remains, at least in part, no more than an “industry arrangement” and NEM participants conduct their affairs by reference to that arrangement. On this view such arrangements, in the absence of authorisation, potentially expose participants to prosecution under Part IV.

The Ministerial approval of the NE Code under the NEL as a code of conduct has not in itself been sufficient for some industry participants to put beyond doubt the legal status of the NE Code as a statutory instrument which mandates obligations as a matter of compliance rather than facilitating arrangements that are a matter of consensus.

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## **4. POTENTIAL OPTIONS TO STREAMLINE AND MANAGE TPA RISK**

Since the March consultation, SCO has further considered the issues of the status of the NE Code, the need for authorisation and the objective to streamline the NE Code change process. In this process SCO has considered a number of approaches which had the potential to address these issues. These approaches were distilled to three options that could potentially satisfy the MCE reform objectives.

These three options, which include a preferred option, are discussed below.

### **4.1 Option 1 - Authorisation of All Code Changes**

This option is similar to the current arrangements where the AEMC would seek authorisation of all NE Code change proposals it has approved. This option accepts a view of “indivisibility” of the NE Code in relation to the application of the net public benefits test.

Under this option streamlining gains for the NE Code change process would be limited. Whilst the duplication of AEMC and ACCC consultation processes could potentially be avoided, the ACCC would still need to consider and approve each and every NE Code change proposal.

This model does not clarify the current ambiguity about the legal status of the NE Code nor whether it is necessary to seek authorisation for any or all of the NE Code and would continue to impose delays in the NE Code Change process and therefore additional costs to the market.

### **4.2 Option 2 - Operating under an Authorised “Umbrella” Framework**

The National Generators’ Forum proposed a model based on a higher level “market framework” that would be the authorised arrangements under Part VII of the TPA. This model would define an “umbrella” framework under which the NE Code would operate. The AEMC would, in administering the NE Code change process, decide if authorisation was to be sought in respect of a proposed NE Code change. The basis for not seeking authorisation would be that a proposed change would already be authorised provided that it did not go beyond the authorised market framework. This model is based on a view that there is a continuing need for authorisation.

The proponents of this model argue that the identification of the market framework as the authorised instrument is consistent with the degree of flexibility and generality that is inherent in Part IV of the TPA and the subject matter that is capable of authorisation under Part VII.

The proponents recognise that there may be proposed NE Code changes that are sufficiently material so as to fall outside of the arrangements covered by the authorised market framework. They suggest that this element of risk could be removed if a procedure similar in concept to that applied in relation to the notification of exclusive dealing under Part VII of the TPA were introduced.

The SCO considers that this model would not provide sufficient regulatory certainty for industry participants and maximal streamlining gains for the NE Code change process.

This model relies on the proposition that the NE Code, sitting underneath the umbrella of the authorised market framework, derives “authorised” status by virtue of the authorisation of the framework arrangements. It is not clear that under the TPA, the concept of authorisation could derivatively encompass those elements which have not been the subject of the ACCC’s consideration. This may also require changes to the TPA that are unique to electricity which is

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contrary to the policy position that the TPA regime should, as far as possible, remain a generic regime across all industries.

This model relies on the AEMC identifying those matters that should be included in any market framework as the instrument that is submitted for authorisation by the ACCC. There would also be an ongoing need to assess whether specific NE Code changes may or may not materially alter the existing authorisation. The proponents of this model themselves recognise that the process of considering whether a specific NE Code change remains within the authorised framework would create significant uncertainty. The proponents suggest that this be addressed via a “certification role” for the AEMC. This would in effect amount to the AEMC and the ACCC both performing functions as a competition regulator.

The policy position agreed by the MCE in December 2003, was that the ACCC will continue in its role as competition regulator under the TPA. The concept of the AEMC having the power to “certify” that a proposed NE Code amendment falls within the authorised market framework is inconsistent with the TPA and not consistent with the new market governance model.

#### **4.3 Option 3 - Clarify the Status of the NE Code as Statutory Rules**

In this model, the NE Code would be clearly identified as a set of “statutory rules” made under the NEL. The NE Code would become the “NE Rules”.

The application of the principal prohibitions contained in Part IV of the TPA depends on there being a contract, arrangement or understanding (in the case of s4D, s45, s45A) or an arrangement or transaction (in the case of s47), referred to in this paper as consensual arrangements.

Under this model, the obligations on participants would find their source in a legislative instrument. Conduct under the NE Rules would be a matter of compliance with State and Territory laws<sup>2</sup>. Their compliance with the NE Rules would be mandatory and not consensual. Provided the provisions of the NE Rules are formulated as mandatory rules rather than consensual arrangements, then the NE Rules would not constitute a contract, arrangement, understanding or transaction which attracts the operation of the above principal prohibitions contained in Part IV of the TPA.

Moreover, if such mandatory rules specify the terms (including price) on which electricity, ancillary services or other goods or services are to be supplied or acquired, then any contract that may arise as a result of those rules will not have a proscribed purpose or effect for the purposes of the TPA prohibitions referred to above. This is because it is the mandatory rules and not any such contract, which would have that purpose or effect.

SCO has taken Senior Counsel<sup>3</sup> advice on this matter.

Some NEM participants have proposed that if this model is to be adopted, consideration should be given to specifically exempting the NE Rules (the NE Code) under s51 of the TPA. This they believe would totally protect them from prosecution under Part IV. The SCO is of the firm view that the use of the s.51 “exemption” is not appropriate for the NE Rules for both legal and policy

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<sup>2</sup> Note also that the NEL (and thus the NE Rules) will be applied as a law of the Commonwealth in the adjacent area of each State and Territory.

<sup>3</sup> Noel Hutley & Sarah Pritchard, Memorandum of Advice dated 5 August 2004.

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reasons. At a policy level, it would not accord with national competition policy. At a legal level, s.51 TPA exemption is only necessary where State/Territory based rules give rise to or constitute, conduct that would contravene Part IV of the TPA. For the reasons given above this model does not entail any contract, arrangement, understanding or transaction that would contravene Part IV of the TPA and therefore there is no basis for applying an exemption under s.51 in the first place.

The change in status of the NE Code to NE Rules will require the States and Territories to ensure, in accordance with clause 5 of the Competition Principles Agreement, that the NE Rules remain a pro-competitive regulatory regime. Under the AEMC's rule making powers (refer to sections 5 and 6 below), the AEMC will need to be satisfied that the benefits of any restriction to the community as a whole outweighs the costs, and that the objectives of the NEL can only be achieved by such restrictions.

#### **4.4 The Preferred Approach**

Option 3 is the preferred approach.

The MCE objective to streamline the NE Code Change process will be achieved by:

- (a) amending the NEL to make it clear that the NE Code is a set of statutory rules made under the NEL (to be the National Electricity Rules); and
- (b) converting key obligations in the NE Code that are referable to a consensual arrangement into mandatory obligations in the NE Rules (without changing the current substance of the rules).

The amendments to the NEL will confer on the AEMC a general rule making power to make the NE Rules (equivalent in the first instance to the current NE Code, including the amendments arising from (b) above and other necessary changes).

It is considered that under the new NE Rules the risk profile for participants in the market will not be materially changed from their existing TPA risk profile under the currently authorised NE Code.

It is proposed that the NE Rule Change process will be substantially the same as that proposed in March 2004 except that there will be no need to have the Rules authorised. However, nothing is proposed to change the legal rights of participants to seek authorisation of their own conduct or arrangements in the NEM.

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## **5. FUNCTIONS OF THE AEMC IN RULE MAKING**

### **5.1 General Functions of the AEMC**

The AEMC was established on 1 July 2004 by the Australian Energy Market Commission Establishment Act 2004 of South Australia. Its functions, expressed by a general conferral of power in the AEMC Establishment Act, are the rulemaking, market development and other functions conferred on the AEMC under the NEL.

### **5.2 AEMC's Market Development Function**

The AEMC market development functions will be:

- (a) to review the operation of the NE Rules, and to undertake any analysis and studies in relation to the performance and efficiency of the NE Rules consistent with the Market Objectives (see below);
- (b) to monitor the NE Rules in relation to the efficient achievement of the Market Objectives; and
- (c) to make recommendations for a Rule Change Proposal to the MCE arising from these market development functions outlined above.

The specific review functions NECA has under the NE Code are to be allocated to the AEMC.

### **5.3 MCE References to the AEMC on the NE Rules**

Under the proposed arrangements, the MCE may refer a matter in the nature of a market development issue relating to the NE Rules for the AEMC to carry out a review/inquiry or to provide advice to the MCE. The MCE may consult on the draft terms of reference relating to matters it is to refer to the AEMC. In setting terms of reference, the MCE may specify timeframes, consultation and whether a report on the review/inquiry is to be published. The results of such a review may entail the AEMC making recommendations to the MCE on any relevant changes to the NE Rules.

### **5.4 Rule Making Functions of the AEMC**

The AEMC will have a power to make (including to amend) the "National Electricity Rules", and the NEL will contain a general rulemaking power to enable the AEMC to make (or amend) the NE Rules (that in the first instance will equate to the current Code).

The proposed rulemaking functions of the AEMC will basically be directed at maintaining:

- (a) efficient performance of the NE Rules consistent with the Market Objectives; and
- (b) the integrity of the NE Rules, as laws of the participating jurisdictions, applying accepted principles of good regulatory design such as clarity of drafting, consistency of language, and the upholding of fair procedures.

All rulemaking (including amending) will be in accordance with the procedures as set out in section 7 below.

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## **6. RULE MAKING CRITERIA**

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. A decision of the AEMC will be consistent with the Market Objectives (which are to be included in the NEL) and with any MCE Statement of Policy Principles.

The assessment process for the net benefit test will be through a 'with or without' analysis. This means that the analysis will cover prospective market outcomes if the Rule Change Proposal is accepted compared to the outcomes if the Rule Change Proposal was not accepted.

### **6.1 The Market Objectives**

The Market Objectives proposed to be included in the NEL are as follows:

1. The primary market objective of the national electricity market is to promote the long term interests of consumers of electricity with respect to price, quality and reliability of electricity services, and economically efficient investment and innovation.
2. In seeking to achieve that primary objective, regard is to be had to the following objectives:
  - (a) the market should be competitive;
  - (b) the operation and use of, and investment in, infrastructure in the electricity industry (including transmission and distribution services) should be economically efficient;
  - (c) customers should be able to choose which supplier (including generators and retailers) they will trade with;
  - (d) any person wishing to do so should be able to gain access to the interconnected transmission and distribution network;
  - (e) a person wishing to enter the market should not be treated more favourably or less favourably than if that person were already participating in the market;
  - (f) a particular energy source or technology should not be treated more favourably or less favourably than another energy source or technology; and
  - (g) the provisions regulating trading of electricity in the market should not treat intrastate trading more favourably or less favourably than interstate trading of electricity.

### **6.2 The MCE Statement of Policy Principles**

The MCE may issue Statements of Policy Principles, and under the NEL, the AEMC will be required to have regard to such a Statement in carrying out its functions. Any such Statement will be required to be consistent with the Market Objectives.

The MCE will be required to publish such Statements in the South Australian Gazette and provide a copy of the Statement to the AEMC.

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## **7. THE PROPOSED RULE CHANGE PROCESS**

### **7.1 Stage 1 – Initiation and Preliminary Assessment of a Proposal**

#### **7.1.1 Any person can initiate a Rule Change Proposal**

The MCE Report foreshadows more active participation of energy users and suppliers in the energy markets. That Report also states that market participants, user representatives, market operators and governments are to be given standing to apply to the AEMC with developed proposals for Rule change.

It is recognised that an open regime enabling “any person” to initiate Rule changes could impose significant costs on the market, with the potential for a floodgate of proposed changes in the future. However, the AEMC as a Rule Change “gatekeeper” (see 7.1.7 below) will ensure that only adequately developed Rule Change Proposals go forward.

Under the existing regime, if the Code Change Panel has decided that a Code Change Proposal does not warrant further consideration then the NE Code allows the Code change proponent plus five NE Code participants to ensure that a Code change proposal receives further consideration. There will be no continuing need to retain this arrangement.

#### **7.1.2 AEMC will not be able to initiate a Rule Change Proposal**

The MCE has stated in its December 2003 Report, that the AEMC will not be able to initiate a Rule Change Proposal in its own right. This policy position was based on the general view that the initiator of a rule change should not also decide whether the rule change should be made.

However, the AEMC will be able to initiate a Rule Change where it is a change of a minor or administrative nature, or to correct a manifest error.

#### **7.1.3 Reliability Panel can initiate specific Rule Change Proposals**

Currently under the NE Code, the Reliability Panel is able to recommend a Code change. In effect, the Reliability Panel is taken to have standing to initiate a NE Code change. The functions and responsibilities of the Reliability Panel (establishing system standards and procedures) basically relate to rulemaking, which is to be the province of the AEMC.

In relation to setting standards (as under chapter 4 of the NE Code), the Reliability Panel is to be restructured as an advisory panel to the AEMC and chaired by an AEMC Commissioner.

Consistent with this role:

- (a) The Reliability Panel’s current functions to monitor, review and report on the reliability and system standards for performance of the power system and on access standards for connection of plant to the network will be retained.
- (b) Any determination on such standards will be by the AEMC following advice of the Reliability Panel provided the Panel has complied with the NE Rule Consultation Procedures in arriving at its advice.
- (c) Any reports of the Reliability Panel are to be to the AEMC. The AEMC will be required to publish any such reports together with the AEMC’s response within a reasonable time frame (say 20 working days).

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- (d) Where the AEMC is to determine matters such as standards, procedures and guidelines, which are currently the responsibility of the Reliability Panel, the AEMC in arriving at any determination must follow the NE Rule Consultation Procedures except that the AEMC will have the discretion to rely on any consultation undertaken by the Reliability Panel.

It is proposed that the new Rule Change Procedure in the NEL enable the Reliability Panel to directly sponsor a Rule Change Proposal, but only in so far as it relates to the responsibilities of the Panel under the NE Rules (currently contained in Chapter 4 Code). This “standing” is to be supported by the following amendments to the NE Rules in relation to the Reliability Panel.

- (a) The representative nature of the Panel will be strengthened to ensure there are representatives for retail, generation, TNSP, DNSP and end users on the Panel.
- (b) Decisions of the Reliability Panel must be by a majority of the Members (governance arrangements will be clarified in the NE Rules).
- (c) The Value of Lost Load (**VoLL**) will continue to be a specific rule, (that is itself subject to the Rule Change Procedures in the NEL) and not merely a “standard”.

Retaining the power for the Reliability Panel to initiate Rule Change Proposals is not inconsistent with the MCE policy decision that the AEMC will not be able to initiate NE Code (i.e. NE Rules) changes. The functions of the Reliability Panel are effectively a “standing review arrangement” and are considered as “technical” in nature since they relate directly or indirectly to power system security and reliability. The functions are of sufficient importance (and technical in nature) to warrant the retention of the Reliability Panel regime.

#### **7.1.4 MCE initiation of Rule Change Proposals**

The MCE will have the power to initiate a Rule Change Proposal including where the Proposal results from a recommendation made by the AEMC as part of a review undertaken by the AEMC.

#### **7.1.5 The requirements for a “Developed” Rule Change application**

The NEL or regulations under the NEL will specify the form for a Rule Change Proposal application and the information that must be provided in the application.

It is proposed that an application would need to include:

- (a) a statement of the problem with the existing NE Rules and how the Rule Change Proposal will address the problem;
- (b) a proposed Rule change solution (optional to include proposed Rule wording);
- (c) prima facie demonstration of the net benefit deriving from the Rule Change Proposal; and
- (d) prima facie demonstration of consistency with the Rule Making Criteria (refer above).

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### **7.1.6 Grounds for AEMC to Reject an Application for a Rule Change Proposal**

The AEMC will be able 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 as described above.

The AEMC will be required to give written reasons to a party if it rejects an application for a Rule Change Proposal.

### **7.1.7 AEMC “Gatekeeper” Role**

The AEMC, as the statutory rule making body, has the responsibility to ensure that the NE Rules (as legally binding rules in each jurisdiction) are drafted consistently, coherently and taking into account the NE Rules as a whole. This means that the AEMC needs to be satisfied with the drafting of any proposed Rule wording as a separate issue to the merits of the substance of a Rule Change Proposal. While a person lodging a Rule Change Proposal may include a suggested Rule wording, the AEMC will determine the draft Rule wording for consideration in the NE Rule Change Process.

To the extent that the AEMC may alter the proposed Rule wording as put forward by a person initiating a Rule Change Proposal this must be with a view to implementing the substance of that Proposal.

## **7.2 Stage 2 – Publication of Rule Change Proposal and Call for Submissions**

If the AEMC has accepted a Rule Change Proposal (in Stage 1), the AEMC will be required under the NEL, or regulations made under the NEL, to undertake public consultation on the Proposal.

### **7.2.1 Initial Involvement of the AER and ACCC in the Rule Change Process**

A Memorandum of Understanding between the AEMC, the AER and the ACCC will define the protocols for consultation between these bodies at an operating level in relation to competition, access, regulation and enforcement issues. Where a Rule Change Proposal relates to the Market Access Rules that have been accepted as an industry access code under the TPA, early involvement and consultation with the ACCC would facilitate a streamlined process. Under the current access regime, the AEMC (as a prescribed industry body) would have responsibility to apply to the ACCC to vary an access code under s44ZZAA of the TPA, and the new 44ZZAB enables the ACCC to rely on the AEMC’s consultation processes if it chooses to do so.

The ACCC and the AER will determine the scope of their input, if any, into a Rule Change Proposal as part of the broader consultation process.

### **7.2.2 Process to Expedite Rule Change Proposals**

The AEMC will be able to expedite a Rule Change Proposal where the AEMC considers that the change to the Rules:

- (a) is of a minor or administrative nature, or to correct a manifest error; or
- (b) is likely to be unopposed.

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Where the AEMC has determined to expedite a Rule Change Proposal, the following process will apply:

- (a) Within fourteen days of the AEMC's public notice of a determination to expedite a Rule Change Proposal, any person may notify the AEMC in writing that they object to the determination and give reasons for the objection.
- (b) If after fourteen days, the AEMC has received no objection, the AEMC can make a final determination in respect to the Rule Change Proposal.
- (c) If the AEMC within 14 days receives an objection to its determination and the AEMC forms the view that the objection is not misconceived or lacking in substance, it will submit the Rule Change Proposal to the full Rule Change Process.

### **7.2.3 Public Notices**

Where the AEMC is required to issue a "public notice", it will be given:

- (a) by way of an advertisement in a newspaper circulating nationally; and
- (b) electronically via email to all Rule Participants and through publication on the AEMC website.

### **7.2.4 Content of a Public Notice in Relation to a Rule Change Proposal**

The content of a public notice in relation to a Rule Change Proposal will be set out in the NEL Regulations. The public notice (newspaper advertisement and email) in relation to a Rule Change Proposal will describe the Rule Change Proposal, invite submissions and provide AEMC contact details.

The AEMC should post on its website the following information:

- (a) the application for the Rule Change Proposal;
- (b) the draft wording of the Proposed Rule Change;
- (c) the proposed consultation procedure and indicative timeframe;
- (d) the MCE's Rule Making Criteria for assessing a Rule Change Proposal;
- (e) whether the AEMC has determined to expedite a Rule Change Proposal; and
- (f) requests for submissions to address any potential competition, access, regulatory or enforcement issues arising out of the Rule Change Proposal.

Unless it has determined to expedite a Rule Change Proposal, the AEMC will, when requesting submissions on a Rule Change Proposal, invite stakeholders to comment on (among other things):

- (a) whether the Proposed Rule Change might result in a contravention of a provision of Part IV of the TPA;
- (b) whether the Proposed Rule Change would be likely to result in any detriment to the public;
- (c) whether the Proposed Rule Change would be likely to result in a benefit to the public that would outweigh any detriment to the public described in paragraph (b) above;
- (d) whether the Proposed Rule Change would result in a variation to an access code accepted by the ACCC under section 44ZZAA of the TPA and, if so, whether the Proposed Rule Change would satisfy the criteria for the approval of such a variation;

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- (e) any potential regulatory or enforcement issues; and
  - (f) any other potential competition issues under Part IV of the TPA or potential access issues under Part IIIA of the TPA.

### **7.2.5 Working groups**

The AEMC will have the ability to convene working groups to consider a Rule Change Proposal.

### **7.2.6 Public Hearings**

The AEMC will decide whether to hold a public hearing in relation to a Rule Change Proposal on the basis that there will be a benefit in the Proposal being the subject of a public hearing.

The purpose of a public hearing will be to explain and clarify a Rule Change Proposal and provide interested persons an opportunity to ask questions and seek clarification. "Interested persons" is a wider group than those who may be involved in the workshops. It is anticipated that a public hearing will improve the quality of submissions. The intention is that the hearings be short (say half a day) so as not to impose significant cost burdens on the industry or interested parties.

Both working groups and public hearings should be convened during the time period granted for submissions on the Rule Change Proposal, to allow participants to incorporate their comments into submissions to the AEMC. If a public hearing is held during the time period granted for submissions, then it will not necessarily lengthen the timetable for the Rule Change Proposal.

## **7.3 Stage 3 – Draft Determination**

### **7.3.1 Draft Determination**

The AEMC will be required to publish a Draft Determination on a Rule Change Proposal.

The Draft Determination by the AEMC will contain broadly:

- (a) a decision as to whether the AEMC proposes to accept or reject a Rule Change Proposal;
- (b) the reasons for the decision including a summary and analysis of material issues raised in the submissions received;
- (c) the AEMC's assessment of potential competition, access, enforcement and regulatory issues, and of the Rule Change Proposal against the Rule Making Criteria; and
- (d) where the AEMC proposes to accept the Rule Change Proposal, the wording of the Rule Change which once published will be formally made.

The AEMC will publish a Draft Determination on a Rule Change Proposal within 28 days from the closing date for submissions. The AEMC will give public notice (as previously outlined) of a Draft Rule Determination which will include a statement that the Draft Determination will become a Final Determination if no party registers their intent, within 14 days of publication of the Draft Determination, to make a submission.

### **7.3.2 Pre-determination Hearing**

A pre-determination hearing provides a final opportunity for the AEMC to explain the Draft Determination and/or the analysis and provide persons with an opportunity to ask questions before making submissions.

The proposed procedures for a pre-determination hearing are as follows:

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- (a) Persons who have participated in the Rule Change Procedure by the making of a submission may request a pre-determination hearing.
  - (b) The purpose of a pre-determination hearing is to provide persons with an explanation of the AEMC's Draft Determination, the analysis and the Draft Rules, and an opportunity to ask questions and seek clarification.
  - (c) The AEMC will have discretion as to whether to hold a pre-determination hearing and, in exercising this discretion, the AEMC must consider both the need for a streamlined process and the need for sufficient consultation.
  - (d) The AEMC may itself decide to offer a pre-determination hearing.
  - (e) The procedures for a pre-determination hearing will be given regulatory support, to allow any person to attend and observe, to allow those who have previously made submissions to participate, and to require intending speakers and attendees to the pre-determination hearing to pre-register with the AEMC.
  - (f) The AEMC will have the discretion to cancel a pre-determination hearing if there is insufficient interest in it.
  - (g) The pre-determination hearing must be requested and convened during the time period granted for submissions on the Draft Determination, to allow persons to incorporate their comments into submissions.
  - (h) The AEMC will have the discretion to extend the period for submissions on the Draft Determination to allow persons to incorporate comments from the pre-determination hearing into submissions.

#### **7.4 Stage 4 – Final Determination**

The AEMC will be required to publish a Final Determination on a Rule Change Proposal.

The Final Determination by the AEMC will contain broadly:

- (a) a decision as to whether the Rule Change Proposal is to be accepted or rejected;
- (b) the reasons for the decision including a summary and analysis of material issues raised in the submissions received;
- (c) the AEMC's assessment of potential competition, access, enforcement and regulatory issues, and of the Rule Change Proposal against the Rule Making Criteria; and
- (d) where the AEMC accepts the Rule Change Proposal, the wording of the Rule Change which once published will be formally made.

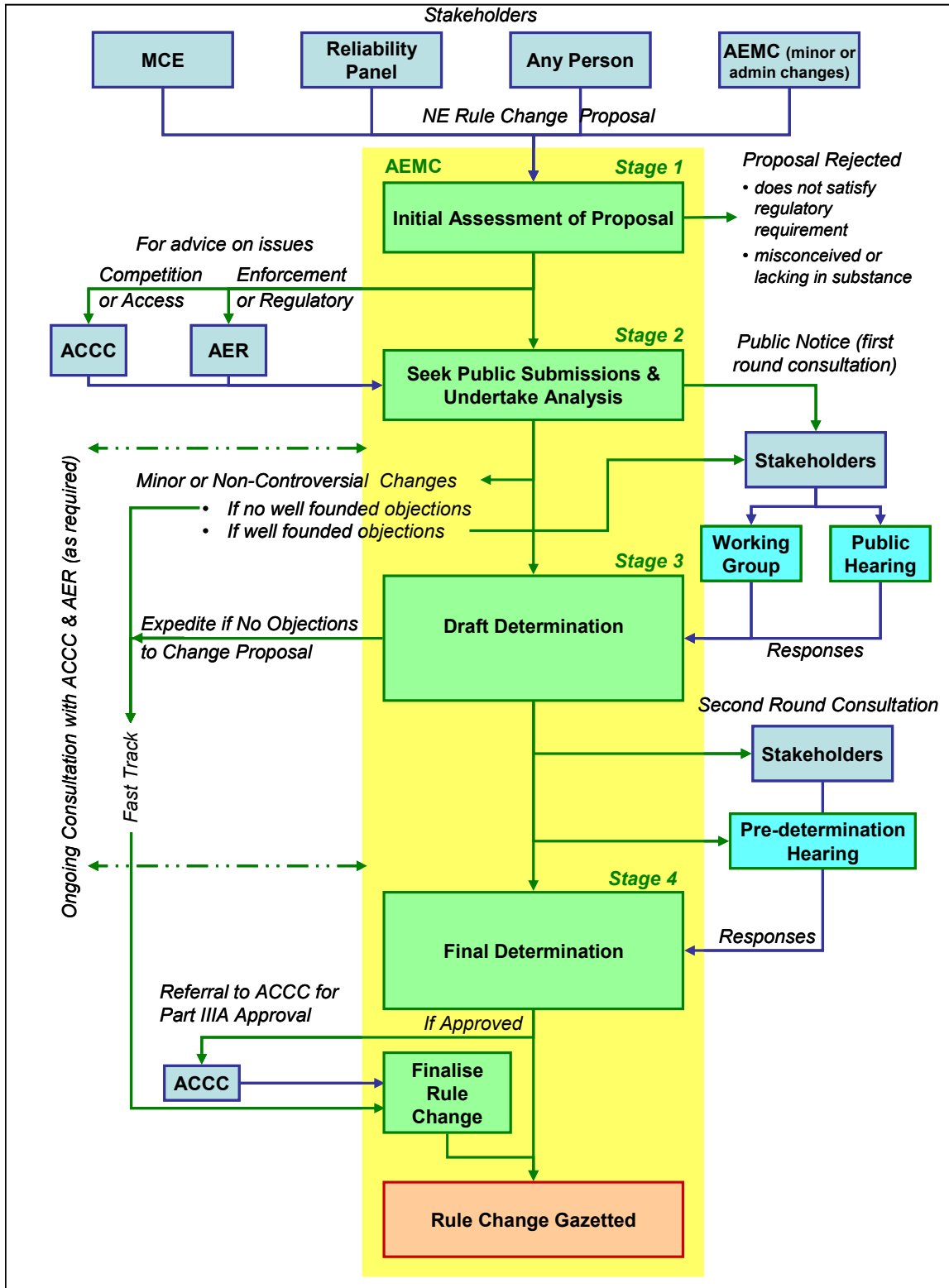
Access related NE Code changes (to any chapter of the NE Code except for possibly chapter 3 – the Market Rules) would need to be submitted to the ACCC for approval under Part IIIA of the TPA. Amendments to the TPA were passed by the Commonwealth Parliament in June 2004 to enable the ACCC to rely on consultations carried out by the AEMC.

The AEMC will be required to publish a notice of a change to the NE Rules in the South Australian Gazette. The notice will contain the words of the Rule added or replaced by the approved Rule change. The AEMC will also publish a notice on its website advising that an approved Rule change has been published in the South Australian Gazette.

## 7.5 Overview of Proposed NE Rule Change Process

The proposed NE Rule Change Process is shown schematically in Figure 2.

**Figure 2 – Proposed NE Rule Change Process**



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## 7.6 Timeframe for a Rule Change Proposal

It is proposed that the NEL will impose a clear obligation on the AEMC to provide an indicative timeframe for a Rule Change Proposal to be consulted and considered. Other than for an expedited procedure, the timeframe will include:

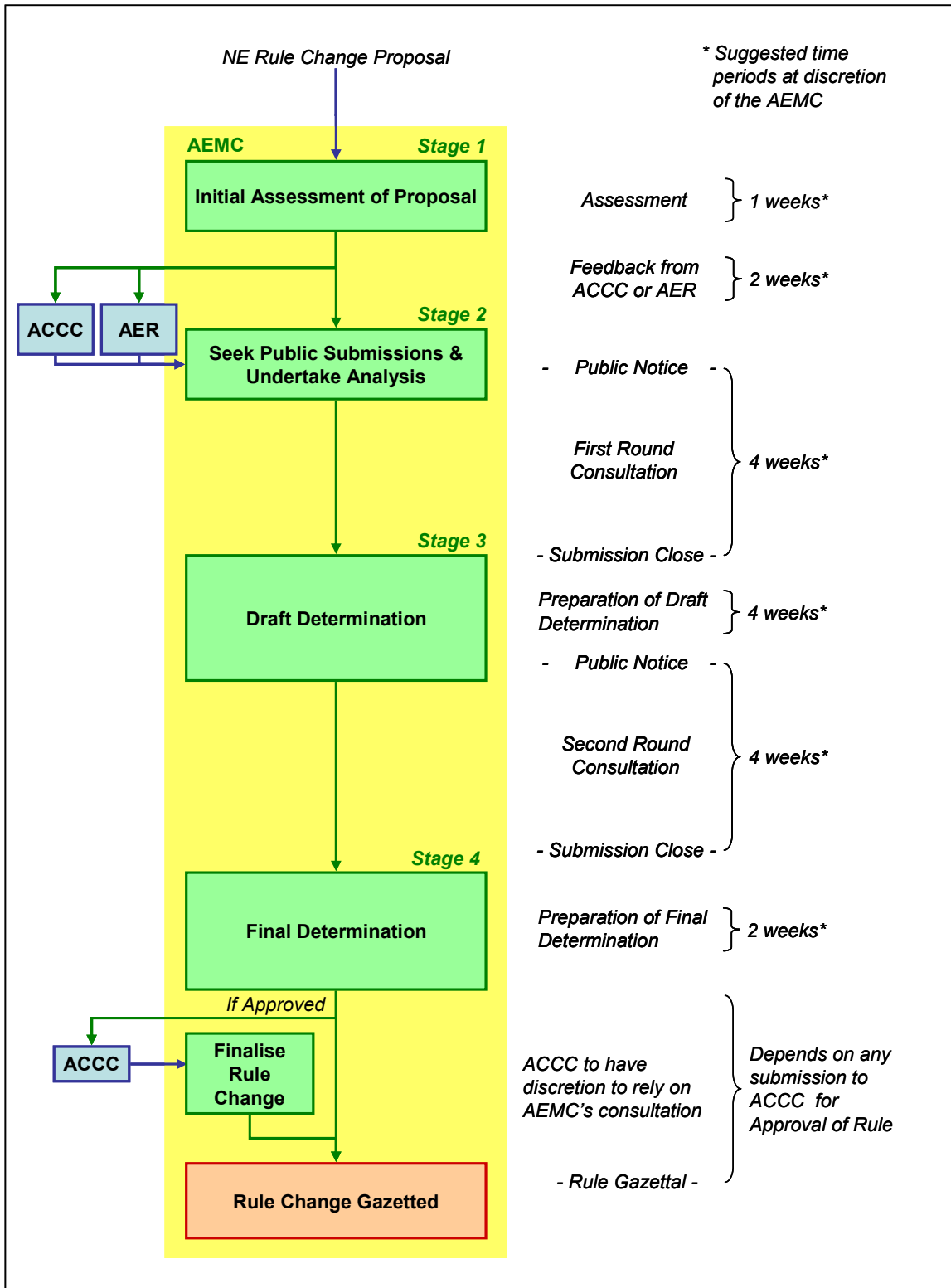
- (a) a 4 week statutory minimum period for submissions (from call for submissions); and
- (b) a 4 week maximum period for the preparation of a draft determination of the AEMC.

The AEMC is to have a statutory discretion in relation to the above time period that is “structured” by a requirement to justify the exercise of the discretion with reasons. The AEMC may extend the above statutory time periods where it considers it is in the public interest to do so, taking into consideration the public interest in both:

- (a) an efficient and streamlined Rule Change Procedure and
- (b) adequate consultation on complex or controversial proposals.

The indicative timeframe for the NE Rule Change Process is shown in Figure 3.

**Figure 3 – Indicative Timeframe for NE Rule Change Process**



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## **8. OTHER MATTERS**

### **8.1 Protected Provisions**

Currently, under section 7 of the NEL, Ministers of participating jurisdictions must unanimously approve the amendment of “protected provisions” of the NE Code.

The rationale for having “protected provisions” in the NE Code was so that Ministerial agreement would be required to change those provisions.

The current NEM Reforms put in place alternative safeguards that the “protected provisions” regime was designed to achieve, namely:

- (a) the AEMC is established as a statutory rule-maker, with greater accountability and a clearly articulated policy role on behalf of governments; and
- (b) the NE Code is to become the NE Rules, with clear legislative force.

The concept of “protected provisions” will therefore not be included in the NE Rules.

### **8.2 Jurisdictional Rule Derogations**

Jurisdictional derogations under Chapter 9 of the NE Code exempt participants in a participating jurisdiction of the NEM from having to comply with specified provisions in the NE Code.

Jurisdictional derogations allow a participating jurisdiction to substitute different jurisdictionally based provisions for those stipulated in the NE Code.

The original purpose of jurisdictional derogations was two-fold:

- (a) they allowed a participating jurisdiction to have an orderly transition from the application of State or Territory based arrangements to the NE Code provisions; and
- (b) they allowed pre-existing arrangements of a participating jurisdiction to be maintained if these arrangements were deemed necessary or beneficial.

A change to a jurisdictional derogation under Chapter 9 required the authorisation of the ACCC.

Only jurisdictions can make changes to their respective jurisdictional derogations. The Minister of a participating jurisdiction that seeks to change its jurisdictional derogations must give notice and consult with the corresponding Minister of each other participating jurisdiction in the NEM about the proposed change. However, the formal consent of the other participating jurisdictions is not required.

Consistent with the NEM Reforms it is proposed that:

- (a) Existing jurisdictional derogations, and the ability to modify them or extend their expiration date, be retained under the NE Rules.
- (b) The ability to initiate new jurisdictional derogations from the NE Rules be retained and enabled under the NEL.
- (c) The AEMC use the Rule Change Process (i.e. apply the net benefit test and consultation process) in determining whether jurisdictional rule derogations (including those that impact on the access rules) should be allowed, extended or rejected.

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- (d) When considering a jurisdictional rule derogation, the AEMC (in conjunction with (c) above), will recognise that jurisdictional rule derogations are for the purpose of allowing a participating jurisdiction to have an orderly transition from the application of existing State or Territory based arrangements to the NE Rules.
  - (e) Jurisdictional rule derogations be applied for either a fixed or indeterminate period, depending on their nature.
  - (f) Only participating jurisdictions (including Tasmania prior to NEM entry) have the ability to initiate jurisdictional rule derogations.

### **8.3 Participant Derogations**

Applications for NE Participant derogations (as per Chapter 8 of the NE Code) will be processed in accordance with the NE Rule Change Process.

**MCE Standing Committee of Officials**

**9 August 2004**