

# **Streamlining of the Code Change Process**

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## **Discussion Paper**

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

March 2004

## **Streamlining of the Code Change Process**

The Ministerial Council on Energy's Standing Committee of Officials (SCO) is seeking specific comments and/or views on the range of issues discussed in the paper to inform the development of policy actions by the MCE. SCO is interested in obtaining the views of all stakeholders.

The consultation process will comprise two similar consultation sessions on 23 and 24 March 2004, as advised in [Bulletin No.3](#), and the opportunity to provide written comments to the SCO by Wednesday 7 April.

Please include your name, address, organisation, and contact details, including your email address, if applicable, on your submission. Wherever possible submissions should be provided electronically.

To ensure the SCO is able to consider all views within the work program timeframe, it is requested that written submissions be limited to five pages. Any supporting documents should be clearly labelled as attachments.

It is intended to make electronic submissions publicly available on the Ministerial Council on Energy website at the end of the process. If you do not want all or part of your submission made publicly available, or you consider any part of your submission to be confidential or commercial-in-confidence, you should make this clear in your submission.

Submissions should be received by 7 April and addressed to:

Streamlining of the Code Change Process  
c/- MCE Market Reform  
Department of Industry, Tourism and Resources  
GPO Box 9839  
CANBERRA ACT 2601  
Facsimile: (02) 6213 7904  
Email: [MCEMarketReform@industry.gov.au](mailto:MCEMarketReform@industry.gov.au)

Please direct any enquiries regarding the consultation process to Neville Henderson, on (03) 8603 3765.

# STREAMLINING THE ENERGY CODE CHANGE PROCESS CONSULTATION PAPER

## Executive Summary

The code change process described in this paper adopts a model that is widely used in economic and competition regulation. The rule-making body, the Australian Energy Market Commission (AEMC), retains management of the code change process while acknowledging the role of the Australian Competition and Consumer Commission (ACCC) as the competition regulator. The model avoids the duplication of consultation and analysis by NECA and the ACCC experienced under the current National Electricity Code (the Code) process.

While the generic model for rule changes in this paper will apply to the NEC, it provides a general framework for code changes in respect of gas. The proposed code change process may be refined and adapted for gas, following consideration of outcomes of the gas access regime review.

## Initiation of the Code Change Proposal

The following parties can initiate a code change proposal:

- Code Participants;
- energy market institutions;
- the MCE; or
- any other person.

A Code change proposal must be in writing and contain the following:

- a statement of the problem with the existing code provisions;
- a proposed code change solution (including draft clauses of the Code)
- a statement of how a code change will address the problem;
- prima facie demonstration that the code change proposal will result in a net benefit based on the achievement of the market objectives, including the long term interests of consumers; and
- prima facie demonstration that the code change proposal is consistent with the “Prescribed Criteria”.

**STEP 1** Initial assessment of the code change proposal by AEMC.  
(2 weeks) In the initial assessment, the AEMC can amend or reject code change proposals against specific criteria.  
AEMC provides the code change proposal to the ACCC and AER for informal consideration of competition and access issues and regulatory issues respectively.

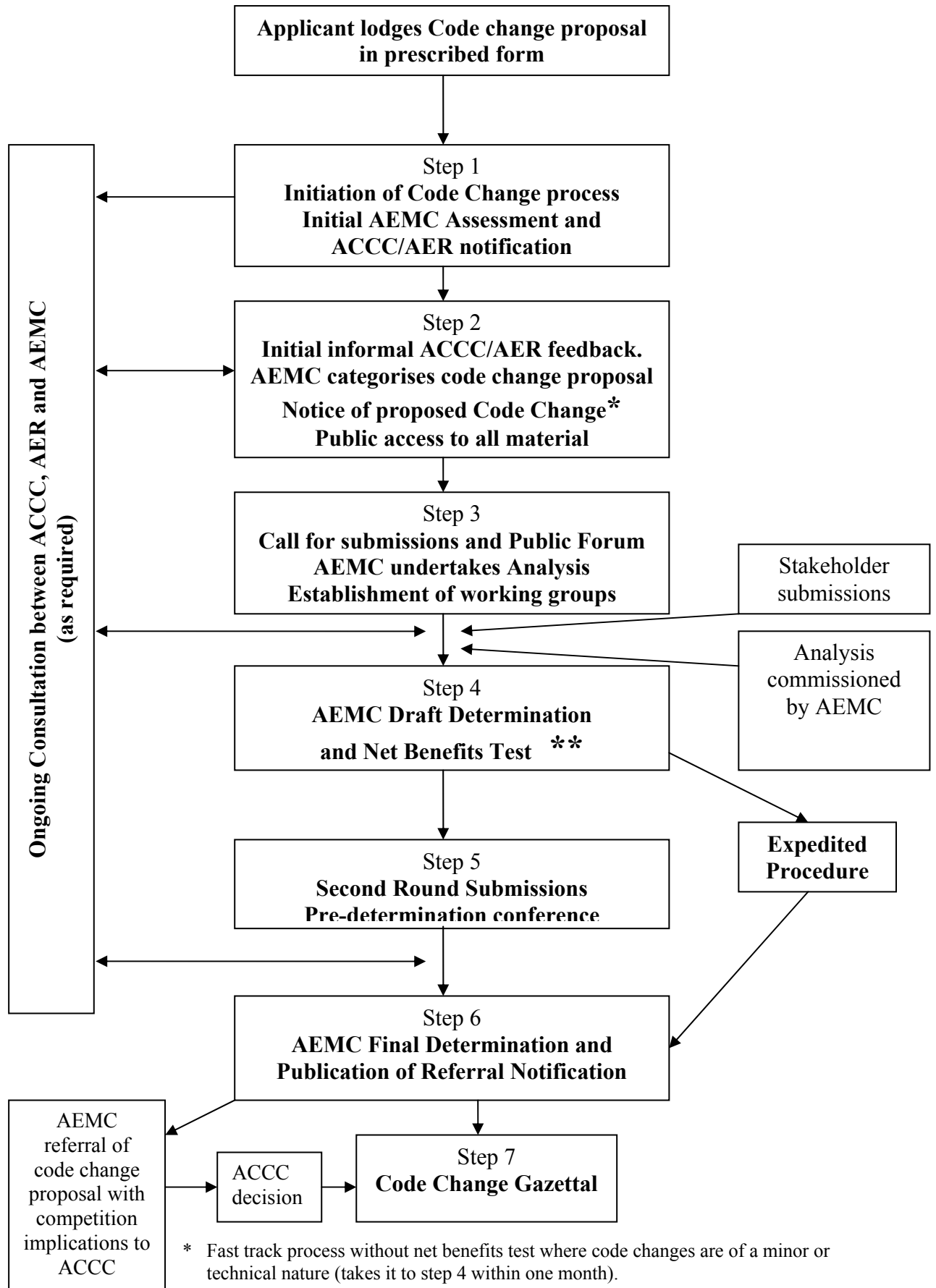
**STEP 2** Initial informal feedback from the ACCC and AER.  
(2 weeks) The feedback will advise the AEMC on any specific matters that it should be raising through consultation.  
AEMC categorises code change proposal. The categories will assist the AEMC in determining whether it can fast track or expedite the code change process.  
Public notice of code change proposal.

- STEP 3** AEMC seeks public submissions.  
 (1 to 3 months) AEMC establishes working groups where necessary to achieve maximum stakeholder agreement on contentious aspects of rule changes.  
 AEMC holds public forum if requested to explain the code change proposal.  
 AEMC undertakes analysis of code change proposal.  
 (may extend by 1 month for submissions on analysis)
- STEP 4** AEMC draft determination.  
 (1 month) AEMC to assess code change proposals against “Prescribed Criteria”.
- STEP 5** AEMC seeks second round submissions.  
 (1 month) AEMC may reconvene working groups if required.  
 AEMC convenes a pre-determination conference if requested.  
 (may be extended by 1 month if a pre-determination conference is requested)  
 AEMC may expedite the code change process and eliminate second round consultation if there is no objection to the code change proposal.  
 (may be shortened by two weeks if no objections raised)
- STEP 6** AEMC final determination.  
 (1 month) AEMC decision on whether to refer the code change proposal to ACCC for authorisation and/or PART IIIA approval.

If the ACCC declines to authorise or approve the Code change on competition or access grounds, a full statement of reasons will be published and the code change proposal will revert to AEMC for those issues raised to be addressed.

Decisions of the AEMC will be subject to judicial review on questions of law.

A final decision on a code change proposal could be reached between five months and seven months from the date of initiation using the proposed code change process and using the timeframes suggested in this paper. There may be scope to expedite the process where there is no objection to the code change. Expedition could shorten the process to four and a half months. If the process allows maximum time for consultation and is extended to cater for submissions on AEMC analysis and a pre-determination conference, the process may take up to nine months.



\* Fast track process without net benefits test where code changes are of a minor or technical nature (takes it to step 4 within one month).

\*\* Expedited procedure applies where no objections are received within 14 days.

## 1 Introduction

The Ministerial Council on Energy (MCE), in its December 2003 report on Energy Market Reform to COAG, made a number of recommendations relating to the process of making changes to the National Electricity Code.

- (1) The ACCC to retain responsibility for competition regulation under Part IV of the *Trade Practices Act*, for competition-related code-change authorisations under Part VII, and for industry access code approvals under Part IIIA.
- (2) The new regulatory arrangements to provide for consultation and cooperation between the AEMC, AER and ACCC. The code change and authorisation process be streamlined, to avoid duplication. AEMC and AER to have specific consultation obligations. End-user and industry consultation in developing 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 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 code changes other than of a minor or administrative nature.

The purpose of this paper is to outline a process for assessing future code changes that would give effect to the recommendations made by the MCE. While the generic model for rule changes in this paper will apply to the NEC, it provides a general framework for code changes in respect of gas. The proposed code change process may be refined and adapted for gas, following consideration of outcomes of the gas access regime review.

The process for code change needs to be considered within the context of the primary objective of the AEMC, which is to promote the long term interests of consumers with regard to price, quality and reliability of electricity and gas services.

## 2 Management of the Code Change Process

The AEMC will manage the Code change process. Under the proposed arrangements, the AEMC would have the discretion to refer competition-related Code changes under Part VII, and industry access Code approvals under Part IIIA of the *TPA*, to the ACCC. The AEMC would decide whether to make any referral after consultation with the ACCC.

The code change process will follow a transparent procedure with adequate opportunity for stakeholder consultation and the AEMC will be accountable for its decisions. The Code Change Panel will be dissolved and the AEMC itself would be responsible for code change decisions.

### 3 Initiation of Code Change Proposal

#### 3.1 Who Can Initiate a Code Change Proposal?

MCE does not intend to restrict the parties who can initiate code changes, therefore any party can initiate a Code change proposal. Such parties include:

- (1) **Code participants** - registered with NEMMCO in accordance with Chapter 2 of the Code or gas market participants registered with AEMC;
- (2) **energy market institutions** - NEMMCO, gas market institutions and the AEMC (in limited circumstances);
- (3) **Governments** through the *MCE*; or
- (4) **any other person** – any stakeholder or interested party such as end use customers not registered as a customer with NEMMCO, user groups and consumer associations, welfare agencies, conservation organisations and public interest advocates.

The AEMC will not have the power to initiate code changes in its own right, except in limited circumstances (for minor or administrative changes or where a code change is required to correct a manifest error in the Code).

As an outworking of its market development responsibilities, the AEMC could of its own initiative, or at the request/direction of the MCE, develop proposed code changes to address a market development or MCE policy matter. The AEMC would make recommendations on such proposals to the MCE and it would be the responsibility of the MCE to initiate the Code change proposal, not the AEMC.

Any Code change proposal initiated by the MCE should be consistent with its policy framework and in particular be consistent with the market objectives.

Any Code change proposal initiated or endorsed by governments or the MCE would follow the normal Code change process.

#### 3.2 What Must a Code Change Proposal Contain?

A Code change proposal must be in writing and contain the following:

- (1) a statement of the problem with the existing code provisions;
- (2) a proposed code change solution (including draft clauses of the Code);
- (3) a statement of how a code change will address the problem;
- (4) prima facie demonstration that the code change proposal will result in a net benefit<sup>1</sup>; and
- (5) prima facie demonstration that the code change proposal is consistent with the “Prescribed Criteria”.

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<sup>1</sup> The AEMC will be required to apply a net benefit test based on the achievement of the market objectives, including the long term interests of consumers, in deciding whether to approve a rule change.

To maintain the integrity of the Code it is desirable but not mandatory that the proponent liaise with the AEMC and where possible to reach agreement on the form of words of a code change solution before submitting a code change proposal.

The AEMC will make all Code change proposals publicly available.

#### **4 Prescribed Criteria for Assessing Code Change Proposals**

The criteria for assessing Proposals for a Code Change would be against the following “Prescribed Criteria”

- (1) ***MCE Policy Framework*** - The MCE’s role is to provide strategic direction for energy market reform and governance of the energy market. In fulfilling this role, the MCE would provide a forward-looking policy framework which would be publicly available so as to provide transparency, guidance and greater certainty to market participants, potential investors and the AEMC in its Code change and market development responsibilities.
- (2) ***The Market Objectives*** – The primary objective is to promote the long term interests of consumers with regard to the price, quality and reliability of electricity and gas services. In seeking to achieve the primary objective of the AEMC, regard shall be had to the following objectives:
  - (a) the market should be competitive;
  - (b) customers should be able to choose which supplier (including generators and retailers) they will trade with;
  - (c) any person wishing to do so should be able to gain access to the interconnected transmission and distribution network;
  - (d) 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;
  - (e) a particular energy source or technology should not be treated more favourably or less favourably than another energy source or technology; and
  - (f) the provisions regulating trading of electricity or gas in the market should not treat intrastate trading more favourably or less favourably than interstate trading of electricity or gas.

#### **5 Step 1**

##### **5.1 Preliminary Assessment of Code Change Proposals by AEMC**

The AEMC will make a preliminary assessment of a Code change proposal and amend or reject it without inviting submissions and putting the proposal through the code change process. In all cases, the AEMC must publish its decision to amend or reject and provide a statement of reason for its decision.

The specific criteria for amending a Code change proposal will be that the proposal is not adequately developed and/or to overcome potential anti-competitive or trade restrictive matters. Where the AEMC amends the Code change proposal it will not

alter the proponent's original intent. The amended Code change proposal must be a material improvement over the original proposal.

If the Code change proposal relates to a protected provision of the Code, the AEMC will seek the approval of the MCE for the AEMC to proceed with consideration of the proposal.

The specific criteria for rejecting a code change proposal include:

- (1) the MCE does not approve consideration of a Code change proposal that relates to a protected provision of the Code; or
- (2) the proposal is not adequately developed and cannot be easily amended; or
- (3) it is clear that there would be no possible benefit to the public that would outweigh any anti-competitive or trade restrictive matters in its application; or
- (4) the proposal fails to demonstrate a prima facie net benefit<sup>1</sup>; or
- (5) frivolous or mischievous behaviour; or
- (6) the proposal is inconsistent with the “Prescribed Criteria”.

Except in relation to a Code change proposal which relates to a protected provision of the Code, the preliminary assessment could be made within two weeks of receiving the code change proposal.

The AEMC must publish its decision to amend or reject a Code change proposal and provide a statement of reasons for its decision.

## **5.2 Initial Involvement of the ACCC and AER**

When the AEMC receives a Code change proposal and hasn't rejected it following its preliminary assessment, the AEMC will promptly provide a copy of the proposal to the ACCC and AER. This is to allow the:

- (1) ACCC to promptly consider and advise AEMC if it identifies, and if so the nature of, any potential competition issues under Parts IV or VII of the TPA or potential access issues under Part IIIA of the TPA arising out of the Code change proposal; and
- (2) AER to promptly consider and advise the AEMC if it identifies, and if so the nature of, any potential code enforcement or regulatory issues arising out of the Code change proposal.

A Memorandum of Understanding between the AEMC, the AER and the ACCC will define the roles and relationships and the protocols for interaction between these bodies at an operating level.

If the AEMC has not received advice from the ACCC on competition or access issues, or AER on enforcement or regulatory issues, within two weeks of it giving notice to

those bodies, then the AEMC will proceed to the next step of the code change process.

## **6 Step 2**

### **6.1 Categorisation of Code Changes by AEMC**

After initial advice on competition or access issues from the ACCC, the AEMC will be in a position to categorise the code change proposal into one of four categories:

- (1) **Category 1** – Code changes which are of a minor or administrative nature or where a code change is required to correct a manifest error. Minor or administrative changes can be fast tracked at the AEMC’s discretion.
- (2) **Category 2** – Code changes that have no significant competition or access issues, which can be expedited after the initial round of submissions (subject to no objection from interested parties);
- (3) **Category 3** – Code changes that have significant competition or access issues, which will require the full code change process;
- (4) **Category 4** – Code changes that affect protected provisions of the Code, which will require the full code change process plus the sign-off from the MCE.

### **6.2 Publication of Code Change**

The AEMC will promptly provide a public Notice of Proposed Code Change on its website and in advertisements in national newspapers. The AEMC will provide public access to the full change proposal, its decision and reasons in respect of categorisation of a Code change proposal.

### **6.3 Process for Dealing with Category 1**

This process is for Code changes which the AEMC has determined are minor or administrative changes and which can be fast tracked at the AEMC’s discretion.

Within 14 days of publishing its decision in respect of a Category 1 Code change proposal, any party, including the ACCC or the AER, can notify the AEMC that they dispute the categorisation.

If the AEMC receives such notification, it is obliged to re-categorise the Code change proposal and proceed with the relevant process for assessing the proposal.

If after 14 days, the AEMC has received no such notifications, the AEMC can make a final determination in respect of the Code change proposal leading to subsequent gazettal of the Code change.

## **7 Step 3**

### **7.1 Call for Submissions for Category 2, 3, and 4**

The AEMC will seek submissions on the code change proposal. In consulting on a Code change proposal, the AEMC will identify any matters raised by the ACCC and/or the AER and seek stakeholders' views on whether the change:

- (1) might result in a contravention of a provision of Part IV of the TPA;
- (2) would be likely to result in any anti-competitive detriment that would be relevant to an application for authorisation under Part VII of the TPA;
- (3) would be likely to result in a benefit to the public that would outweigh any anti-competitive detriment described in (2) above;
- (4) would result in a variation to an access code accepted by the ACCC under s44ZZAA of the TPA and, if so, whether the code change would satisfy the criteria in s 44ZZAA(3) of the TPA;
- (5) is consistent with the "Prescribed Criteria".

A minimum and maximum timeframe for submissions (eg between one and three months) would provide the AEMC with some discretion depending upon the complexity of the code change proposal and the category determined in Step 1.

Submissions received through the consultation process will be made public by the AEMC (except where commercial in confidence material was contained).

### **7.2 Working Groups**

The AEMC will establish working groups where necessary to achieve maximum stakeholder agreement on contentious aspects of code changes.

### **7.3 Public Forum**

Interested parties have the option to call for a public forum either by the AEMC or the proponent of the code change. The forum provides the opportunity for the AEMC or the proponent of the code change to explain the proposal and/or the analysis and provides interested parties with an opportunity to ask questions. The forum must be requested within the closing date designated for submissions.

### **7.4 AEMC Analysis for Category 2, 3, and 4**

In parallel to asking for submissions on a Code change proposal, the AEMC will undertake economic, legal or engineering analysis of a material Code change proposal. The AEMC will confer with the ACCC and the AER and undertake any analysis required to seek to address the competition and access issues or the regulatory issues raised by the ACCC and AER respectively.

The AEMC will have the discretion to publish any such analysis and call for submissions on the analysis. Consequently, the AEMC may extend the time period for lodging submissions by a further month. In any event any such analysis will be included as part of the AEMC's draft determination.

## **8 Step 4**

### **8.1 Draft Determination for Category 2, 3 and 4**

The AEMC will publish a draft determination of the Code change proposal application. The draft determination will include:

- (1) the AEMC assessing the code change proposal (including the submissions received and any analysis if conducted) against the Prescribed Criteria;
- (2) amending the draft wording of the code change proposal to address concerns raised through the consultation process;
- (3) all material issues raised in consultation by stakeholders should be addressed;
- (4) the AEMC will address all competition and access issues notified by the ACCC and regulatory issues notified by the AER;
- (5) foreshadowing whether the AEMC proposes to seek ACCC approval for the proposed code change;
- (6) the AEMC assessing and reporting on net benefits<sup>1</sup>; and
- (7) the AEMC's draft decision of whether to approve the proposed code change and the reasons for its draft decision.

The timeframe would be a maximum of one month to write the draft determination.

## **9 Step 5**

### **9.1 Second Round Submissions**

Following publication of the draft determination, the AEMC would call for second round submissions. The closing date for submissions will be one month after publication of the draft determination, but may be extended to two months if a pre-determination conference is required.

The second round submissions would address issues arising from the AEMC's assessment and draft determination rather than revisiting issues in the code change proposal that were addressed in the first round submissions. The proponent would have the opportunity in its submission to respond to submissions made by interested parties as well as the AEMC's draft determination.

## **9.2 Expedited Procedure**

The draft determination will automatically become a final determination without second round submissions if no party registers their intent to make a second round submission within two weeks of publication of the draft decision.

## **9.3 Working Groups**

The AEMC will reconvene working groups if necessary to achieve maximum stakeholder agreement on contentious aspects of draft determinations and rule changes.

## **9.4 Predetermination Conference**

Prior to the final determination interested parties are provided the option to call for a pre-determination conference. The conference would have to be called within a prescribed timeframe before the closing date for second-round submissions.

The pre-determination conference provides the opportunity for the AEMC to explain the draft determination and/or the analysis, and provide interested parties with an opportunity to ask questions before submitting their second round submissions.

# **10 Step 6**

## **10.1 Final Determination**

The AEMC will publish a final determination of the code change proposed, including the wording of the actual code change. The final determination will include:

- (1) the AEMC assessing the code change proposal (including the submissions received and the additional analysis if conducted) against the prescribed criteria;
- (2) explicitly addressing each material issue raised in comments and submissions on the draft determination, including those raised by the ACCC and AER – referencing comments of the proponent and incorporating comments of the interested parties and the AEMC’s draft determination of whether to approve the proposed code change and the reasons for its draft determination;
- (3) each substantive issue raised in the pre-determination conference would be explicitly addressed in the final determination – referencing comments of the proponent and incorporating comments of the interested parties;
- (4) the AEMC assessing and reporting on net benefits<sup>1</sup>; and
- (5) the AEMC’s final determination of whether to approve the proposed code change and the reasons for its final determination.

A suggested timeframe would be a maximum of one month to write the final determination.

On making its final determination, the AEMC will confer with the ACCC and the AEMC will decide whether to refer the Code change proposal to the ACCC for authorisation or approval.

Protected provisions, Category 4, would still need MCE sign-off before gazettal.

## **11 Gazettal**

If the code change is not referred to the ACCC, the proposed code change will come into effect when it is gazetted. If the code change is referred to the ACCC, it would not come into effect until the ACCC has made its determinations.

## **12 Referral of Proposed Code Changes to the ACCC**

For competition-related proposed code changes, it is proposed that the AEMC would have the discretion to apply to the ACCC for authorisation under Part VII of the TPA and for industry access code approval under Part IIIA of the TPA. Note however, that a Part IIIA role for the ACCC does not currently apply to gas.

If the AEMC refers a proposed code change to the ACCC for approval or authorisation, the ACCC has the discretion to rely on the submissions provided to the AEMC, and generally would only seek further information if:

- (1) the AEMC did not, during the rule change process, invite submissions on the issues that are relevant to the application before the ACCC;
- (2) a submission made during the rule change process raises material competition and access issues that were not adequately addressed by the AEMC and require supplementary or further consultation;
- (3) the proposed code change that is the subject of the application before the ACCC raises material competition or access issues that were not raised by the proposed code change that was the subject of consultation by the AEMC; or
- (4) a failure to undertake further consultation would result in reviewable error of law by the ACCC.

The ACCC will give public reasons why it had not relied on the consultation or analysis conducted by the AEMC and is seeking further consultation.

It is proposed that changes be made to the *TPA* to provide the ACCC with discretion to rely on the consultation carried out by the AEMC.

If ACCC declines to authorise or approve the Code change on competition or access grounds, a full statement of reasons will be published and the code change proposal will revert to AEMC for those issues raised to be addressed. The AEMC can:

- (1) make a minor amendment to the code change proposal and proceed to gazette the amended code change;
- (2) amend the code change proposal and consult on the amended proposal; or
- (3) withdraw the code change proposal.

## **13 Appeals**

Decisions of the AEMC will be subject to judicial review on questions of law.

ACCC decisions on authorisation under Part VII of the *TPA* will continue to be subject to both merit review by the Australian Competition Tribunal and judicial review on questions of law. ACCC decisions under Part IIIA of the *TPA* on industry access undertaking approvals (such as the NEM Access Code) will continue to be subject to judicial review on questions of law and will be subject to merit review by the Australian Competition Tribunal, following forthcoming amendments to Part IIIA of the *TPA*.

When regulatory functions for the Electricity and Gas Codes are transferred from the ACCC to the AER, the rights of review are not affected by this process. Hence, revenue determination decisions under the Electricity Code will continue not to be subject to merit review and existing provision under the Gas Code for merit review of certain decisions by the Australian Competition Tribunal will continue.

## **14 Timeframe for the Code Change Process**

A final decision on a Code change proposal could be reached between five and seven months from the date of initiation using the proposed code change process and the timeframes suggested in this paper. There may be scope to expedite the process where there is no objection to the proposed code change. Expedition could shorten the process to four and a half months. If the process allows maximum time for consultation and is extended to cater for submissions on AEMC analysis and a pre-determination conference, the process may take up to nine months.

To ensure that code changes are processed by the AEMC in a timely manner, the enabling legislation could either prescribe timeframes for the various stages in the Code change process, or give the AEMC greater discretion over the management of the Code change process by prescribing a timeframe for a final decision after a code change proposal is initiated.

However, the enabling legislation should recognise that some Code change proposals may involve complex issues which, for example, would require substantive analysis, with the consequence that the Code change could not be processed by the AEMC within the statutory timeframe. In those circumstances, the legislation should permit the AEMC the discretion to extend the timeframe after notifying and providing reasons to the MCE.

## **15 Interpretative Guidelines**

The AEMC would be required to develop and publish Interpretative Guidelines to ensure that the Prescribed Criteria applied consistently to different Code change proposals. The guidelines would be made publicly available and undergo an iterative process to enhance transparency and consistency. Specifically, the AEMC would be responsible for the continual updating of the guidelines as final determinations on code changes were approved.

## **16 Legislative and Other Changes to Implement a Streamlined Code Change Process**

In order to ensure accountability and transparency and a streamlined process, the following legislative and other instruments will be used to implement the Code change process:

- (1) Enabling legislation for the AEMC, including judicial review of AEMC decisions;
- (2) Memorandum of Understanding between AEMC, AER and ACCC;
- (3) Clarification within the National Electricity Code on the right of appeal from Code change decisions;
- (4) Amending Chapter 8 of the National Electricity Code as required and making the Code change process part of the National Electricity Law;
- (5) Changes to the Trade Practices Act; and
- (6) Changes to the Gas Access Law following consideration of the outcomes of the review of the gas access regime.

March 2004