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Streamlining of the Code Change Process  
c/- MCE Market Reform  
Department of Industry, Tourism and Resources

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### **Streamlining the Code change process**

Transend Networks Pty Ltd (Transend) welcomes the opportunity to respond to the above discussion paper.

Transend supports the objective of streamlining the Code change process. In particular, the existing processes have led to unnecessary duplication of regulatory effort between NECA and the ACCC. It is important that the new arrangements provide greater clarity on the respective roles of the AEMC, the AER and the ACCC. The proposed Memorandum of Understanding (subject to a separate consultation exercise) has an important role to play in ensuring that these roles are carried out effectively.

#### **AEMC's role with respect to Code changes**

The discussion paper on the Code change process suggests that the AEMC should be limited in its ability to propose Code changes. However, the discussion paper does not clearly articulate how these limitations should be applied in practice. For example, the discussion paper makes the following statements with regard to the role of the AEMC:

1. The AEMC could of its own initiative, or at the request/direction of the MCE, develop proposed Code change proposals as an outworking of its market development responsibilities.
2. The AEMC will not itself be able to initiate code changes other than of a minor or administrative nature.
3. The AEMC can amend the draft wording of a Code change proposal to address concerns raised through the consultation process.

These statements provide slightly confusing descriptions of the role of the AEMC and, in particular, the restrictions placed on the AEMC in being the proponent of Code change proposals. For example, points 1 and 2 may be contradictory where a MCE proposal or a proposal driven by market development initiative leads to a proposed Code change that is beyond a minor or administrative change. In addition, allowing the AEMC to draft proposed Code changes, albeit as the result of a consultative process, may not be

materially different to the AEMC developing its own Code changes. It is possible, for instance, that the AEMC's revised drafting no longer has the support of the original proponent of the Code change.

### **Principles for the AEMC and the Code change process**

In Transend's view, further work is required to state clearly the role of the AEMC in the Code change process. In this regard, it would be helpful if principles were developed to provide broad guidance on how the AEMC should carry out its functions. In particular, the discussion paper appears (in places) to adopt an implicit principle that the AEMC should not be able to propose Code changes. However, there is no discussion as to why this principle should be adopted. Presumably, such an approach is appropriate if the AEMC is considered unable to judge its own Code change proposals impartially.

In Transend's view, it is better to state the principles that underpin the proposed Code change process so that interested parties can understand and discuss its rationale. In particular, the AEMC may be reasonably effective in considering its own Code proposals providing that:

1. the AEMC has clear objectives and criteria against which proposals can be assessed
2. any decision by the AEMC is open to challenge by interested parties through judicial review or some other dispute resolution process
3. as a not-for-profit organisation, the AEMC has no financial interest in the proposed Code change.

### **Recognition of requirements for Code change**

An alternative restriction on AEMC-promoted Code change proposals may be that the AEMC may bring a proposal where such an action has the support of a number of interested parties. Such a situation may arise where an interested party, or number of parties, identifies an issue with the Code, but considers that the solution may be complex to design and would more appropriately be developed by the AEMC. In such a situation, the AEMC could advertise the case and see whether there is support from more than one party for the AEMC to assume the Code change proposal role.

Given interested party support, Transend would argue that the AEMC should be allowed to propose its own Code changes. Such an approach would help to share the burden of developing detailed Code change proposals that would otherwise fall entirely on interested parties.

### **MCE advocacy**

Transend is concerned that it is proposed that the AEMC should be able to act as the advocate of an MCE-proposed Code change. Whilst it is right that the MCE should set the broad framework for the direction of the market, Transend questions whether the MCE should be able to request that the AEMC promotes a particular Code change.

The issue at hand is whether the AEMC should be independent of all interested parties, including the MCE. In Transend's view, providing regulators with a reasonable degree of independence from Government is an important design principle. Regulatory independence can provide greater consistency in decision-making and, consequently, is more likely to ensure that decisions are not unduly influenced by shorter-term considerations. In Transend's view, the Code change process should embrace the principle of independence by preventing the AEMC from promoting a Code change on behalf of a *single* party, including the MCE.

The issue of independence highlights again the importance of providing high-level principles for how the regime should work, and then develop a process which meets those principles. In Transend's view, the following principles could underpin the Code change process:

1. the AEMC should apply objective criteria (set out in the Code or enabling legislation) to determine whether a proposed Code change should be supported
2. the AEMC should consider each proposal on its merits
3. the AEMC should act independently of other interested parties
4. the consultation process with interested parties should be effective, but should not prolong or delay Code changes unnecessarily.

### **Timeframes**

With regard to the fourth principle above, Transend notes that the discussion paper proposes broad timeframes for each step of the consultative process. It should be widely accepted that effective consultation requires that there is sufficient opportunity to address substantive issues, but the process should not be unduly protracted. In Transend's view, therefore, effective consultation requires that minimum and maximum timeframes are set for each step of the consultation process.

This approach will provide the AEMC with a reasonable degree of discretion on the consultation process, whilst providing some broad assurances to interested parties that the consultative process will be reasonable. In particular, where an issue can be resolved relatively quickly it seems inappropriate to follow a protracted consultation timeframe.

### **Code interpretation**

On a separate issue, Transend's view is that one of the new regulatory bodies (either the AER or the AEMC) should have the role of providing public guidance to interested parties on issues of Code interpretation. As Transend understands that Code oversight is to be undertaken by the AER, the guidance role may most appropriately rest with the AER.

Transend suggests that, where the Code is ambiguous, interested parties should be able to obtain a ruling [from the appropriate energy regulator] in a similar way to the Australian Tax Office, which provides rulings for specific circumstances. This role would provide a useful avenue for interested parties to obtain comfort that it is Code-compliant.

### **Linkage with Memorandum of Understanding**

The different roles and responsibilities of the various regulators have implications for the Memorandum of Understanding (MOU), with the MOU subject to a separate consultation exercise. In Transend's view, it is preferable to consider the Code change process, the roles of the regulators and the MOU in an integrated fashion. This will ensure that the overall process is comprehensive and complementary.

Transend would be pleased to make staff available to discuss any of the issues raised in this submission. A mutually convenient meeting can be arranged by contacting Bess Ramsay on (03) 6274 3909.

Yours sincerely

[by email]

Bess Ramsay

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