



Australian Energy Market Commission

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Productivity Commission
Locked Bag 2
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Dear Sir/Madam

Australian Energy Market Commission submission on the National Access Regime Inquiry Issues Paper

The Australian Energy Market Commission (AEMC) welcomes the opportunity to respond to the Issues Paper for the Productivity Commission (PC) inquiry into the National Access Regime (“the inquiry”).

National energy network access regime

The AEMC’s response is in respect of the regimes for access to energy network services under the national electricity law (NEL), the national electricity rules (NER), the national gas law (NGL) and the national gas rules (NGR).

Role of the AEMC

The AEMC is an independent national body responsible to the Council of Australian Governments through the Standing Council on Energy and Resources (SCER), which comprises the energy and resources ministers of the Commonwealth and each Australian State and Territory. The AEMC is responsible under the NEL and the NGL for making and amending the NER and the NGR that define the framework for the national electricity and gas markets, including the access regimes for the electricity and gas networks.¹ The AEMC is also responsible under these laws for conducting reviews of the energy markets and access regimes, and for providing advice to the SCER.

When undertaking its functions the AEMC must have regard to the national electricity objective (NEO) and the national gas objective (NGO), as relevant. These objectives promote efficient investment in, and efficient operation and use of, electricity and gas services for the long term interests of consumers of those services.

¹ The NER covers the Eastern States of Australia. Western Australia and the Northern Territory have different arrangements for access regulation. The NGR also covers the Eastern States of Australia, but some provisions regarding pipeline access regulation apply in Western Australia.

AEMC rule change process

The process the AEMC must follow to make electricity and gas rules is specified in the respective national laws. The rule making process generally requires two rounds of public consultation, providing stakeholders with opportunities to comment on the proposed changes and the AEMC's draft determination and draft rules to be amended or made. In addition, the AEMC regularly meets with stakeholders individually, through their industry groups or at public meetings in relation to issues raised in their submissions.

This high level of consultation, combined with the requirements on the AEMC to consider the NEO and NGO (as relevant), leads to a rigorous process for amending the rules.

Risks of declaration under Part IIIA

Given that nature of the national electricity and gas objectives, the AEMC places a high level of importance on clearly defined access regimes to the national electricity and gas networks in order to promote efficient investment in the provision of services, and in the upstream and downstream industries that rely on these services. Therefore, the AEMC considers that it would be conducive to efficient investment and use of electricity and natural gas services for the energy access regimes embodied in the NEL, NER, NGL and NGR (energy access regimes) to be immune from declaration under Part IIIA of the Competition and Consumer Act 2010 Commonwealth (CCA). We note, however, that the current avenue for declaration immunity involving the certification of energy access regimes is intrinsically challenging and may lead to inefficient and costly outcomes. This is discussed further below.

The AEMC acknowledges that if a declaration is sought in respect to services provided by means of networks regulated under the national energy access regimes, the process of considering that declaration application (even if the risk of declaration being made is itself very low) may create confusion and uncertainty and affect investor confidence.

Risks of certification

The AEMC is of the view that addressing the declaration risk under Part IIIA of the CCA by seeking certification (and recertification as necessary) of the national energy access regimes, will create another set of costs and risks that will not be conducive to efficient investment in, and efficient operation and use of, electricity and natural gas services. The national energy access regimes (particularly electricity) are not "steady state" and therefore, in order to be assured that "immunity" from declaration is maintained, it will be necessary to seek recertification after any substantial modifications to the energy access regimes. The AEMC considers that a requirement for recertification is likely to lead to:

- duplication of regulatory processes for rule changes:
 - requiring consideration by the National Competition Council (NCC) and the Minister, in addition to the AEMC;
 - uncertainty of the outcome as the AEMC, the NCC and the Minister would base their decisions on subtly different tests and criteria;
 - the potential for "relitigation" of issues considered in the AEMC's rule making process; and
 - the NCC and Ministerial process becoming a new forum for contesting rule changes.
- delays to the rule change process, if each material rule change proposal activated recertification, caused by the need to follow two "assessment" processes for rule changes, where the certification process would need to be coordinated by the participating jurisdictions; and

- regulatory uncertainty, if a periodic approach were taken to recertification, as to:
 - whether a rule as made by the AEMC will create risks to the certification of the access regime;
 - how a rule change can be “unwound” if it will put at risk the certification of the access regime;
 - which parts of the NEL, NGL, NER and NGR constitute the national access regime; and
 - which amendments to the NEL, NGL, NER and NGR would constitute a substantial modification to the national energy access regime and, hence, have the potential to trigger the need for re-certification.

The risks of certification identified above are similar to the risks faced by the NEM under the governance arrangements that applied prior to the formation of the AEMC in July 2005. At that time the National Electricity Code Administrator (NECA) undertook the change process for the National Electricity Code (NEC) that defined the access regime for the NEM. Following completion of the initial process, NECA submitted all changes to the NEC to the ACCC for authorisation and only implemented them when the ACCC gave approval. In addition, the ACCC was required to consent to all changes to the NEC as an industry code for the purposes of the voluntary access undertakings made by network service providers. This resulted in substantial delays and uncertainty for the NEC change process, which was regarded as unsatisfactory by many stakeholders.

Possible alternatives to certification

For the reasons above, the AEMC considers that the PC’s inquiry into the National Access Regime with respect to electricity and gas should consider alternative ways in which the national energy access regimes can obtain immunity from declaration under Part IIIA of the CCA.

The AEMC has given some initial thought to possible options other than certification. One potential option could be Commonwealth legislation (such as an amendment to the CCA) that deems the national energy access regimes to be effective access regimes and therefore certified access regimes for a time period and/or subject to certain conditions being satisfied.

We would be happy to discuss our submission further with you, and to provide any further advice that you would find helpful regarding the impact of any potential changes to the National Access Regime for energy markets, including possible alternatives to certification.

If you have any questions regarding this submission please contact me or Paul Smith on (02) 8296 7800.

Yours sincerely

Steven Graham
Chief Executive