Australian Energy Market Commission

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Productivity Commission
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Dear Commissioners

Australian Energy Market Commission submission - National Access Regime Inquiry Draft Report

The Australian Energy Market Commission (AEMC) welcomes the opportunity to respond to the Draft Report for the Productivity Commission (PC) inquiry into the National Access Regime ("the inquiry").

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 National Electricity Law and National Gas Law for making and amending the national electricity rules and the national gas rules. These laws and rules define the framework for the national electricity and gas markets, including the access regimes for electricity and gas networks.[1] The AEMC is also responsible under law for conducting policy reviews of the energy markets and access regimes, and providing market development advice to the SCER.

Response to the draft report

In the context of this inquiry, the AEMC is focussed on the industry-specific regimes for access to energy network services and the process for certification under the National Access Regime.

Our views are broadly consistent with those expressed in the 11 July 2013 submission from the Victorian Department of State Development, Business and Innovation ('the Victorian Government submission'). We do not consider that the proposal in the PC's draft report to remove the certification obligation from the Australian Energy Market Agreement adequately addresses the regulatory uncertainty and duplication associated with the risk of declaration.

[1] They set out the energy access arrangements for all Australian states and territories, except Western Australia for electricity and the Northern Territory for gas and electricity.

The PC has requested more information about the costs and benefits of certification. Our response is provided below for the two questions of relevance to the AEMC's work.

PC questions: What are the costs and benefits associated with certifying the electricity and gas access regimes? How would the proposed reforms outlined in draft recommendation 8.5 affect these costs and benefits?

The industry-specific access regimes for the electricity and gas sectors are somewhat unique in terms of the governance structure, their national consistency, and the existing role of the Commonwealth Government within the regimes. The arrangements are set out in the national law and rules, which is template legislation applied across Australian jurisdictions providing a high degree of national consistency. Similar to the National Access Regime, the energy access regimes are amended on the basis of a guiding objective, which focusses on economic efficiency in the long term interests of consumers. Access policy is determined collectively by State, Territory and Commonwealth Ministers through the SCER. Changes to the laws require unanimous agreement of the SCER, with the Commonwealth Minister as chair. Changes to the rules require the AEMC to follow a statutory rule change process with open consultation requirements.

These governance arrangements provide for good quality access arrangements that are developed through robust consultation with a high degree of national consistency. The AEMC is a specialist, independent energy market rule-making body and the SCER provides appropriate checks and balances, with the oversight of State, Territory and Commonwealth Governments.

Certification costs

To clarify our views on the costs of certification for energy access regimes expressed in our earlier submission, it may be useful to outline the practicalities of achieving certification and retaining the certified status for the full duration of the certified period (10-15 years on average).

Our understanding of the process based on earlier work with SCER members is as follows:

- Certification would likely involve a coordinated application across the jurisdictions to the National Competition Council (NCC), subject to the agreement of all states. We understand it is likely that most of the laws and rules for electricity and gas would need to be included in the application as aspects of access are dealt with throughout this legislation.
- The NCC would need to review the regimes (using a slightly different test to that applied during the development of the regimes) to decide whether it considers them 'effective'. We understand the NCC and subsequent Ministerial process currently take around 240 days or longer for a decision. We expect it may take longer, depending on the appetite and resources of stakeholders to re-litigate a range of issues that have been previously addressed through rule change consultation over the course of the AEMC's eight years as the rule maker, and in the earlier development of the equivalent documents that preceded the rules.
- This process of NCC and Ministerial review and approval introduces regulatory duplication that does not currently exist for energy access regimes.
- If the Minister certifies the regime, and if the ultimate goal is retaining this certification, the energy sector governance structure would potentially be materially altered. Instead of the AEMC having a single and clear objective for rule making (that the rule change promotes the National Gas Objective or the National Electricity Objective), the national gas and electricity laws would potentially need to be amended so that the AEMC could also consider the certification implications of proposed rule changes. That is, the AEMC would need to factor into its statutory assessment process whether a proposed rule change could be considered a 'substantial modification' by the NCC and Minister and jeopardise the ongoing certification of the electricity and gas regimes. This introduces a second and possibly competing objective in considering the merits of a rule change. As the submission by the Victorian Government explains, if the objectives under which the AEMC

makes decisions are not changed there is a risk of substantial regulatory uncertainty. Furthermore, there is a risk of 'forum shopping' between the AEMC and the NCC by stakeholders on issues, and a risk of substantial regulatory duplication.

- While some submissions have noted it is unlikely that rule changes would be considered substantial modifications, we note that that over the course of a typical certification period (10-15 years) it is highly probable that at least one change would be made that could be considered substantial. For example, the recommendations in the AEMC's March 2013 Transmission Frameworks Review final report relate very directly to the terms of access to the network. Implementing these recommendations could be considered substantial modifications. The economic regulation of networks rule changes introduced at the end of 2012 are another example of changes that could potentially be considered substantial modifications. We note that the PC in its 2013 final report for the inquiry into electricity network regulatory frameworks stated that if our network regulation rule changes in 2012 had been made as an Act of Parliament it would have been considered a substantial legislative change.
- In addition to the regulatory duplication and uncertainty introduced by achieving and retaining certification, there would be additional administrative costs in the AEMC liaising with the NCC during rule change processes. Importantly, this would add more time to the rule change process, which some stakeholders (including the PC in its aforementioned inquiry on network regulatory frameworks review) already consider a lengthy process in some instances.
- In liaising with the NCC during the rule change assessment process, the NCC and Commonwealth Minister would not be required to provide firm commitments as to their interpretation of 'substantial modification' in each rule change instance and a degree of uncertainty would remain as to whether adopting a rule change would jeopardise ongoing certification. The existing Memorandum of Understanding between the NCC and AEMC does little to address this issue and there would need to be unambiguous statutory arrangements to provide the appropriate level of certainty to minimise costs to the AEMC, NCC, the sector and consumers.
- In seeking to retain certification, the relevant Commonwealth minister would essentially become the ultimate decision maker as to whether rule changes relevant to access regimes should proceed and, ultimately, how electricity and gas access arrangements should be designed. This would be a significant departure from the current governance arrangements.

Separately, we note that while we support the idea of the proposed revocation mechanism in the PC's draft recommendation 8.5, this does not address the costs outlined above – it simply addresses the costs of uncertainty as to whether a regime is still considered to be certified by the Commonwealth Minister.

Certification benefits

We recognise the benefits that certification aims to achieve in improving the consistency and quality of access regimes, promoting regulatory certainty, and reducing the scope for regulatory duplication. These are desirable outcomes for any access regime. However, in the context of energy access regimes, we do not consider certification will provide these benefits and it is likely instead to introduce greater uncertainty and regulatory duplication.

As outlined above, the current energy access regimes are already good quality regimes, with governance arrangements that promote national consistency, regulatory certainty and avoid regulatory duplication. They are broadly consistent with the National Access Regime and we do not consider certification to offer much, if anything at all, in the way of benefits by promoting any additional consistency. We recognise there is potential for change over the longer term where these regimes may deviate from the National Access Regime, but we do not consider certification to be an efficient or proportionate means to mitigate the risk of deviation.

In light of the above, we consider the sole potential benefit of certification is in addressing the risk of declaration. Submissions to the PC have indicated that the application of the National Access Regime to energy services is generating a degree of regulatory uncertainty as there is a risk that energy services may be declared due to the uncertified status of the energy access regimes. We consider it important to address this uncertainty but note this cannot be efficiently addressed through the current certification arrangements. We suggest an alternative below.

PC Question: Would certification lead to greater consistency between the National Access Regime and the gas and electricity access regimes, and what would be the costs and benefits of this?

We support the response provided by the Victorian Government to this question.

We note there are some key differences between the National Access Regime and the energy access regimes due to the nature of the energy infrastructure services. This is consistent with the PC's views expressed in the draft report that it is appropriate for industry-specific regimes to remain open to alternative approaches where there is a strong basis for these differences. For example, the electricity access regime does not adopt a negotiate-arbitrate model in regulating access to shared transmission and distribution services due to the open access framework for electricity networks. This involves multiple asset owners across interconnected networks and numerous access seekers who are more efficiently served through upfront regulatory arrangements.

The energy access regimes are broadly consistent with the National Access Regime in many important aspects, including sharing similar overall objectives. As such, we do not consider a mechanism to promote greater consistency between the regimes is necessary at this time.

We appreciate that leaving open the option for the National Access Regime to apply may have appeal as a means to address any potential future deviations between the regimes. However, we do not consider that the certification process is an appropriate or proportionate means by which to address this potential deviation due to the costs outlined above and the fundamental change to the governance arrangement that this represents.

Alternative approach to certification

Consistent with the submission provided by the Victorian Government, we propose that the PC recommend exempting the energy access regimes from the certification requirements. We consider this approach to best achieve the objectives of promoting regulatory certainty and reducing the scope for regulatory duplication.

Possible options include deeming the energy regimes to be 'effective' under law or through an exemption where Part IIIA does not apply to energy access regimes regulated under the National Electricity Law and National Gas Law. The latter is consistent with the exemption that is currently in place for Commonwealth access regimes.

We appreciate the concern about setting negative precedents for industry regime exemption, but we do not accept this to be the case in this instance. We consider that exempting energy access regimes is consistent with the existing Commonwealth regime exemption for the reasons outlined above regarding the national consistency and Commonwealth oversight involved. It may be appropriate for other industry-specific regimes to be considered for exemption. However, they would need to reach similar hurdles. These could include demonstrating there are net costs associated with remaining within the National Access Regime and that the regimes:

- are good quality regimes with a high degree of national consistency;
- have been established under a clear objective that is broadly consistent with the national access regime objective; and

- they are only amended through robust processes with good governance arrangements involving State, Territories and Commonwealth Governments.

To address concerns about a material deviation between the energy access regimes and the National Access Regime over time (where the deviation represents a deviation from good regulatory practice), exemption could involve a legislative trigger or a periodic review mechanism. Such a trigger could involve a review of the exemption if the clause 6 principles of the Competition Principles Agreement or the objects clause of Part IIIA of the Competition and Consumer Act 2010 significantly diverge from the objectives of the National Electricity Law or the National Gas Law.

Our key focus in proposing these changes to the current arrangements is to promote regulation that offers net benefits. In the context of the effective energy access regimes, this means achieving immunity from declaration that endures for a reasonable period of time and to achieve this immunity through a means that does not jeopardise the effectiveness of the existing governance arrangements for the energy markets. Our suggested approach offers an efficient and proportionate means to remove the uncertainty of declaration without creating additional uncertainty, regulatory duplication or other costs.

We welcome the opportunity to discuss these issues in further detail with the PC and other stakeholders. The appropriate contact is Paul Smith, Senior Director of Strategy and Economic Analysis,

Yours sincerely

Chris Spangaro
A/g Chief Executive