



Australian Energy Market Commission

FINAL DETERMINATION

**NATIONAL ELECTRICITY AMENDMENT
(MINOR CHANGES 2) RULE 2018**

**NATIONAL ENERGY RETAIL
AMENDMENT (MINOR CHANGES 2)
RULE 2018**

AEMC

8 NOVEMBER 2018

DETERMINATION

INQUIRIES

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ABOUT THE AEMC

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

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SUMMARY

- 1 The Commission has determined:
 - under sections 102 and 103 of the National Electricity Law (NEL), to make the *National Electricity Amendment (Minor Changes 2) Rule 2018 No. 11* (electricity Rule)
 - under sections 259 and 261 of the National Energy Retail Law (NERL), to make the *National Energy Retail Amendment (Minor Changes 2) Rule 2018 No. 5* (retail Rule).
- 2 The electricity Rule and the retail Rule (the Rules):
 - correct minor errors, including: formatting; typographical, definitional and cross referencing anomalies; and insertion of civil penalty provision notes
 - correct a minor error in the definition of “jurisdictional regulator” in clause 8.12(a) of the National Electricity Rules (NER) to reflect the policy intent of the Australian Energy Market Commission (AEMC or Commission)
 - amend subrule 117(1) of the National Energy Retail Rules (NERR) to clarify the intent of the rule and reflect the policy intent of the Commission
 - correct certain clause references in the transitional arrangements at clauses 11.109.2 and 11.109.3 of the NER to reflect the policy intent of the Commission.
- 3 The Rules were proposed by the Commission and aim to promote clarity of meaning and remove identified errors in the NER and NERR. The Rules made by the Commission differ from the draft rules proposed by the Commission with a few additional minor errors identified for correction since the Rule change processes were commenced.
- 4 The Commission considers that:
 - the electricity Rule will or is likely to contribute to the achievement of the National Electricity Objective (NEO) and therefore satisfies the Rule making test under section 88 of the NEL;
 - the retail Rule will or is likely to contribute to the achievement of the National Energy Retail Objective (NERO) and therefore satisfies the Rule making test under section 236(1) of the NERL; and
 - the retail Rule is compatible with the development and application of consumer protections for small customers and therefore satisfies the Rule making test under section 236(2)(b) of the NERL.
- 5 The Rules will commence on 9 November 2018.

CONTENTS

1	The AEMC's rule change request	1
1.1	The rule change request	1
1.2	Rationale for the rule change request	1
1.3	Solution proposed in the rule change request	1
1.4	The rule making process	2
2	Final rule determination - electricity	4
2.1	The Commission's final rule determination	4
2.2	Rule making test	4
2.3	Summary of reasons	5
3	Final rule determination - retail	8
3.1	The Commission's final rule determination	8
3.2	Rule making test	8
3.3	Summary of reasons	9

APPENDICES

A	Legal requirements under the NEL and NERL	11
A.1	Final rule determination	11
A.2	Power to make the rule	11
A.3	Commission's considerations	11
A.4	Civil penalties	12
A.5	Conduct provisions	12

1 THE AEMC'S RULE CHANGE REQUEST

1.1 The rule change request

The Commission has power to make a Rule without a request if it considers that the Rule corrects a minor error in the Rules or makes a non-material change to the Rules.¹

On 4 October 2018, the Commission initiated:

- the proposed *National Electricity Amendment (Minor Changes 2) Rule 2018* under sections 95 and 96(1)(a) of the NEL; and
- the proposed *National Energy Retail Amendment (Minor Changes 2) Rule 2018* under sections 251 and 252(1)(a) of the NERL,

subject to any requests not to expedite the Rule making process.

The Commission initiated the proposed Rules under the expedited process in section 96(1)(a) of the NEL and section 252(1)(a) of the NERL respectively as it considered the Rules (relevantly) were unlikely to have a significant effect on the National Electricity Market (NEM) or on a market for energy or the regulation of customer connection services. The Commission therefore considered that the Rules fell within the definition of a non-controversial rule under sections 87 of the NEL and 235 of the NERL.

The AEMC did not receive any requests not to expedite the Rule making process. Accordingly, the Rule change proposal was considered under an expedited process.

The Commission invited submissions on the Rule change proposal by 1 November 2018. The Commission received two submissions on the Rule change proposal - one from Origin Energy received on 31 October 2018, and one from Alinta Energy received on 1 November 2018. This is discussed in further detail at section 3.3 below.

1.2 Rationale for the rule change request

As part of the AEMC's rule making functions conferred on it under legislation, the Commission reviews, amends and maintains the Rules in accordance with the NEL, the NERL and the National Gas Laws. The purpose of this function, among other things, is to improve and enhance the quality of the Rules.

The Rule change proposal has been prompted by the identification of various minor errors and non-material changes that should be corrected or made to improve the quality and clarity of the Rules and to reflect the policy intent of the Commission.

1.3 Solution proposed in the rule change request

The Commission proposed Rules seek to:

- correct minor errors, including: formatting; typographical, definitional and cross referencing anomalies; and insertion of civil penalty provision notes

¹ Section 91(2) of the NEL and section 243(2) of the NERL.

- correct a minor error in the definition of “jurisdictional regulator” in clause 8.12(a) of the NER to reflect the policy intent of the Commission
- amend subrule 117(1) of the NERR to clarify the intent of the rule and reflect the policy intent of the Commission
- correct certain clause references in the transitional arrangements at clauses 11.109.2 and 11.109.3 of the NER to reflect the policy intent of the Commission.

With respect to clause 8.12(a) of the NER, an error was made in the definition of “jurisdictional regulator” in clause 8.12(a) of the NER. It was intended that this definition capture all applicable regulators in NEM jurisdictions and the Northern Territory. The relevant Tasmanian regulator was unintentionally omitted from this definition. The electricity Rule addresses this drafting error by including an additional paragraph in this definition. It is proposed that this drafting error be addressed by way of the minor rule change process on the basis that the amendment to correct the error is consistent with the policy intent of the Commission (as outlined in the Final Determination of the “Establishing values of customer reliability” rule change)² and will not impact upon the application of rule 8.12. Accordingly, the change is “non-material” in nature.

With respect to subrule 117(1) of the NERR, the proposed amendment is intended to clarify the intent of that rule, namely that the de-energisation restrictions in rule 117 are only to apply if a retailer has the right to de-energise both the electricity and gas supply of a customer, and the customer has a dual fuel contract.³ It is proposed that this be addressed by way of a minor rule change process on the basis that it is consistent with the policy intent of the rule (as agreed with the AER), and accordingly, the change is “non-material” in nature.

With respect to clauses 11.109.2 and 11.109.3 of the NER, those provisions make reference to particular clauses in the connection framework at Chapter 5 of the NER, with the unintended effect that connection applicants intending to connect embedded generating units were excluded from those transitional arrangements. This was not in accordance with the policy intent of the “Generator technical performance standards” rule change,⁴ which was intended to apply the transitional arrangements to all connection applicants. The amendments to clauses 11.109.2 and 11.109.3 resolve this drafting error by deleting and inserting (as applicable) the relevant clause references.

1.4 The rule making process

On 4 October 2018, the Commission published a notice advising of its commencement of the rule making process and consultation in respect of the rule change request.⁵ A Rule Proposal

² The final Rule Determination (dated 5 July 2018) and the *National Electricity Amendment (Establishing Values of Customer Reliability) Rule 2018 No. 8* can be found at: <https://www.aemc.gov.au/rule-changes/establishing-values-of-customer-reliability>

³ The need for this clarification became apparent following an amendment to the definition of “dual fuel market contract” under the *National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018 No. 2*.

⁴ The final Rule Determination (dated 27 September 2018) and the *National Electricity Amendment (Generator technical performance standards) Rule 2018 No. 10* can be found at: <https://www.aemc.gov.au/rule-changes/generator-technical-performance-standards>

⁵ This notice was published under s. 95 of the National Electricity Law (NEL) and 251 of the National Energy Retail Law (NERL).

identifying specific issues for consultation was also published. Submissions closed on 1 November 2018.

The Commission considered that the rule change request was a request for a non-controversial rule as defined in sections 87 of the NEL and 235 of the NERL. Accordingly, the Commission commenced an expedited rule change process, subject to any written requests not to do so. The closing date for receipt of written requests was 18 October 2018.

No requests to not carry out an expedited rule change process were received. Accordingly, the rule change request was considered under an expedited process.⁶

The Commission received two submissions on the Rule change proposal - one from Origin Energy received on 31 October 2018, and one from Alinta Energy received on 1 November 2018. This is discussed in further detail at section 3.3 below.

⁶ Section 96 of the NEL and 252 NERL.

2 FINAL RULE DETERMINATION - ELECTRICITY

2.1 The Commission's final rule determination

In accordance with sections 102 and 103 of the NEL the Commission has made this final Rule determination and the final Rule in relation to the electricity Rule proposed by the Commission.

The Commission's reasons for making this final Rule determination are set out in section 2.3.

In relation to the electricity Rule's application in the Northern Territory, the Commission has determined to not make a differential rule. See section 2.2.2 for the definition of a differential rule and the Commission's ability to make a differential rule.

This chapter outlines:

- the rule making test for changes to the NER
- the Commission's consideration of the final rule against the national electricity objective
- the Commission's consideration in deciding whether to make a uniform or differential rule in accordance with the Northern Territory legislation adopting the NEL;⁷ and
- a summary of the Commission's reasons in deciding to make the electricity Rule.

Further information on the legal requirements for making this final rule determination is set out in Appendix B.

2.2 Rule making test

2.2.1 Achieving the NEO

Under the NEL the Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the national electricity objective (NEO).⁸ This is the decision making framework that the Commission must apply.

The NEO is:⁹

to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to:

- (a) price, quality, safety, reliability and security of supply of electricity; and
- (b) the reliability, safety and security of the national electricity system.

2.2.2 Making a differential rule

Under the Northern Territory legislation adopting the NEL, the Commission may make a differential rule if, having regard to any relevant MCE statement of policy principles, a different rule will, or is likely to, better contribute to the achievement of the NEO than a uniform rule. A differential rule is a rule that:

⁷ National Electricity (Northern Territory) (National Uniform Legislation) Act 2015.

⁸ Section 88 of the NEL.

⁹ Section 7 of the NEL.

- varies in its term as between:
 - the national electricity system, and
 - one or more, or all, of the local electricity systems, or
- does not have effect with respect to one or more of those systems

but is not a jurisdictional derogation, participant derogation or rule that has effect with respect to an adoptive jurisdiction for the purpose of s. 91(8) of the NEL.

As the proposed rule relates to parts of the NEL that apply in the Northern Territory, the Commission has assessed the draft rule against additional elements required by the Northern Territory legislation.¹⁰

2.3 Summary of reasons

The final rule made by the Commission is attached to and published with this final rule determination. The key features of the draft rule were:

- correcting minor errors, including: formatting; typographical, definitional and cross referencing anomalies; and insertion of civil penalty provision notes; and
- correcting a minor error in the definition of “jurisdictional regulator” in clause 8.12(a) of the NEL to reflect the policy intent of the Commission.

See section 1.3 above for further detail regarding the changes made to clause 8.12(a) of the NEL.

The final electricity Rule is largely the same as the draft rule. The differences between the electricity Rule and the draft rule are limited to:

- reinstating the word “and” at the end of clause S5.2.5.13(b)(3)(ix), which was inadvertently deleted as part of the “Generator technical performance standards” rule change; and
- correcting certain clause references in the transitional arrangements at clauses 11.109.2 and 11.109.3 of the NEL to reflect the policy intent of the Commission.

See section 1.3 above for further detail regarding the changes made to clauses 11.109.2 and 11.109.3 of the NEL.

Having regard to the issues raised in the rule change request and during consultation, the Commission considers that the electricity Rule will improve the quality of the NEL in terms of accuracy and consistency. The Commission considers that the electricity Rule will or is likely to contribute to the achievement of the NEO.

Northern Territory Requirements

From 1 July 2016, the NEL, as amended from time to time, apply in the Northern Territory, subject to derogations set out in regulations made under the Northern Territory legislation

¹⁰ From 1 July 2016, the NEL, as amended from time to time, apply in the NT, subject to derogations set out in regulations made under the NT legislation adopting the NEL. Under those regulations, only certain parts of the NEL have been adopted in the NT. (See the AEMC website for the NEL that applies in the NT.) National Electricity (Northern Territory) (National Uniform Legislation) Act 2015.

adopting the Law.¹¹ Under those regulations, only certain parts of the NER have been adopted in the Northern Territory.¹² As aspects of the electricity Rule relates to parts of the NER that apply in the Northern Territory, the Commission will assess the electricity Rule against additional elements required by the Northern Territory legislation (referred to here as the NT Act).¹³ The additional tests are set out below.

National electricity system and local electricity systems

Under the NT Act, the Commission must regard the reference in the national electricity objective to the “national electricity system” as a reference to whichever of the following the Commission considers appropriate in the circumstances, having regard to the nature, scope or operation of the proposed rule change:

- (a) the national electricity system;
- (b) one or more, or all, of the local electricity systems; or
- (c) all the electricity systems referred to above.¹⁴

For the purposes of the electricity Rule, the Commission has determined the reference to the national electricity system to be “all the electricity systems referred to above”.

Differential rule

Under the NT Act, the Commission may make a differential rule if, having regard to any relevant ministerial statement of policy principles, the differential rule will, or is likely to, better contribute to the achievement of the NEO than a uniform rule.¹⁵ A differential rule is a rule that:

- (a) varies in its terms as between:
 - (i) the national electricity system; and
 - (ii) one or more, or all, of the local electricity systems; or
- (b) does not have effect with respect to one or more of those systems,

but is not a jurisdictional derogation, participant derogation, or rule that has effect with respect to an adoptive jurisdiction for the purpose of section 91(8) of the NEL.¹⁶

For this reason, the Commission has:

- for the purposes of applying the rule making test under section 88 of the National Electricity (NT) Law, regarded the reference in the NEO to the national electricity system,

11 National Electricity (Northern Territory) (National Uniform Legislation) (Modifications) Regulations

12 For the version of the NER that applies in the Northern Territory, refer to: <https://www.aemc.gov.au/regulation/energy-rules/national-electricity-rules-northern-territory>.

13 National Electricity (Northern Territory) (National Uniform Legislation) Act 2015.

14 Section 14A of Schedule 1 to the NT Act, inserting section 88(2a) into the National Electricity Law as it applies in the Northern Territory.

15 Section 14B of Schedule 1 to the NT Act, inserting section 88AA into the National Electricity Law as it applies in the Northern Territory.

16 Section 14 of Schedule 1 to the NT Act, inserting additional definitions into section 87 of the National Electricity Law as it applies in the Northern Territory.

as a reference to all the local electricity systems as defined in the National Electricity Law; and

- for the purposes of section 88A of the National Electricity (NT) Law not made a differential rule.

3 FINAL RULE DETERMINATION - RETAIL

3.1 The Commission's final rule determination

In accordance with sections 259 and 261 of the NERL the Commission has made this final Rule determination and the final Rule in relation to the retail Rule proposed by the Commission.

The Commission's reasons for making this final rule determination are set out in section 3.3.

This chapter outlines:

- the rule making test for changes to the NERR; and
- the Commission's consideration of the retail Rule against the national energy retail objective.

Further information on the legal requirements for making this final rule determination is set out in Appendix B.

3.2 Rule making test

3.2.1 Achieving the NERO

The Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the national energy retail objective (NERO).¹⁷ This is the decision making framework that the Commission must apply.

The NERO is:¹⁸

to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.

The Commission must also, where relevant, satisfy itself that the rule is "compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers" (the "consumer protections test").¹⁹

Where the consumer protections test is relevant in the making of a rule, the Commission must be satisfied that both the NERO test and the consumer protections test have been met.²⁰ If the Commission is satisfied that one test, but not the other, has been met, the rule cannot be made.

There may be some overlap in the application of the two tests. For example, a rule that provides a new protection for small customers may also, but will not necessarily, promote the NERO.

¹⁷ Section 236(1) of the NERL.

¹⁸ Section 13 of the NERL.

¹⁹ Section 236(2)(b) of the NERL.

²⁰ That is, the legal tests set out in s. 236(1) and (2)(b) of the NERL.

3.3 Summary of reasons

The retail Rule made by the Commission is attached to and published with this final rule determination. The key feature of the retail Rule is an amendment to subrule 117(1) of the NERR to clarify the intent of the rule and reflect the policy intent of the Commission.

See section 1.3 above for further detail regarding the changes made to subrule 117(1) of the NERR.

Having regard to the issues raised in the rule change request and during consultation, the Commission considers that the retail Rule will improve the quality of the NERR in terms of accuracy and consistency. The Commission considers that the proposed retail Rule will or is likely to contribute to the achievement of the NERO and is satisfied that the rule is compatible with the development and application of consumer protections for small customers.

Origin Energy and Alinta Energy submissions

The Commission received two submissions to the proposed rule change, one from Origin Energy (Origin) received on 31 October 2018 and a second from Alinta Energy (Alinta) received on 1 November 2018.

In its submission, Origin expressed a concern that the proposed change to subrule 117 does not make the intent of the subrule clear, unless read in conjunction with the Rule Proposal. Origin proposed the following further amendment to subrule 117(1) (in underline):

“This rule applies where a retailer and a customer have entered into a dual fuel market contract for the customer’s premises and the retailer has the right to arrange for de-energisation of the customer’s gas supply and the customer’s electricity supply under this Division and the customer has a single contract for their gas supply and electricity supply, or a single bill is issued to a customer for their gas supply and electricity supply.”

Alinta expressed a concern regarding application of the rule where the billing and credit collection timings under the electricity and gas contracts are not aligned contractually. Alinta proposed the following further amendment to subrule 117(1) (in underline):

“This rule applies where a retailer and a customer have entered into a dual fuel market contract for the customer’s premises and the retailer has the right to arrange for de-energisation of the customer’s gas supply and the customer’s electricity supply under this Division under which the billing and credit collection timings are aligned.”

Commission’s consideration of submissions

The Commission has determined not to make the changes put forward by Origin or Alinta in their submissions, for the reasons set out below:

1. The policy intent behind the change to the definition of “dual fuel market contract” in the *National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018* was to include contracts with contingent terms and conditions, regardless of whether billing cycles were aligned, consistently with the AER’s current use of this term in the Retail Pricing Information Guidelines. Thus, rule 117 was intended to apply to all

small customers under a dual fuel contract (whether under a single contract or two contingent contracts), where the retailer has a right to de-energise both fuels, as clarified in the Rule Proposal. The amendments proposed by Origin and Alinta have the effect of further limiting the application of rule 117 to customers who: (i) have a single contract for gas and electricity supply or are issued a single bill for gas and electricity supply (Origin proposal); or (ii) have contracts where the billing and credit collection timings are aligned (Alinta proposal). This narrowing of the “dual fuel” concept does not accord with the policy intent of the definition of “dual fuel market contract”.

2. Further, the Commission considers that limiting rule 117 in the manner proposed by Origin and Alinta would not amount to a “non-material change to the Rules” or a change that “corrects a minor error in the Rules”. Accordingly, the changes proposed are beyond the scope of a minor rule change and cannot be made by the Commission under section 243(2) of the NERL.

A LEGAL REQUIREMENTS UNDER THE NEL AND NERL

This appendix sets out the relevant legal requirements under the NEL and NERL for the AEMC to make this final rule determination.

A.1 Final rule determination

In accordance with ss. 102 of the NEL and 259 of the NERL the Commission has made this final rule determination in relation to the electricity Rule and retail Rule.

In accordance with section 103 of the NEL and section 261 of the NERL, the Commission has made the final electricity Rule and final retail Rule.

The Commission's reasons for making this final rule determination are set out in sections 2.3 and 3.3.

The key features of the electricity Rule and retail Rule are described in section 1.3.

A.2 Power to make the rule

The Commission is satisfied that the Rules fall within the subject matter about which the Commission may make rules. The electricity Rule falls within s. 34(1)(b) of the NEL under which the Commission may make Rules for or with respect to any matter or thing contemplated by the NEL, or which are necessary or expedient for the purposes of the NEL. The Commission considers the electricity Rule necessary and expedient for the purposes of the NEL.

Further the retail Rule falls within the matters set out in section 237 of the NERL, as under section 237(1)(b) of the NERL the Commission may make Rules for or with respect to any matter or thing contemplated by the NERL, or which are necessary or expedient for the purposes of the NERL. The Commission considers the retail Rule is necessary and expedient for the purposes of the NERL.

A.3 Commission's considerations

In assessing the rule change request the Commission considered:

- it's powers under the NEL and NERL to make the electricity Rule and retail Rule
- the Rule Proposal;
- the Commission's analysis as to the ways in which the Rules will or are likely to, contribute to the NEO and the NERO; and
- the extent to which the retail Rule is compatible with the development and application of consumer protections.

There is no relevant Ministerial Council on Energy (MCE) statement of policy principles for this rule change request.²¹

The Commission may only make a rule that has effect with respect to an adoptive jurisdiction if satisfied that the proposed rule is compatible with the proper performance of the Australian Energy Market Operator (AEMO)'s declared network functions.²² The electricity Rule is compatible with AEMO's declared network functions because it makes only minor and non-material changes to the NER and does not change AEMO's functions in any material respect.

A.4 Civil penalties

The Commission cannot create new civil penalty provisions. However, it may recommend to the COAG Energy Council that new or existing provisions of the NER and NERR be classified as civil penalty provisions.

The Commission's final rule amends the following provisions of the NER that are civil penalty provisions:

- clause 3.13.3(b1)
- 4.11.2(d); and
- clause 5.2.3A(b)

The above provisions are currently classified as civil penalty provisions under Schedule 1 of the National Electricity (South Australia) Regulations. The Commission considers the above provisions (other than clause 4.11.2(d)) should continue to be classified as civil penalty provisions as the changes to these clauses are minor or non-material, and therefore does not propose to recommend any change to their classification to the COAG Energy Council.

The Commission considers that clause 4.11.2(d) should no longer continue to be classified as a civil penalty provision because this provision has been deleted as part of this rule change (as the provision is now redundant) and therefore will propose to the COAG Energy Council that its classification be changed.

A.5 Conduct provisions

The Commission cannot create new conduct provisions. However, it may recommend to the COAG Energy Council that new or existing provisions of the NER or NERR be classified as conduct provisions.

The final rule does not amend any rules that are currently classified as conduct provisions under the NEL or National Electricity (South Australia) Regulations, or the NERL or National Energy Retail Regulations. The Commission does not propose to recommend to the COAG Energy Council that any of the proposed amendments made by the Rules be classified as conduct provisions.

²¹ Under s. [33 of the NEL/ 73 of the NGL/ 225 of the NERL] the AEMC must have regard to any relevant MCE statement of policy principles in making a rule. The MCE is referenced in the AEMC's governing legislation and is a legally enduring body comprising the Federal, State and Territory Ministers responsible for energy. On 1 July 2011, the MCE was amalgamated with the Ministerial Council on Mineral and Petroleum Resources. The amalgamated council is now called the COAG Energy Council.

²² Section 91(8) of the NEL.