

Australian Energy Market Commission
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ERC0323 – Improving Consultation Procedures in the Rules

The Australian Energy Council welcomes the opportunity to make a submission to the Australian Energy Market Commission's ('AEMC') *Improving Consultation Procedures in the Rules* Consultation Paper (the Consultation Paper).

The Australian Energy Council ('AEC') is the industry body representing 20 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia, sell gas and electricity to over 10 million homes and businesses, and are major investors in renewable energy generation.

The AEC does not consider the rule change proposed by the Australian Energy Market Operator (AEMO) achieves its intended purpose of making sure consultation processes are able to respond to the changing circumstances in the energy market and still deliver good outcomes for consumers. While the AEC agrees that there is a need to improve consultation processes to ensure they are fit for purpose and efficient, AEMO's suggested approach that would see consultation reduced by default does not strike the right balance in ensuring a delegated rule maker is able to effectively identify, understand, and respond to the issues created by a change proposal.

Broadly, the AEC considers that two rounds of consultation provides the greatest opportunity for industry and consumers to effectively participate in a change process. In the AEC's experience, a single round of formal consultation leads to a rushed outcome – with either issues identification at the commencement of a process or solution design in its latter stages impeded by the lack of a formal ability for stakeholders to provide comment. Especially considering that in order to assess the impact of a change to consumers, the decision maker is reliant on information from stakeholders about the costs, benefits and any timing considerations. However, the AEC does support the need for a formal expedited or streamlined consultation process for use by decision makers where change processes are urgent or uncontroversial. In effect, the AEC contends that the AEMO proposal should be flipped, ensuring a robust two round consultation process is formalised in the rules, with an ability for a rule maker to shorten the process where appropriate.

The AEC encourages the AEMC to develop a more preferable rule as part of this rule change consultation that delivers a flexible and fit for purpose change process consultation procedure that could be utilised in all change processes by decision makers (that is, all change processes illustrated in Appendix B of the Consultation Paper) that values robustness and efficiency over speed. To achieve this, two rounds of consultation (as is required by the AEMC in undertaking a standard rule change process) are critical to provide confidence to stakeholders that processes are robust, and decisions are made that effectively balance the needs of industry and consumers alike. The AEC considers the development of an expedited or streamlined rule making power to be used by decision makers in circumstances where a change is urgent or non-controversial would achieve many of the outcomes sought by AEMO in its rule change proposal without the risk of unintended outcomes that detrimentally impact the market and consumers. This expedited or streamlined process should provide an opportunity for impacted parties to object to the shortened change process, and ensure

that the integrity of the change process is maintained in areas that are more complex or technical than decision makers might appreciate.

Finally, the AEC recommends the AEMC consider what an appropriate governance structure might look like in a rules consultation procedure that allows greater flexibility to decision makers to structure its consultation processes in a manner that ensures that change process meets the long-term interests of consumers.

Best practice consultation

The AEC considers that best practice consultation can be broken up into two phases, each with different objectives.

The first phase enables decision makers to better understand the issues presented by the change, in particular, the commercial and customer experience impacts it is unlikely to be aware of. In the AEC's view, the approach of the AEMC in publishing a consultation paper seeking feedback on key issues it considers important, but also seeking alternative views that it might not have yet considered represents one means of effectively undertaking a phase one consultation. Another effective approach is the precursor to the impact and Implementation assessment undertaken as part of a change to the National Gas Rules. This approach sees AEMO develop and publish a more progressed view of what it sees as the pertinent issues and response than the AEMC's consultation paper model does, resulting in a deeper understanding of issues both from the decision maker and stakeholders, however the AEC acknowledges that the development of this type of phase one consultation likely comes at greater cost to the decision maker. As this highlights, there is no distinct ideal first phase consultation approach, with each issue presenting at different levels of development and complexity.

The objective of phase one consultation is to resolve the issues the decision maker seeks to deliver from the change process at a high level. While in many cases this phase can be undertaken with one round of consultation with stakeholders, in some more complex change processes there may be value in an additional round of consultation. This is particularly relevant where a consultation process highlights that there are a number of potential solutions that might resolve a particular issue. Where stakeholders have not had an opportunity to consider these options, an options or approach paper might be beneficial.

The AEC would welcome the opportunity to work with the AEMC and other decision makers to develop an effective phase one consultation process that enables a decision maker to best engage stakeholders and encourages highly pertinent feedback that enables the decision maker to identify solutions to the key questions.

The second phase of best practice consultation is particularly important in the development of technical or operational change processes. Phase two consultation seeks to translate the proposed policy decision into specific regulations or obligations. Provided the policy decision has been made based on a rational assessment of the evidence before it, second round consultation effectively assumes a pre-determined outcome, with the focus of the consultation process being to obtain feedback on errors made, or the specific solution proposed, rather than to re-litigate the merits of a change proposal.

The AEC considers these two phases are critical, and should be undertaken sequentially. It might be said that either phase could be skipped, or both phases could be undertaken simultaneously. However, the AEC considers that this view would disregard the clearly different outcomes sought from each phase, resulting in suboptimal decision making. If for example, a decision maker proposed a solution that disregarded a pertinent factor identified by stakeholders in the single round of consultation, the decision maker would need to make a final decision on that issue without other

stakeholders having an opportunity to consider the impact of the new solution on their operations or customers. Alternatively, a decision maker could seek views from stakeholders as to what the optimal solution is, as is undertaken in the AEMC's expedited rule change process, yet then be required to develop and finalise technical drafting without an opportunity for stakeholders to consider whether that drafting might result in any unintended consequences. Neither of these outcomes is in the long-term interests of consumers.

An improved consultation procedure

The AEC considers the AEMC should seek to develop one improved consultation procedure that can be utilised in all existing subordinate instrument consultation processes.

As a default, the AEC considers that two rounds of consultation should be enshrined in the rules, however, a shortened process should be able to be proposed by a decision maker in instances where it is appropriate, provided an appropriate governance structure is developed that provides confidence to stakeholders that consultation will not be unreasonably circumvented.

The AEC proposes that the decision maker should be given flexibility to identify timeframes and processes that it considers appropriate as part of its development of a consultation process, provided it met the objectives sought in the two phases of best practice consultation highlighted above. The AEC agrees with AEMO that the current rules consultation procedure is unnecessarily structured, and does not allow for efficient decision making. Similarly, this flexibility in approach should be covered by an appropriate governance structure that enables objections from stakeholders in certain circumstances.

So as to provide guidance to decision makers in determining appropriate consultation processes, the AEC supports AEMO's proposal to develop a list of principles that should be considered. These principles might include a requirement on the decision maker to consider:

- The complexity of the change proposed
- Whether the change proposed impacts individual participants or B2B operations
- The increase or decrease in regulatory burden on participants of the change proposed
- The urgency of the change proposed on the successful operation of the market
- Whether the change has been previously consulted on by another consultation process at an appropriate level of detail
- Whether a new subordinate instrument is being consulted on,
- any change would alter the competitive market landscape such as broadening or narrowing of potential industry players,
- Will the service or information provision characteristics for participants be materially altered,
- Whether changes have the potential to materially increase or decrease costs or earnings,
- If market transparency, information disclosure, accountability and reporting by decision makers is reduced, or
- where requested as part of participant feedback to an initial consultation plan.

Decision makers should be required to ensure that the proposed consultation process is undertaken in a timely manner, with consideration on the regulatory or compliance burden of participants in engaging with the process. The AEC does not see a need to specifically entrench timeframes within the Rules, however consider that there should be an expectation that a reasonable period of time is provided to enable the type of feedback a decision maker is seeking. To illustrate this need for flexibility, the AEC understands the current RCP timeframes where only 10 business days are allowed for feedback to a draft proposal has at times impeded the ability of participants to properly

understand the technical or operational impacts of a change, and led to submissions not being made. In other circumstances, 10 business days might be appropriate, particularly if changes proposed are not detailed, the changes proposed are well understood, or the decision is for no change to be made at all. So as to adequately protect participants, again, the AEC considers that the governance framework should enshrine certain obligations on a decision maker in determining an appropriate timeframe.

In this improved consultation procedure, the AEC considers that the governance framework within the rules should detail the ability of stakeholders to object to process related decisions of decision makers. As a starting point, the governance framework should require a decision maker to propose early in its phase one consultation its preferred approach to consulting on the change, including its preferred timelines and processes. Should stakeholders oppose this approach, there should be an ability to lodge a formal objection on reasonable grounds, in line with the ability to object to an expedited rule making process in the AEMC's governance framework. This objection process might require a participant to illustrate that the decision maker has failed to comprehend the impact on that participant, to the extent that the principles have not been properly considered. The AEC considers that stakeholders and decision makers have shared objectives for efficient and appropriately developed consultation processes, so there does not appear to be a benefit in making the ability for a stakeholder to object to a timeline to be overly narrow. If necessary, the AEC consider that the rules could set out a 'standard' approach that could be followed in circumstances where an objection is unable to be resolved.

Additional obligations in the rules consultation procedures

Finally, the AEC considers that as part of this rule change, the AEMC should entrench an obligation on a subordinate decision maker to ensure that any change proposed is in line with the National Electricity Objective and its equivalents. In particular this would make clear that subordinate decisions contribute to the long-term interests of consumers, as is required in decisions of the AEMC. The AEC consider that an enhanced expectation on decision makers to focus on the benefits and costs of change will ensure positive outcomes for consumers in an environment where an increasing number of changes are delegated to guidelines and other instruments.

The AEC looks forward to continuing to work with the AEMC as it progresses this rule change to ensure that the rules consultation procedure is fit for purpose, flexible and efficient. These consultation processes are critical to confidence of stakeholders that decisions will contribute to the ongoing efficacy of changing energy markets, in the long-term interests of consumers.

Any questions about this submission should be addressed to me directly, by email to ben.barnes@energycouncil.com.au or by telephone on (03) 9205 3115.

Yours sincerely,



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