THE UNIVERSITY OF
SYDNEY

Associate Professor Penelope Crossley

Associate Professor Energy Law and SOAR Fellow (2020 – 2022)

18 August 2022

Dear Mr Oakeshott

I am writing to you in my capacity as a commercial energy law expert to request that you do not expedite the 'Amending the administered price cap' rule change' under s.96 of the National Electricity Law.

As you may be aware, I have previously conducted research on the AEMC rule change processes and have critically evaluated the effectiveness of that process from the perspective of the long-term interests of consumers. That research and my expertise in this area informs my submission.

Meaning of the word 'urgent'

This matter is clearly controversial and does not meet the alternative basis for an expedited rule change of being 'urgent' under s.96(1)(c) of the *National Electricity Law*. An urgent rule is defined in s.87 of the NEL as a rule relating to any matter or thing that, if not made as a matter of urgency, will result in that matter or thing imminently prejudicing or threatening— (a) the effective operation or administration of the wholesale exchange operated and administered by AEMO; or (b) the safety, security or reliability of the national electricity system.

Noting that the meaning of the word 'urgent' in the *National Electricity Law* has never been interpreted by the courts, according to principles of statutory interpretation the word ought

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to be interpreted according to its ordinary and common-sense meaning. In this context, I would argue that the word 'urgent,' portrays a sense that the market conditions pose an imminent threat or require immediate attention. This is consistent with the approach that the courts have taken to interpreting the meaning of the word 'urgent' in other legislative contexts.[1]

Do the present market conditions warrant an 'urgent' final rule determination?

The current electricity market conditions do not support the application of the expedited rule-change process, and its consequent impact on energy consumers' ability to participate in a proper two-stage rule change consultation process.

I have had the benefit of reading the EUAA's submission on this point, and I concur with their assessment that the conditions that would lead to the administered price threshold being exceeded are not currently present and nor are they an imminent threat.

However, even if the AEMC finds that an imminent threat does exist, the potential impact of such a rule change on consumers means that this still does not warrant a rushed expedited process and that the two-stage process of a normal rule change should still be undertaken. Under the normal rule change process, the process from initiation to final determination will be concluded well before next Winter but will still afford robust market and consumer consultation and a transparent deliberation process.

Negative impact on consumers by impeding their opportunity to make submissions

Energy consumers are arguably the best placed stakeholders to assess what is in their long-term interests. My previous research has found that consumer submissions are more likely to be incorporated into a final rule determination when they are made at the draft

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[1] See e.g., Green *v Econia Ptv Ltd* [2016] SASC 153, where Dart J added, "For a matter to be urgent, it must have the quality of requiring immediate attention": at [23]. In *CPB Contractors Pty Ltd v JKC Australian LNG Pty Ltd* [2017] WASC 112, Le Miere J considered an "urgent" matter to be "pressing; compelling or requiring immediate action or attention": at [37]; followed by Ward CJ in Eq in *CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd* [2017] NSWSC 1798 at [105], [119].

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determination stage.[2] The opportunity for consumers to make submissions at this stage will not be afforded to them in the context of an expedited rule change, and thus the Commission will lose a valuable opportunity for consumers to provide input into what they believe to be in their long-term interests.

Impact of a twelve-month sunset clause

I finally would like it noted that I am concerned that representations have been made to the Commission that the expedited process rather than the normal process should be used because of the presence of a twelve-month sunset clause. The presence or absence of this clause is immaterial to any consideration of whether the threat of exceeding the administered price cap is an imminent threat.

Please contact me should you wish to discuss any of these matters further, Penelope.crossley@sydney.edu.au or (02) 9351 0388.

Yours sincerely

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[2] Crossley, P (2015) '*The impact of consultations with energy consumer advocates in the AEMC rule-change process: A study of the outcomes of energy consumer advocates*,' Report for the Public Interest Advocacy Centre.

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