



Australian Energy Market Commission

**Rule Determination**

**National Electricity Amendment (Easement  
Land Tax Pass Through) Rule 2008**

Rule Proponent(s)  
SP Ausnet

27 November 2008

Signed:  .....

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For and on behalf of  
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## **About the AEMC**

The Council of Australian Governments, through its Ministerial Council on Energy, established the Australian Energy Market Commission (AEMC) in July 2005 to be the Rule maker for national energy markets. The AEMC is currently responsible for Rules and policy advice covering the National Electricity Market. It is a statutory authority. Our key responsibilities are to consider Rule change proposals, conduct energy market reviews and provide policy advice to the Ministerial Council as requested, or on AEMC initiative.

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## Abbreviations

ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
NEL	National Electricity Law
NEM	National Electricity Market
NEO	National Electricity Objective
Rules	National Electricity Rules

# 1 SP Ausnet's Rule Change Proposal

## 1.1 Proposal

On 17 September 2008 the Commission received a Rule Change proposal from SP Ausnet entitled "Pass Through of Easement Land Tax in Victoria" (Rule Change Proposal).

SP Ausnet seeks to amend the National Electricity Rules (Rules) in order for it to recover the costs of easement land tax that it incurs in Victoria.<sup>1</sup> By amending the Rules, SP Ausnet seeks to give expression to an understanding between the Victorian Government and SP Ausnet with respect to easement land tax. Furthermore, it seeks to reinstate the previous regulatory treatment of SP Ausnet by the Australian Competition and Consumer Commission (ACCC) prior to the introduction of the current chapter 6A to the Rules.

SP Ausnet submitted that the Rule Change Proposal is non-controversial and has therefore requested that the Rule-making process be expedited in accordance with section 96 of the National Electricity Law (NEL).<sup>2</sup>

## 1.2 Problem to be addressed by the Rule Change

Under savings and transitional provisions which commenced with chapter 6A of the Rules, there were inserted provisions which sought to enable SPI PowerNet to recover the costs of land tax payable on its easements. These provisions are set out in clause 11.6.21 of the Rules. In SP Ausnet's view these provisions do not operate as intended for the following reasons:

- Variations in the amount of land tax payable for the easements (when compared with the amounts forecast and included for that tax in SP Ausnet's current revenue determination) may not meet the materiality threshold set out in the Rules to allow for a pass through of these variations.<sup>3</sup>
- The definition of *easements tax change event* is complex and uncertain<sup>4</sup>. There is uncertainty regarding the relationship between an easement tax change event (as defined in clause 11.6.21) and a tax change event (as defined in the Rules).<sup>5</sup> Related to this, there is confusion arising out of references to different concepts in

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<sup>1</sup> Rule Change Proposal, p 1. SP Ausnet is the business name adopted by SPI PowerNet.

<sup>2</sup> Rule Change Proposal, p 2

<sup>3</sup> Rule Change Proposal, p 2 - 3

<sup>4</sup> Terms in italics have the same meaning as they do in the Rules

<sup>5</sup> Rule Change Proposal, p 4

the definition of easements tax change event, such as amount of land tax payable, the value of easements and easement tax rates.<sup>6</sup>

### 1.3 Proponent's Proposed Solution

SP Ausnet's proposed solution is to amend the definition of *easements tax change event* in clause 11.6.21 with the object of enabling SP Ausnet to completely pass through to its customers the amount of easement land tax (regardless of the materiality). It proposes to remove the materiality threshold that is currently applied to easement land tax and to simplify the definition of *easements tax change event*.

SP Ausnet proposes that the definition of easements tax change event in clause 11.6.21 be amended to read as follows:

**“easements tax change event** means a change in the amount of land tax that is payable by SPI PowerNet in respect of the easements which are used for the purposes of SPI PowerNet's transmission network where the change results in SPI PowerNet incurring higher or lower costs in providing prescribed transmission services than the amount included by the AER in its Revenue Determination. The easement tax change event is not subject to any materiality threshold that would otherwise apply [in accordance with the definitions of positive change event and negative change event] but for this clause 11.6.21. For the avoidance of doubt the purpose of this provision is to ensure that SPI PowerNet is neither financially advantaged nor disadvantaged in present value terms by the payment of easement land tax.”

### 1.4 Consultation

On 16 October 2008, the Commission published a notice under section 95 of the NEL advising of its intention to commence the Rule change process and initial consultation on the Rule Change Proposal.

The Commission accepted that the Rule Change Proposal was a request for a non-controversial rule as it considered that the proposed Rule would be unlikely to have a significant effect on the national electricity market. Accordingly, the Commission intended to expedite the Rule Change Proposal under section 96 of the NEL, subject to any written objections. On 31 October 2008, the deadline for written objections closed. None were received. The Rule Change Proposal would be considered under an expedited process under section 96 of the NEL.

On 14 November 2008, the submissions period for the Rule Change Proposal closed. The Commission received no submissions on the Rule Change Proposal.

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<sup>6</sup> Rule Change Proposal, p 4

## 2 Rule Determination

### 2.1 Commission's Determination

In accordance with section 102 of the NEL the Commission has made and published this Rule determination. In accordance with section 103 of the NEL the Commission has made the *National Electricity Amendment (Easement Land Tax Pass Through) Rule 2008 No 11* (Rule as Made).

The Rule as Made will commence on 1 January 2009.

The Rule as Made, which is different from the proposed Rule in the Rule Change Proposal, is published with this Rule determination.<sup>7</sup>

### 2.2 Commission's Considerations

This Rule determination sets out the Commission's reasons for making the Rule as Made. In coming to its decision in favour of the Rule as Made, the Commission has taken into account:

- the Commission's powers under the NEL to make the Rule as Made;
- the revenue and pricing principles set out in the NEL;<sup>8</sup>
- the Rule Change Proposal and the proposed Rule; and
- the Commission's analysis as to the ways in which the Rule Change Proposal will, or is likely to, contribute to the National Electricity Objective (NEO) so that the Rule making test is satisfied.

The Commission considers that the Rule as Made will, or is likely to, better contribute to the achievement of the NEO than the Rule proposed by SP Ausnet. The Rule as Made satisfies the Rule making test because it:

- provides for regulatory certainty and consistency, reflecting an agreement between SP Ausnet and the Victorian Government and reinstating previous regulatory practice; and
- provides clarity in the Rules by removing much of the complexity in the definition of *easements tax change event*.

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<sup>7</sup> See section 103(3) of the NEL. It provides that a Rule that is made in accordance with section 103(1) need not be the same as the draft of the proposed Rule to which a notice under section 95 relates.

<sup>8</sup> Under section 88B of the NEL, the Commission is required to take into account the revenue and pricing principles set out in section 7A of the NEL with respect to matters and things specified in items 15-24 and 25-26J of schedule 1 to the NEL.

Further, the Rule as Made is consistent with the revenue and pricing principles which provide, amongst other things, that regulated network service providers should be provided with a reasonable opportunity to recover at least the efficient costs in complying with a regulatory obligation or requirement.<sup>9</sup>

### **2.3 Differences between Rule as Made and proposed Rule**

While reflecting the intention of the Rule Change Proposal, the Rule as Made differs from the Rule put forward by SP Ausnet in the following respects:

- it amends clause 11.6.21(d) to address the materiality issue to ensure that easements tax change events meet the necessary pre-requisites for the pass through provisions in clause 6A.7.3; and
- it simplifies the definition of *easements tax change event* but retains an explanation of how a change in the amount of land tax is payable is determined – being the difference between the amount of land tax forecast and included in SP Ausnet’s revenue determination and the amount of land tax actually payable, as advised by the Commissioner for State Revenue, Victoria.

### **2.4 Commission’s power to make the Rule**

The Commission is satisfied that the Rule as Made falls within the subject matters for which the Commission may make Rules as set out in section 34 of the NEL and in Schedule 1 to the NEL. The proposed Rule is within:

- The matters set out in section 34 (1)(a)(iii), as it relates to the activities of persons participating in the NEM or involved in the operation of the national electricity system.
- The matters set out in items 15- 24 of Schedule 1 of the NEL as it relates to transmission system revenue and pricing.

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<sup>9</sup> Section 7A(2)(b) of the NEL.

### **3 Commission's assessment against NEL criteria**

This Chapter sets out the Commission's assessment of the Rule Change Proposal and its reasons for making the Rule as Made.

#### **3.1 Methodology**

In assessing any proposed Rule change against the NEL criteria, one must consider the counterfactual arrangements against which the Rule change is being compared in light of the NEO. In the present case, the relevant counterfactual would be a continuation of present arrangements under which SP Ausnet would have changes in its easement land taxes continued to be passed through, subject to a materiality threshold. The Commission has also considered the background to this Rule Change Proposal.

#### **3.2 Rule making test and the National Electricity Objective**

The Rule making test states that 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 NEO.<sup>10</sup> The overarching objective of the NEL is 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:

- price, quality, safety, reliability and security of supply of electricity; and
- the reliability, safety and security of the national electricity system.<sup>11</sup>

The NEO is founded on the concepts of economic efficiency (including productive, allocative and dynamic dimensions of efficiency), good regulatory practice (which refers to the means by which regulatory arrangements are designed and operated) as well as reliability, safety and security priorities. Of particular relevance for this Rule Change Proposal is good regulatory practice; including clarity, certainty and consistency.

SP Ausnet is of the view that the proposed Rule would contribute to the NEO as it would, amongst other things:

- ensure that the amount in respect of easement land tax actually paid by SP Ausnet's customers is no more or less than the actual amount paid by SP Ausnet;
- reinstate an understanding between SP Ausnet and the Victorian Government as well as previous practice between SP Ausnet and the ACCC regarding treatment of easements land tax.<sup>12</sup>

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<sup>10</sup> See section 88(1) of the NEL

<sup>11</sup> See section 7 of the NEL

### 3.3 Revenue and pricing principles

As the matters raised by this Rule Change Proposal concern the regulatory framework governing transmission revenue and pricing, the Commission must also take into account the revenue and pricing principles (set out in section 7A of the NEL).

The revenue and pricing principles relate to providing a reasonable opportunity for regulated network service providers to recover at least the efficient costs, effective incentives to promote efficiency and to ensuring that prices should allow for a return commensurate with the regulatory and commercial risks involved in providing the service.

### 3.4 Commission's analysis

The Commission's assessment has involved a consideration of the background to this Rule Change Proposal and the issues raised by SP Ausnet, being the materiality threshold and complexities in the definition of *easements tax change event*.

#### 3.4.1 Background

In 2004 the *Land Tax (Amendment) Act (Vic) 2004* came into effect. The Commission understands that the effect of this legislation was to extend Victoria's land tax regime to easements held by electricity transmission companies. The amount of this land tax was not included in SP Ausnet's revenue determination for the five years commencing 2004-2005. SP Ausnet applied for and was granted by the regulator full pass through of the easement tax amount, as permitted in its then current revenue determination.

Under chapter 6A of the Rules, SP Ausnet was required to forecast its easement land tax liability as part of the forecast operating expenditure associated with the provision of *prescribed transmission services*. Under chapter 6A, where the forecast included in the *revenue determination* differs from the actual easements land tax paid, SP Ausnet is entitled to apply for a cost pass through under clause 6A.7.3, but only if it meets a materiality threshold (being 1% of the *maximum allowed revenue*). Following commencement of chapter 6A of the Rules, the only pass through mechanisms available are those contained in the Rules (previously the ACCC / Australian Energy Regulator had the discretion to tailor the pass through arrangements to the specific transmission network service provider).

According to SP Ausnet, it sought and was provided, assurances from the Victorian Government that the introduction of the easement land tax would not result in any negative impact on the business. The intention of clause 11.6.21 was to reflect this, given the prerequisites for the operation of clause 6A.7.3.

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<sup>12</sup> Rule Change Proposal, p 1.

However, under present drafting SP Ausnet is not able to pass through to its customers the actual amount of land tax payable by it due to materiality thresholds under the Rules for seeking cost pass throughs and a number of complexities embedded in the definition of *easements change tax event*.

### 3.4.2 Materiality

SP Ausnet's concern is meeting the threshold requirements so that it can rely on clause 6A.7.3 of the Rules (Clause 6A.7.3 deals with cost pass throughs). SP Ausnet's draft Rule seeks to address the materiality threshold issue in the definition of *easements tax change event* in clause 11.6.21(a).

To satisfy the requirements of clause 6A.7.3 of the Rules, an event must be a *positive change event* or a *negative change event*. These definitions include a materiality threshold test; being 1% of the *maximum allowed revenue*.

Currently, clause 11.6.21(d) simply provides that a *pass through event* includes an *easements tax changes event*. To address the materiality issue for the purposes of clause 6A.7.3, clause 11.6.21(d) should provide that, for the purposes of clause 6A.7.3, an *easements tax change event* is deemed to be a *pass through event* and deemed to be a *positive change event* or *negative change event*, as the case may be (even though, as a matter of fact, it might not meet the materiality threshold). This would remove the requirement to meet the materiality hurdle included in the definitions of *positive change event* and *negative change event* in the Rules. It would be deemed to have met it.

### 3.4.3 Complexity

Another concern articulated by SP Ausnet relates to complexity and uncertainty around the relationships between certain concepts in the definition of *easements tax change event* in clause 11.6.21(a) including:

- overlap of that definition with a *tax change event*,
- mixing of concepts such as amounts of land tax, values of easements, rates of land tax, easement tax rates,
- relationship between the amount of land tax payable and its impact on the costs in providing *prescribed transmission services*; and
- the fact that an event is not actually defined.

SP Ausnet has sought to simplify the clause to remove a number of these concepts which, in its view, are redundant. It would appear that the complexity associated with this definition contributes to the difficulty in its application. A number of these concepts detract from the major purpose of the definition. While removing some of the concepts included in the definition are warranted, some concepts should be retained and clarified so that the clause can operate effectively with clause 6A.7.3 of the Rules.

### 3.4.4 Comment

The Commission acknowledges and accepts that:

- the Victorian Government gave a commitment to SP Ausnet that the easements land tax should not have a negative impact on SP Ausnet's business;
- in the past, SP Ausnet has been able to recover the exact amount of the easement tax payable. This should continue; and
- that there may be some confusion around the application of this clause, given the complexity of the definition of *easements tax change event*.

For these reasons the Rule change request is accepted. However, some changes to the drafting suggested by SP Ausnet are warranted.

The Commission proposes that the following provisions below (marked up against clause 11.6.21 in its current form) will address SP Ausnet's concerns about materiality and complexity but ensure a clearer link to clause 6A.7.3 and clarity on what is meant by an *easements tax change event*, and when such an event can be said to have taken place.

### 11.6.21 SPI Powernet savings and transitional provision

#### Definitions

(a) In this clause 11.6.21:

**easements tax change event** means a change in the amount of land tax that is payable by SPI PowerNet in respect of the easements which are used for the purposes of SPI PowerNet's *transmission network*. ~~where that change results in SPI PowerNet incurring higher or lower costs in providing prescribed transmission services than it would have incurred but for that event.~~ For these purposes of this definition, the change in the amount of land tax that is payable by SPI PowerNet must be calculated as by applying the relevant land tax rate to the difference between:

(1) the amount of land tax that is payable in each regulatory year by SPI PowerNet, as advised by the Commissioner of State Revenue, Victoria value of the easements which is used for the purposes of assessing the land tax that is payable; and

(2) the value of the easements amount of land tax which is assumed forecast for the purposes of and included in the revenue determination for each regulatory year of the regulatory control period;

~~and an easements tax change event does not include an event described in paragraphs (a), (b) or (c) of the definition of tax change event.~~

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(d) For the purposes of a *revenue determination* for SPI PowerNet (including but not limited to, a 2008 determination as defined in clause 11.6.18(a)) and clause 6A.7.3, a pass through event includes an easements tax change event is deemed to be:

(1) a pass through event; and

(2) a positive change event or negative change event, as the case may be, whether or not the easements tax change event would be material for the purposes of those definitions.

### **3.5 Assessment against Rule making test**

The Commission has analysed and assessed the Rule Change Proposal. The Commission considers that addressing the issues raised by SP Ausnet through the Rule as Made satisfies the Rule making test as the Rule as Made will:

- enhance regulatory certainty with respect to the treatment of the amount of easements land tax payable by SP Ausnet. Currently there is regulatory uncertainty as to whether the Victorian Government's commitment with respect to parties levied easement land taxes can be realised.
- provide for the consistent application of policy to market participants (namely, SP Ausnet); referring to the reinstatement of previous regulatory practice adopted by the ACCC prior to the introduction of the new Chapter 6A Rules.
- introduce clarity into the operation of Clause 11.6.21 by removing unnecessary complexity and ambiguity.

The Commission considers that the Rule as Made will enable SP Ausnet to be able to recover the efficient costs incurred in complying with the regulatory obligation imposed by the easement land taxes. The Rule as Made would give effect to the revenue and pricing principles and would meet the objectives of the NEO.

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