



Australian Energy Market Commission

## **DRAFT CONSULTATION PAPER**

National Electricity Amendment (Business day definition) Rule 2011

**Rule Proponent**  
AEMO

10 March 2011

**RULE  
CHANGE**

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## **About the AEMC**

The Council of Australian Governments, through its Ministerial Council on Energy (MCE), established the Australian Energy Market Commission (AEMC) in July 2005. The AEMC has two principal functions. To make and amend the national electricity and gas rules - and to conduct independent reviews of the energy markets for the MCE.

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# 1 Introduction

On 21 January 2011, the Australian Energy Market Operator (AEMO) (Proponent) submitted a Rule change request to the Australian Energy Market Commission (AEMC or Commission) to change the definition of *business day* in the *National Electricity Rules* (the Rules). The purpose of the Rule change is to clarify the days that are recognised as public holidays and thereby make clear which days are *business days* under the Rules.

The Proponent proposes to align the definition of *business day* in the Rules with the definition in the *National Electricity Law* (NEL) so that a day that is observed as a public holiday in each participating jurisdiction will not be a *business day*. The Rule change request is available on the AEMC's website. The Proponent's Rule change request did not include a proposed Rule. Appendix A contains a draft Rule prepared by the AEMC.

## *Request for expedited process*

The Rule change Proponent has requested that the Rule change request be subject to the expedited Rule making process as provided for under section 96 of the NEL on the grounds that the Rule change relates to a non-controversial Rule. Section 87 of the NEL defines a 'non-controversial Rule' as 'a Rule that is unlikely to have a significant effect on the national electricity market'. The Proponent considers that this Rule change will not have a significant effect because there will be no practical changes to the operation of the market.

Under an expedited process, the Commission has six weeks from the publication of the notice under section 95 of the NEL to publish a Final Rule Determination. There is no draft Rule determination published. Stakeholders have two weeks from the publication of the notice under section 95 of the NEL to submit written objections to the request for an expedited Rule making process. Stakeholders have four weeks from the publication of the notice under section 95 of the NEL to provide written submissions on the content of the request. More information on the expedited process and due dates from submissions and objections are contained in Part 6 of this Consultation Paper.

## *The Consultation Paper*

This Consultation Paper has been prepared by the staff of the AEMC to facilitate public consultation on the Rule change proposal and does not necessarily represent the views of the AEMC or any individual Commissioner of the AEMC.

This paper:

- sets out a summary of, and a background to, the *Business day* Rule change proposed by the Proponent;
- identifies a number of questions and issues to facilitate the consultation on this Rule change request; and
- outlines the process for making submissions.

Submissions are due by close of business 8 April 2011. The Final Rule Determination is expected to be published on 21 April 2011.

## 2 Background

*Business day* is a term with wide reaching application in the Rules. For example, it is used in relation to:

- settlement requirements;
- prudential management processes;
- service of notices;
- applications to AEMO; and
- publication of reports.

In most cases, *business day* is used to establish the maximum time period within which an action may occur, for example, "Within 3 *business days* of receipt of the summary, AEMO must publish the summary on its website."<sup>1</sup> In some cases it stipulates an exact date, for example, "on the 20th *business day* after the end of a billing period, or 2 *business days* after receiving a statement under clause 3.15.15, whichever is the later, and in accordance with the timetable each Market Participant must pay to AEMO in cleared funds the net amount..."<sup>2</sup>

*Business day* is defined in both the NEL and the Rules, though the definitions are different as shown in Box 2.1 (underline added to highlight differences).<sup>3</sup> The definitions have remained unchanged since the commencement of each instrument, and there are no obvious reasons for the difference between them.

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<sup>1</sup> NEL s 5.6.6B(c).

<sup>2</sup> NEL s 3.15.16.

<sup>3</sup> For comparison purposes, the definition of *business day* in the *National Gas Law* (NGL) is consistent with the definition in the NEL, and *business day* is not a defined term in the *National Gas Rules* (NGR).

**Box 2.1: Definition of *Business Day***

**NEL - Schedule 2, Clause 10**

a day that is not:

- (a) a Saturday or Sunday
- (b) observed as a public holiday on the same day in each of the participating jurisdictions<sup>4</sup> (except the Commonwealth).

**The Rules - Glossary**

A day other than a Saturday, Sunday or a day which is lawfully observed as a national public holiday on the same day in each of the participating jurisdictions.

The NEL definition does not apply to the Rules, since clause 1.7.1 of the Rules specifically excludes the relevant clause of Schedule 2 of the NEL which contains the *business day* definition. However AEMO has only recently become aware that the *business day* definition in the Rules is different from the NEL definition. As a result, to date AEMO has operated in accordance with the meaning of *business day* in the NEL, rather than the Rules.

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<sup>4</sup> A participating jurisdiction refers to the Commonwealth, a Territory or a State if there is in force, as part of the law of that jurisdiction, a law that corresponds to Part 2 of the *National Electricity (South Australia) Act 1996* of South Australia.

### 3 Details of the Rule change Request

There are two issues with the current definition of *business day* under the Rules:

1. The meaning of *business day* under the Rules is currently unclear due to the formulation of public holiday. When the words in the definition are given their ordinary meaning there are several possible interpretations of *a day which is lawfully observed as a national public holiday on the same day in each of the participating jurisdictions*. This is because it is uncertain what would give a public holiday the characteristic *national*, given that public holidays are gazetted by the States and Territories rather than the Commonwealth. Each interpretation is discussed in further detail in Sections 3.1 and 3.2. This leads to two problems:
  - (a) There is a risk that the stakeholders interpret *business days* differently in meeting their regulatory obligations because the meaning of *business day* is unclear; and
  - (b) Each possible interpretation of *national* produces an outcome where some public holidays will be classified as *business days* even though a public holiday is observed on the same day in each participating jurisdiction.
2. The current definition of *business day* in the Rules requires that a non-*business day* be lawfully observed as a public holiday in each participating jurisdiction, which includes the Commonwealth.<sup>5</sup> However, the Commonwealth does not declare public holidays. If the Commonwealth was treated as having no public holidays then there would be no public holidays for the purposes of the Rules. This is an unworkable result.

#### 3.1 Interpretation of national public holiday - 1: Public holiday on the same date in every State and Territory

Firstly, *national public holiday* may be interpreted to mean a day which is lawfully observed as a public holiday in all States and Territories in Australia. However AEMO currently treats a day as a non-*business day* if a public holiday is observed in each jurisdiction in the National Electricity Market (NEM) (excluding the Commonwealth), even if a public holiday is not observed in Western Australia or the Northern Territory. For example, the second Monday in June (the Queen's Birthday), is not a public holiday in Western Australia, however it is treated as a non-*business day*.

Given that the Rules only apply to participating jurisdictions, AEMO has submitted that the public holiday schedule of non-participating jurisdictions is not relevant to the operation of the NEM (notwithstanding that the Commonwealth is a participating jurisdiction). This reasoning is consistent with the definition in the NEL which only

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<sup>5</sup> The Commonwealth is a participating jurisdiction because the *Australian Energy Market Act 2004 (Cth)* applies the *National Electricity (South Australia) Act 1996* as a law of the Commonwealth.

requires that the public holidays fall on the same day in the participating jurisdictions (except the Commonwealth).

The interpretation of *national public holiday* as a day which is lawfully observed as a public holiday in all States and Territories is also problematic because it means that the remainder of the provision (*on the same day in each of the participating jurisdictions*) has no practical operation.<sup>6</sup>

### **3.2 Interpretation of national public holiday - 2: Public holiday observes the same national event in each NEM jurisdiction**

To ensure that every word in the definition of *business day* has operation, *national public holiday* may instead refer to a national event, for example, Christmas Day or Australia Day. This would mean that in addition to the requirement that a public holiday be observed on the same day in each participating jurisdiction, the holiday must observe the same event. However, ascertaining whether the same event is lawfully observed is not necessarily straightforward because:

- State based legislation does not necessarily refer the event that is being celebrated. For example the South Australian legislation provides for public holidays to fall on *the second Monday in June, 1 January, and 26 December* (commonly known as the Queen's Birthday, New years Day, and Boxing Day – noting that the 26 December is celebrated as Proclamation Day rather than Boxing Day in South Australia).
- When a public holiday falls on a Saturday, in some jurisdictions the legislation provides that the public holiday will be celebrated on the following Monday instead, while in others, the public holiday remains on the Saturday with an additional public holiday declared for the Monday. For example, when 1 January falls on a Saturday, strictly speaking the “New Years Day” public holiday falls on 1 January (Saturday) in NSW, Victoria and Queensland, and on 3 January (Monday) in SA, Tasmania and ACT, noting that NSW, Victoria and Queensland have an additional public holiday on the 3 January which also celebrates New Years Day.

In addition, treating a day which is a public holiday in every participating jurisdiction as a *business day* for the reason that it is not described uniformly by the various legislative instruments produces unworkable results. Participating jurisdictions regularly assign different events to public holidays, particularly where public holidays coincide or fall in succession. For example, because Easter Monday and Anzac Day coincide this year, 26 April 2011 is celebrated as:

- Anzac Day - Victoria;
- Easter Monday – NSW, Queensland; and

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<sup>6</sup> In accordance with the principles of statutory interpretation, all words in a provision should be given a function where possible.

- Easter Tuesday – SA, Tasmania.<sup>7</sup>

Similarly, because Christmas Day will fall on a Sunday this year, 26 December 2011 will be celebrated as the Christmas Day public holiday in all States except Victoria and Tasmania, where it is the Boxing Day public holiday.

If *national public holiday* requires that the same event be celebrated, these days would be *business days* under the Rules and therefore require normal settlement and prudential management processes to proceed on these public holidays when most (if not all) financial and banking services in Australia (and many overseas) are not available. This includes the Australian Stock Exchange's (ASX) Austraclear facility, which is relied on as the primary electronic funds transfer (EFT) facility used for NEM settlements.

We consider that the purpose of treating a public holiday as a non-*business day* is that AEMO, market participants, and external organisations (such as the ASX) are unlikely to be fully operational on these days. We do not consider that the particular event for which the organisation is not fully operational is relevant to this purpose.

The Proponent proposes to align the definition of *business day* in the Rules with the definition in the NEL. However the Proponent's Rule change does not include a draft Rule. The AEMC's proposed Rule is in Appendix A.

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<sup>7</sup> The Easter Tuesday public holiday in Tasmania only applies to certain classes of persons. *Statutory Holidays Act 2000* (Tas), s 6.

## 4 Assessment Framework

The Commission's assessment of this Rule change request must consider whether the proposed Rule promotes the National Electricity Objective (NEO) as set out under section 7 of the NEL as follows:

“The objective of this Law 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 –

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

The Proponent submitted that the proposed Rule will provide regulatory certainty for NEM Participants regarding the treatment of *business day* in the NEM. It will also align the definition with current practices. This will remove the possibility for confusion or dispute over when certain obligations, including settlement payments, are due. This is particularly important given the very wide application of the definition in the Rules. AEMO submits that removing the risk of dispute is likely to promote the efficient operation of electricity services for the long term interests of consumers of electricity with respect to the price of electricity supply.

In addition, consistent language between the NEL and the Rules is desirable where the same result is intended.

## 5 Issues for Consultation

Taking into consideration the assessment framework and potential requirements to implement the proposed Rule change, we have identified a number of issues for consultation that appear to be relevant to this Rule change request.

These issues outlined below are provided for guidance. Stakeholders are encouraged to comment on these issues as well as any other aspect of the Rule change request or this paper including the proposed framework.

### 5.1 Policy reasons for the current definition of *business day*

Before the Rule is changed it is prudent to investigate whether there are any policy reasons for either of the interpretations of *national public holiday* identified in Sections 3.1 or 3.2.

#### **Question 1      Policy reasons for the current definition of *business day***

- 1.1 For the purposes of the Rules, should a non-*business day* require that a public holiday be lawfully observed in every State and Territory in Australia, including Western Australia and the Northern Territory?**
- 1.2 For the purposes of the Rules, should a non-*business day* require that a public holiday observe the same event, as well as fall on the same day in each participating jurisdiction? If yes, how should the proper purpose of the public holiday be determined?**

### 5.2 Is the Rule change sufficient to provide for regulatory certainty?

The purpose of the Rule change request is to promote regulatory certainty with regard to the timing of obligations under the Rules. However, given the jurisdictional approach to declaring public holidays, there may be some anomalous public holidays which are not neatly captured by the NEL definition. This could mean that the treatment of certain days may remain unclear under the Rules. For example, AEMO intends to treat 26 April 2011 as a public holiday. However, in Tasmania, Easter Tuesday is referred to in the *Statutory Holidays Act 2000* (Tas) as “a holiday to be observed by certain persons” (which refers to particular State employees). This is distinct from other statutory holidays in the Tasmanian statute which are described as “statutory holidays to be observed as public holidays generally.” It is not obvious whether Easter Tuesday is a public holiday in Tasmania and therefore whether it is a *business day* under the Rules.

One option to provide certainty as to whether a day will be a *business day*, is to give AEMO formal authority to clarify the treatment of the day. This would remove the possibility for disputes to arise with regard to the timing of obligations under the Rules. For example, the ASX Listing Rules define a *business day* as:

“Monday to Friday inclusive, except New Years Day, Good Friday, Easter Monday, Christmas Day, Boxing Day and any other day that the ASX declares is a non-*business day*.”

However, a general discretion to declare public holidays has the potential to detract from the regulatory certainty sought by this Rule change. Alternatively, discretion may be allowed for a limited set of circumstances (for example, where there is a public holiday in at least five NEM jurisdictions). Additional regulation may be required for the timing and mode of such a declaration. Given that the AEMC does not anticipate that there will be many partially declared holidays in one jurisdiction that coincide with public holidays in every other participating jurisdiction (except the Commonwealth), changing the Rules in this way may not be considered a proportionate option.

A second option to clarify whether a day should be a *business day* under the Rules, is to define *business day* with respect to the availability of the fund clearing service used by AEMO. However, as mentioned previously, *business day* refers to a wide range of participant obligations in addition to settlement obligations. It may not be appropriate for the timing of all of these obligations to be subject to the availability of the funds clearing service. Given that, we would like to raise the alternative for stakeholders comment, that for the specific circumstance of financial settlement, *business day* could be defined as a day which the funds clearing service used by AEMO is available.

The two options outlined above would have the result that the definition of *business day* in the Rules would have a different meaning to *business day* in the NEL and NGL (and therefore the National Gas Rules). Consistent definitions of *business days* in each instrument may be desirable to limit the potential for confusion for the timing of obligations.

It is noted that where it is necessary to depart from the meaning of *business day* AEMO can apply to the AEMC for a Rule derogation. This option was exercised by AEMO in 2007 when a settlement day fell on the day declared as the APEC<sup>8</sup> public holiday in Sydney (other participating jurisdictions did not observe a public holiday on this day).

## **Question 2      Regulatory certainty**

- 2.1    Should the Rules give AEMO the authority to declare public holidays, either generally, or in a defined set of circumstances (for example, where there is a public holiday in at least five NEM jurisdictions)?**
- 2.2    For the purposes of settlement, or any other financial transaction required under the Rules, should a *business day* be defined as a day on which the funds clearing service used by AEMO is available?**

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8      Asia-Pacific Economic Cooperation

## **6 Lodging a Submission**

The Commission has published a notice under section 95 of the NEL stating that this Rule change proposal will be assessed following an expedited process pursuant to section 96 of the NEL (subject to written exceptions) as it is a non-controversial Rule.

Under the expedited process, stakeholders have two weeks after the publication of the notice under section 96 of the NEL to object, in writing, to the Rule change proposal being expedited. Written objections need to contain reasoning as to why the stakeholder considers the Rule change proposal is controversial and should be not expedited and will be assessed by the Commission in accordance with section 96 of the NEL. Stakeholders are required to lodge objections with the Commission by 25 March 2011.

The expedited process also provides a four week consultation process on the content of the Rule change proposal. Submissions on the content of the Rule change proposal can be lodged online or by mail by 8 April 2011.

Where practicable, submissions should be prepared in accordance with the Commission's Guidelines for making written submissions on Rule change proposals.<sup>9</sup> The Commission publishes all submissions on its website subject to a claim of confidentiality.

All enquiries on this project should be addressed to Jessica Robinson on (02) 8296 7800.

### **6.1 Lodging a submission electronically**

Electronic submissions must be lodged online via the Commission's website, [www.aemc.gov.au](http://www.aemc.gov.au), using the "lodge a submission" function and selecting the project reference code "ERC0122". The submission must be on letterhead (if submitted on behalf of an organisation), signed and dated.

Upon receipt of the electronic submission, the Commission will issue a confirmation email. If this confirmation email is not received within 3 business days, it is the submitter's responsibility to ensure the submission has been delivered successfully.

### **6.2 Lodging a submission by mail**

The submission must be on letterhead (if submitted on behalf of an organisation), signed and dated. The submission should be sent by mail to:

Australian Energy Market Commission  
PO Box A2449  
Sydney South NSW 1235

Or by Fax to (02) 8296 7899.

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<sup>9</sup> This guideline is available on the Commission's website.

The envelope must be clearly marked with the project reference code: " ERC0122."

Except in circumstances where the submission has been received electronically, upon receipt of the hardcopy submission the Commission will issue a confirmation letter.

If this confirmation letter is not received within 3 business days, it is the submitter's responsibility to ensure successful delivery of the submission has occurred.

## Abbreviations

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
ASX	Australian Stock Exchange
Commission	See AEMC
EFT	electronic funds transfer
NEL	<i>National Electricity Law</i>
NEM	National Electricity Market
NEO	National Electricity Objective
NGL	<i>National Gas Law</i>
NGR	<i>National Gas Rules</i>
the Rules	<i>National Electricity Rules</i>

## A Draft Rule

A draft Rule was not provided by AEMO in its Rule change proposal. The AEMC's draft Rule is provided in Box A.1.

### **Box A.1: AEMC's proposed Rule**

#### *Business day*

~~A day other than a Saturday, Sunday or a day which is lawfully observed as a national public holiday on the same day in each of the participating jurisdictions.~~

a day that is not:

- (a) a Saturday or Sunday
- (b) observed as a public holiday on the same day in each of the participating jurisdictions (except the Commonwealth).