



Australian Energy Market Commission

RULE DETERMINATION

National Electricity Amendment (Business Day definition) Rule 2011

Commissioners

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Spalding

21 April 2011

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For and on behalf of the Australian Energy Market Commission

**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. We make and amend the national electricity and gas rules, and we conduct independent reviews of the energy markets for the MCE.

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Summary

On 21 January 2011, the Australian Energy Market Operator (AEMO or Rule Proponent) submitted the Business Day Definition Rule Change. AEMO submitted the Rule Change to clarify the days that are recognised as public holidays under the National Electricity Rules (the Rules) and thereby make clear which days are *business days* for the purposes of the National Electricity Market (NEM).

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

1. The meaning of *business day* under the Rules is unclear due to the formulation of public holiday as a "national public holiday." 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. This creates a risk of stakeholders interpreting *business days* differently in meeting their regulatory obligations.
2. Under each of the possible interpretations of *business day* in the Rules, occasions may arise where a day that is observed as a public holiday in each participating jurisdiction (except the Commonwealth)¹ is a *business day* under the Rules. As a result, some participant obligations may not feasibly be discharged on these days.

In agreement with AEMO's Rule Change proposal, the Australian Energy Market Commission (AEMC or Commission) makes this final Rule Determination which aligns the definition of *business day* in the Glossary of the Rules with the definition of *business day* in the National Electricity Law (NEL). This will mean that a day which is observed as public holiday in each participating jurisdiction (except the Commonwealth) will not be a *business day* for the purposes of the Rules.

The Rule as made commences on 21 April 2011.

The Rule as made will:

- Improve the feasibility of participants meeting their obligations in accordance with the Rules;
- Remove the ambiguity from the current formulation of *business day* and thereby provide regulatory certainty for the treatment of *business day* in the NEM; and
- Improve the consistency between the regulatory instruments in the energy market – the definition of *business day* in the Rules will align with the definition in the NEL and the National Gas Law (NGL).

¹ 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. However the Commonwealth does not declare public holidays.

The factors outlined above will minimise the possibility of confusion or dispute over when certain obligations are due. This is important given the magnitude of the consequences associated with the failure to adhere to time frames for particular participant obligations (such as those relating to settlement).

Minimising the risk of dispute has the potential for market participants to avoid costs that could ultimately be passed through to electricity consumers through increased prices.

The Rule as made will reflect how the definition of *business day* has been practically applied in the NEM to date. Therefore market participants are unlikely to be adversely affected by this Rule Change.

Consultation on the Rule Change Request

On 10 March 2011, the Commission gave notice under sections 94 and 95 of the NEL to initiate the Rule Change Request under the expedited Rule Change process as a request for a non-controversial Rule. No objections to this process were received, so the Commission has assessed the Rule Change Request under the expedited process provided for in section 96 of the NEL.

The consultation period for submissions on the content of the Rule Change Request closed on 8 April 2011. Two submissions were received. A summary of the issues outlined in the submissions is provided in Appendix A.

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1 AEMO's Rule Change Request

1.1 The Rule Change Request

On 21 January 2011, AEMO (Rule Proponent) made a request to the AEMC to make a Rule Change regarding the definition of *business day* (Rule Change Request).

1.2 Rule Change Request Rationale

AEMO requested this Rule Change to clarify the days that are recognised as public holidays under the Rules and thereby make clear which days are *business days* for the operation of the NEM.

Business day is drafted in Chapter 10 of the Rules as follows:

“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.”

AEMO considers that there are two problems with definition.

Firstly, the meaning of "national public holiday" is unclear. This is because it is uncertain what feature would give a public holiday the characteristic of "national", given that public holidays are gazetted by the States and Territories rather than the Commonwealth.

AEMO considers that a "national public holiday" may refer to a national event, for example, Christmas Day or Australia Day. This means that if a public holiday is observed in each participating jurisdiction (except the Commonwealth) on the same day, but is not observed for the same purpose,² it would be *business day* under the Rules. For example, although 25 April 2011 (Anzac Day/Easter Monday) is observed as a public holiday in each participating jurisdiction, it would not be a "national public holiday" because the purpose of the public holiday is different in each jurisdiction.³ Therefore under this interpretation it would be a *business day*.

Participating jurisdictions regularly assign different events to public holidays that are observed nationally, particularly where public holidays coincide or fall in succession. If these days are considered to be *business days* under the Rules, it would be difficult (if not impossible) for market participants to discharge some of their obligations. For example, market participants would not be able to meet any settlement obligations that may arise, as the clearing facility used by AEMO is not available on these days.

² As described in any of the State-based legislative instruments.

³ Anzac Day is celebrated on 25 April in the Australian Capital Territory, New South Wales, Queensland, South Australia, and Tasmania. Easter Monday is celebrated on this day in the Australian Capital Territory, South Australia, Tasmania, and Victoria.

Secondly, AEMO considers that the definition of *business day* may produce the result that there are no public holidays for the purposes of the Rules, and therefore only Saturdays and Sundays may be non-*business days*. This is because the definition requires that a non-*business day* be lawfully observed as a public holiday in each participating jurisdiction, which includes the Commonwealth. However, the Commonwealth does not declare public holidays. If all public holidays were considered as *business days* under the Rules, participants would not be able to meet their obligations on these days.

1.3 Solution proposed by the Rule Change Request

The Rule Change Request proposed to change the definition of *business day* in the Glossary of the Rules to align it with the definition of *business day* in the NEL. This would have the result that a day which is observed as public holiday in each participating jurisdiction (except the Commonwealth) is not a *business day* for the purposes of the Rules.

1.4 Commencement of Rule making process

On 10 March 2011, the Commission published a notice under section 95 of the NEL advising of its intention to commence the Rule Change process and the first round of consultation in respect of the Rule Change Request. A Consultation Paper prepared by AEMC staff identifying specific issues or questions for consultation was published with the Rule Change Request. Submissions closed on 8 April 2011.

The Commission received two submissions from Victorian distribution businesses, SP AusNet and United Energy Distribution (UED), on the Rule Change Request as part of the first round of consultation. They are available on the AEMC website.⁴ A summary of the issues raised in these submissions and the Commission's responses is contained in Appendix A.

The Commission accepted that the Rule Change Request was a request for a non-controversial Rule. Accordingly, the Commission intended to expedite the Rule Change Request under section 96 of the NEL, subject to any written requests not to do so. The closing date for receipt of written requests was 8 April 2011.

No written requests not to expedite the Rule Change Request were received. Accordingly, the Rule Change Request was considered under an expedited process in accordance with section 96 of the NEL.

⁴ www.aemc.gov.au.

2 Final Rule Determination

2.1 Commission's determination

In accordance with section 102 of the NEL, the Commission has made this final Rule Determination in relation to the Rule Change proposed by AEMO. In accordance with section 103 of the NEL the Commission has decided to give effect to the Rule Proponent's Rule Change Request.

The Commission's reasons for making this final Rule Determination are set out in section 3.1.

The *National Electricity Amendment (Business Day definition) Rule 2011 No [3]* (Rule as made) is published with this final Rule Determination. The Rule as made commences on 21 April 2011. The Rule as made was drafted by the AEMC in the absence of a proposed Rule submitted by the Rule Proponent. Its key features are described in section 3.2.

2.2 Commission's considerations

In assessing the Rule Change Request the following was material and relevant:

- the Commission's powers under the NEL to make the Rule;
- the Rule Change Request;
- that there are no relevant Ministerial Council on Energy (MCE) Statement of Policy Principles;⁵
- submissions received during consultation;
- the Commission's analysis as to the ways in which the proposed Rule will or is likely to, contribute to the achievement of the National Electricity Objective (NEO); and
- a previous Rule Change, the National Electricity Amendment (NEMMCO⁶ Participant Derogation (Deferral of Settlement Payments due to APEC⁷)) Rule 2007.

⁵ Under section 33 of the NEL the AEMC must have regard to any relevant Statement of Policy Principles in making a Rule.

⁶ National Electricity Market Management Company (this is the body that preceded AEMO).

⁷ Asia-Pacific Economics Cooperation.

2.3 Commission's power to make the Rule

The Commission is satisfied that the Rule as made falls within the subject matter about which the Commission may make Rules. The Rule as made falls within the matters set out in section 34 of the NEL as it relates to:

- the operation of the national electricity market; and
- the activities of persons (including Registered participants) participating in the national electricity market or involved in the operation of the national electricity system.

2.4 Rule making test

Under section 88(1) of 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 NEO. This is the decision making framework that the Commission must apply.

The NEO is set out in 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 Commission is satisfied that the Rule as made will, or is likely to, contribute to the NEO. The Commission considers that the relevant aspect of the NEO is promoting the efficient operation of electricity services for the long term interests of consumers of electricity with respect to the price of electricity.⁸

The Rule as made will improve the feasibility of participants meeting their obligations under the Rules, and will provide regulatory certainty for market Participants regarding the treatment of *business day* in the NEM. It will also improve consistency between the regulatory instruments in the energy market. These factors will minimise the possibility of confusion or dispute over when certain obligations, including settlement payments, are due. This is important given the magnitude of the consequences associated with the failure to adhere to time frames for participant obligations (such as those relating to settlement).

⁸ Under section 88(2), for the purposes of section 88(1) the AEMC may give such weight to any aspect of the NEO as it considers appropriate in all the circumstances, having regard to any relevant MCE Statement of Policy Principles.

Minimising the risk of dispute has the potential for electricity market participants to avoid costs that would ultimately be passed through to electricity consumers through increased prices.

Further discussion of how the Rule as made will or is likely to contribute to the NEO is included in section 3.

2.5 Compatibility of the Rule as made with the proper performance of AEMO's declared functions

Under section 91(8) of the NEL 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 AEMO's declared network functions. The Rule as made is compatible with AEMO's declared network functions because it will not interfere with or impede AEMO's performance of these functions.

2.6 Other requirements under the NEL

In applying the Rule making test in section 88 of the NEL, the Commission has also considered whether there are any relevant MCE Statement of Policy Principles as required under section 33 of the NEL. The Commission has determined that there are no relevant MCE Statements of Policy Principles to this Rule Change.

The Commission has also taken into account form of regulation factors as required under section 88A of the NEL, revenue and pricing principles as required under section 88B of the NEL and matters in relation to the making of jurisdictional derogations as described in section 89 of the NEL. The Commission has determined that there are no relevant matters related to these sections which are relevant to this Rule Change.

3 Commission's reasons

The Commission has analysed the Rule Change Request and assessed the issues/propositions arising out of this Rule Change Request. For the reasons set out below, the Commission has determined that a Rule be made. Its analysis of the Rule proposed by the Rule Proponent is also set out below.

3.1 Assessment

The Commission considers that the definition of *business day* is ambiguous and could lead to multiple interpretations with different outcomes by market participants. One interpretation of *business day* is that a "national public holiday" requires that the same event be celebrated in each participating jurisdiction on the same day.⁹ This has the practical outcome that 25 April 2011 would not be a public holiday because it is legally referred to as Anzac Day in some participating jurisdictions, and Easter Monday in others. Normal settlement and prudential management processes would be required to proceed on this day even though most (if not all) financial and banking services in Australia (and many overseas) are not available.

The Commission considers that the particular event for which a public holiday is observed is not relevant to whether a day should be treated as a non-*business day*. The reason for treating a public holiday as a non-*business day* is that AEMO, market participants, and external organisations (such as the Australian Securities Exchange (ASX)) are unlikely to be fully operational. This is not dependent on the title of the public holiday.

Even if the event for which a public holiday is observed was a relevant consideration to the classification of a day as a non-*business day*, determining the event for which a public holiday is observed is not necessarily a straightforward process.¹⁰

An alternative interpretation of the reference to "national public holiday" in the Rules is a day that is observed as a public holiday in all States and Territories, regardless of the event being observed. This is more likely to reflect the purpose of the definition.¹¹ However this interpretation means that if a public holiday is observed in each participating jurisdiction (except the Commonwealth), but not observed in Western Australia or the Northern Territory, it would be a *business day*, for example, the 2nd Monday in June (the Queen's birthday). The Commission considers that the public

⁹ This meaning is the only interpretation that gives all words in the clause operation.

¹⁰ State 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. Also, 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.

¹¹ Where there are competing interpretations of a provision, the preferred interpretation is one which will achieve the purpose of the provision. NEL Sch 2, Cl 7 and NEL Cl 41.

holiday schedule of non-participating jurisdictions is not relevant to the operation of the NEM.

The ambiguity in the definition of *business day* is potentially confusing for market participants, as some days are classified as a *business day* under one interpretation, but not under the other. Both of the meanings identified are different from the meaning of *business day* in the definition of the NEL and the NGL, which has been used to date by AEMO to classify *business days* for the purpose of determining the time frames for the operations and obligations under the Rules. Therefore the Commission considers that the Rule lacks regulatory certainty.¹²

The Commission also considers that each of the interpretations of *business day* produces an outcome that, on some occasions, a day which is observed as a public holiday in each participating jurisdiction (except the Commonwealth) is classified as a *business day* under the Rules. On these days it would be difficult (if not impossible) for market participants to discharge their obligations (for example, market participants would be unable to meet any settlement obligations that may arise, as the clearing facility used by AEMO is not available on these days).

Therefore, the Commission considers that a Rule Change is required in order to improve the regulatory certainty in relation to the definition of *business day*, and also to improve the feasibility of market participants meeting the time frames for their obligations under the Rules.

3.2 Rule as made

The Rule as made amends the definition of *business day* in the Glossary of the Rules. The definition applies throughout the Rules (on a total of 266 instances) to a wide variety of operations and obligations. For example, it is used in relation to:

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

The Rule as made aligns the definition of *business day* in the Rules with the definition of *business day* in the NEL. It has the result that a day which is observed as public

¹² The Rule Proponent also raised the possibility that the *business day* definition does not recognise any public holidays in the NEM. The 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. However, the Commonwealth does not declare public holidays. The Commission considers that Statutory interpretation would exclude the Commonwealth from the definition of "participating jurisdiction" for the purposes of the definition of *business day* in order to give "national public holiday" operation.

holiday in each participating jurisdiction (except the Commonwealth) is not a *business day* for the purposes of the Rules. It reflects the Rule Proponent's description of the proposed Rule in its Rule Change Request (no proposed Rule was formally submitted).

The Commission considers that the Rule as made will be effective in allowing the market participants to meet their obligations under the Rules. It will clarify when a *business day* will occur under the Rules, based on predictable and transparent criteria. In addition, aligning the definition of *business day* in the Rules and the NEL and the NGL will minimise the risk of confusion as to the relevant definition for a given operation in the NEM, and therefore limits the risk that an incorrect meaning of *business day* will be applied by market participants.

In assessing the Rule Change Request, the Commission considered two alternative Rule Changes to the solution proposed by the Rule Change Request. These were:

1. For AEMO to have authority to declare NEM public holidays; and
2. For the purposes of settlement, or for any other financial transaction required under the Rules, that a *business day* be defined as a day on which the funds clearing service used by AEMO is available.

Although these alternatives may be more effective in ensuring that market participants are able to meet their obligations under the Rules, neither of the alternatives were adopted. This is because the Commission considers that the regulatory uncertainty that could arise from adopting either of the options is likely to cause a greater risk of dispute than the Rule as made. The assessment of these options is in section 5.4.

4 Commission's assessment approach

This chapter describes the Commission's approach to assessing the Rule Change Request in accordance with the requirements set out in the NEL (and explained in Chapter 2).

In assessing this Rule Change Request, the Commission has considered the following issues:

- whether the Rule is effective; that is, whether the definition will allow the market participants to feasibly meet their obligations under the Rules; and
- whether the Rule will promote regulatory certainty for electricity market participants within the Rules.

The Commission has focussed on these issues because they relate to the principles of good regulatory design and practice. The Commission seeks to apply the principles of good regulatory design and practice as it considers that the NEO has implications for the means by which the regulatory arrangements operate (in addition to their ends). In applying these principles, the Commission seeks to have regard to the need for:

- stability and predictability - Rules should be stable, or changes to them predictable, so that participants can plan and make informed decisions; and
- transparency - to the extent that intervention in the market is required, it should be based on, and applied according to, transparent criteria; and
- proportionality - the magnitude of the regulatory change should be appropriate given the size of the risks, and the potential benefits gained.

5 Assessment of the issues

This chapter sets out the Commission's considerations regarding whether the Rule will promote regulatory certainty for market participants within the Rules. It also sets out the Commission's considerations regarding whether the Rule is effective; that is, whether the definition of *business day* will allow market participants to feasibly meet their obligations under the Rules.

5.1 Rule Change proponent's view

The Rule Proponent considers that the inconsistency between AEMO's treatment of *business day* (which aligns with the definition of the NEL) and the definition in the Rules creates the possibility for confusion or dispute over when certain obligations are due. AEMO submits that the definition of *business day* in the NEL would provide regulatory certainty and cope with inconsistent nomenclature used by jurisdictions when proclaiming commonly observed public holidays.

In addition, the Rule Proponent submitted that the definition of *business day* in the Rules means that occasions may arise where a day which is observed as a public holiday in each participating jurisdiction (except the Commonwealth) is a *business day* under the Rules.¹³ On these days it would be difficult (if not impossible) for market participants to discharge their obligations. For example, market participants would be unable to meet any prudential settlement obligations that may arise, as the clearing facility used by AEMO is not available on these days.

The Rule Proponent considers this to be an unreasonable and impractical outcome for market participants, and would result in significant compliance issues and costs to market participants.

5.2 Stakeholder views

Both SP AusNet and UED agree that the current definitions of non-*business days* in the various applicable regulatory documents are inconsistent. They support the need for regulatory certainty regarding the regulatory obligations for *business days*. UED is supportive of removing the possible confusion or potential for disputes and considers that the NEL definition offers more clarity than the definition in the Rules.

SP AusNet considers that the fact that the trading market is national and involves generally nationally operating retailers, supports an argument that this market should commit participants to participate on all days where this is practical and efficient. It notes that banking facilities are nationally provided, such that access to these facilities are available even if only one state does not have a public holiday. Hence SP AusNet

¹³ The Rule Proponent also considered that because the Commonwealth does not legally declare public holidays, there may be no public holidays for the purposes of the Rules. This is because a non-*business day* required that a non-*business day* be lawfully observed as a public holiday in each participating jurisdiction, which includes the Commonwealth.

considers that the definition of public holiday as only where all NEM jurisdictions have coincident public holidays (as reflected in the NEL) is appropriate as a trading market definition.

UED notes that the *business day* definition is used in the Rules in relation to connections, pricing and metering in addition to settlement and prudential processes. Therefore it considers that the assignment of public holidays should take account of all aspects of the regulatory framework (customer impact, cost impact, effect on retail competition etc), not just the availability of a funds clearing service.

SP AusNet and UED also consider that for some functions, a definition of *business day* which recognises public holidays according to the arrangements in the jurisdictions in which the obligation occurs, may be appropriate. These functions may include non-trading obligations such as those relating to connections, pricing and metering.

5.3 Other relevant considerations

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Under the Rule as made, a non-*business day* will require that a public holiday be observed in each participating jurisdiction (except the Commonwealth). However, there may be instances where it is not obvious whether a particular holiday is a public holiday. For example, in Tasmania, Easter Tuesday of this year is designated as a holiday under the *Statutory Holidays Act 2000* (Tas). However, it is located in the section of the Act that refers to holidays observed by certain persons (which refers to particular State employees). This is distinct from other statutory holidays 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 Rule as made.

National Electricity Amendment (NEMMCO Participant Derogation (Deferral of Settlement Payments due to APEC)) Rule 2007

In 2007, AEMO applied to the AEMC for a Rule Change derogation to delay settlement obligations by one day for the Asia-Pacific Economic Cooperation (APEC) public holiday. On this day a public holiday was declared in Sydney and it coincided with a settlement day.

The Commission allowed the Rule Change derogation in order to minimise operational risks that may have resulted in unintended default events occurring in the market on this day. It is noted that the electronic funds transfer (EFT) facility used by AEMO was available on this day.

This Rule Change derogation highlights the importance of ensuring that the *business day* definition allows for market participants to meet their obligations under the Rules.

Other Rule Change options

The definition of *business day* in the NEL will not always be consistent with the definition used by institutions that interact with the NEM. For example, many institutions recognise public holidays according to the arrangements in the jurisdictions in which the obligation occurs. ASX's Austraclear facility (which is relied upon as the primary EFT facility for NEM settlements) will declare a non-*business day* whenever banks are closed in either Melbourne or Sydney or in special circumstances.¹⁴

Therefore in the Consultation Paper, the AEMC raised for discussion the options of:

- Conferring on AEMO the authority to declare NEM public holidays either generally or in a defined set of circumstances so that the public holiday schedule could be adjusted to ensure compatibility with other institutions as required; or
- For the purposes of settlement, or any other financial transaction, a *business day* being defined as a day on which the funds clearing service used by AEMO is available.

5.4 Commission's analysis

The Commission considers that the current drafting of the definition of *business day* in the Rules is ambiguous. It also notes that neither of the possible interpretations of *business day* are consistent with AEMO's treatment of *business day* in practice. Therefore a significant degree of regulatory uncertainty currently exists in relation to the Rule.

The Commission also agrees that the current definition of *business day* results in an interpretation that would not allow participants to meet their obligations under the Rules. For example, one interpretation results in 25 April 2011 being classified as a *business day*, which would mean that the settlement obligations of market participants would fall due on this day. However the EFT facility used by AEMO will not be available and therefore participants could not feasibly meet their settlement obligations.

This Rule Change is intended to address these issues. The Commission has used the analytical framework in section 4 to assess the draft Rule against the alternative options raised in the Consultation Paper.

NEL definition of business day (the draft Rule)

Under the NEL definition, a non-*business day* requires that a public holiday is observed in each of the participating jurisdictions (except the Commonwealth). The Commission considers that in the overwhelming majority of cases, this definition clearly identifies whether a day is a *business day* according to predictable and transparent criteria. The AEMC does not anticipate that there will be many partially declared holidays in one

¹⁴ ASX, 12011 Settlement Calendar for Australian Securities Exchange - Cash Market Products, http://www.asx.com.au/documents/settlement/2011_asx_settlement_calendar.pdf.

jurisdiction that coincide with public holidays in every other participating jurisdiction (except the Commonwealth), such that the classification of a day will be unclear, analogous to the public holiday on 26 April 2011.¹⁵

The Commission also considered whether the NEL definition would allow market participants to meet their obligations. It examined whether it would produce any instances of a settlement day coinciding with a day on which the Austraclear¹⁶ facility is unavailable which would prevent the market participants from meeting their settlement obligations. There are no instances of this occurring under the current schedule of public holidays in each State.¹⁷ This situation would only arise if:

- An additional Sydney or Melbourne public holiday was gazetted (either on a one-off basis, such as for the APEC public holiday, or a new regular public holiday), such that the EFT facility operators declared a public holiday on this day,¹⁸ and it coincided with a settlement day; or
- The EFT facility operators declared an ad hoc public holiday on a settlement day.

Overall, the Commission considers that the risk that market participants will not be able to meet their obligations under the NEL definition of *business day* is very low. The AEMC has been advised by AEMO that historically there have been no occasions where a public holiday has coincided with a *business day* on a settlement day, and the EFT facility has been unavailable. As noted in section 5.3, the Austraclear facility was available on the APEC day public holiday. Therefore the Commission considers that the definition of *business day* in the NEL is likely to be effective in allowing market participants to meet their obligations under the Rules.

It is noted that if it were necessary to depart from the meaning of *business day* in the Rules so that market participants could meet their obligations, AEMO could apply to the AEMC for a Rule derogation, as exercised by AEMO for the APEC public holiday. This option is able to address the specific obligation concerned (for example, by way of delaying the obligation), rather than changing the timing for all obligations which could have unintended consequences.

¹⁵ It is noted that Anzac Day last coincided with Easter Monday in 1859.

¹⁶ ASX's Austraclear is currently used by AEMO for EFT transactions. However AEMO does not have to use ASX and could use another settlement option available.

¹⁷ Settlement occurs 20 *business days* after the billing period end, which falls on a Saturday. Unless a public holiday occurs in every participating jurisdiction (except the Commonwealth) in this 20 day period, the payment date will occur on a Friday. The ASX will usually declare a public holiday (additional to the public holidays that are observed Australia wide) when banks in Sydney or Melbourne are closed. Under current state public holiday legislation, banks in Sydney or Melbourne are closed on the first Monday in August, the third Monday in October, and the first Tuesday in November. As there are no public holidays that coincide in every participating jurisdiction in the 20 day period preceding these state specific public holidays, settlement occurs on the Friday of each relevant period.

¹⁸ The ASX will usually declare a public holiday when banks in Sydney or Melbourne are closed in addition to the public holidays that are observed Australia wide.

Other Rule Change Options

The alternative options raised in the Consultation Paper have the potential to ensure that market participants will always be able to meet their obligations, and therefore they may be more effective solutions. For specific cases, such as 26 April 2011, the alternative Rule Change options would be able to clearly determine whether a *business day* applies, that is, the classification of the day would be declared by AEMO, or the availability of AEMO's EFT facility would be determinative, under each respective option. However, in general, the Commission considers that the alternative definitions are likely to reduce regulatory certainty:

- The option of allowing AEMO the discretion to declare NEM public holidays may reduce the predictability and transparency of the *business day* schedule, which has the potential to create confusion and misapplication of the definition. Discretion to declare NEM public holidays may be limited to a specific set of circumstances (for example, where there is a public holiday in at least five NEM jurisdictions), however additional regulation may be required for the timing and mode of such a declaration.
- The option of determining a public holiday by the availability of the EFT facility used by AEMO was limited in the Consultation Paper to the purposes of financial transactions. This is because *business day* applies to a wide range of operations in the NEM that do not rely on an external clearing service (for example applications to AEMO). However, a multi-purpose definition carries the risk that it may not be clear as to whether the availability of the EFT facility is required for a particular obligation, for example, whether it would apply to clauses relating to the calculation of interest. The potential lack of clarity could be overcome by introducing a distinct definition in respect to financial transactions, for example, *financial business day*, or *settlement business day*, and adopting it for the relevant clauses in the Rules. This would require a significant examination of the Rules, as *business day* occurs on 266 separate instances throughout the Rules.
- Adopting an alternative option would mean that the definitions in the Rules and the NEL and NGL would remain inconsistent. This has the potential to cause confusion as to the relevant definition for a given operation, and creates a risk that the incorrect definition will be applied.

As noted in 5.2, SP AusNet and UED noted that it may be appropriate for the timing for specific obligations to recognise all public holidays that occur in a jurisdiction (in addition to NEM-wide public holidays). The AEMC considers that the Rules relating to the timing of specific obligations would be more appropriately considered under a separate Rule Change process. Altering the timing of obligations globally by changing the substance of the definition of *business day* could materially impact upon a range of obligations of market participants. A Rule Change of this kind would require a much more detailed and consultative Rule Change process.

Commission conclusion

On balance, the Commission considers that the Rule as made produces a very high degree of regulatory certainty. The Commission considers that the regulatory uncertainty that could arise from adopting either of the alternative options is likely to cause a greater risk of dispute than the Rule as made, given that there is a low likelihood of a settlement day coinciding with a day on which the EFT facility used by AEMO is unavailable. More comprehensive changes to the Rules to reflect the alternative options may reduce the associated regulatory uncertainty, and therefore the risk of dispute. However the Commission does not consider that a large regulatory change would be appropriate given the size of the risks associated with Rule as made and the relative potential benefits gained from the alternative options. Therefore the Commission considers that the most proportionate solution is to accept AEMO's suggestion to align the definition of *business day* in the Rules with the definition in the NEL.

Abbreviations

AEMC or Commission	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
APEC	Asia-Pacific Economic Cooperation
ASX	Australian Securities Exchange
EFT	electronic funds transfer
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NEM	National Electricity Market
NEO	National Electricity Objective
NGL	National Gas Law
UED	United Energy Distribution

A Summary of issues raised in submissions

Stakeholder	Issue	AEMC response
SP AusNet	<p>For non trading market services and functions, SP AusNet considers that the <i>business day</i> definition should recognise the public holidays according to the jurisdictional arrangements in which they occur. In particular, it considers that service obligations on distributors on jurisdictional specific public holidays would lead to the deployment of a largely wasted resource.</p> <p>The distribution functions referred to by SP AusNet are currently regulated under State-based regimes. However SP AusNet notes that the regulation of these services will be transferred to the National Energy Customer Framework (NECF), and that the <i>business day definition</i> should be flagged for analysis for the purposes of this framework.</p>	<p>SP AusNet has not provided any evidence that there are non trading market services and functions within the Rules that would be better served with a jurisdictional-based definition of public holiday. Its submission primarily relates to the definition under the NECF which is outside the scope of the Rule Change.</p> <p>The National Energy Retail Law (NERL) and the associated National Energy Retail Rules (NERR) are the relevant instruments for the NECF. The MCE has established a NECF Joint Implementation Group to assist in co-ordinating the implementation of the NECF in participating jurisdictions, including monitoring the readiness of jurisdictions, market bodies and market participants and may be an appropriate forum for the consideration of this issue raised by SP AusNet.</p>
United Energy Distribution	<p>For non-trading functions under the Rules, which use <i>business day</i> to define the relevant time frames, UED's operational practice is to observe the Victorian gazetted public holidays including those that are additional to NEM-wide public holidays for its staffing requirements in relation to these functions. UED submits that common sense should prevail in relation to civil penalties and compliance in relation to obligations which fall on these days.</p> <p>UED considers that it would be useful to provide clarity for the non <i>business days</i> for the NEL framework and the non <i>business days</i> for the NERL framework, and that this</p>	<p>The Commission considers that because the NEM is a cross jurisdictional institution, prima facie, it should recognise public holidays only when they are observed in each participating jurisdiction.</p> <p>There may be specific obligations for which the timing should take account of jurisdictional public holidays that are not observed NEM-wide. If this is the case, the timing should be considered in a separate Rule Change process for the specific obligations, rather than altering the timing of obligations globally by changing the definition of <i>business day</i>. This option would constitute a much more substantial change to the Rules, and could materially impact upon the obligations of market participants.</p>

Stakeholder	Issue	AEMC response
	function could be undertaken by the AEMC.	We note that AEMO currently publishes various calendars on its website which provide the public holiday schedules for different purposes (for example, the NEM calendar is distinct from the gas market calendar which incorporates the public holiday schedule of the Northern Territory and Western Australia).