

Australian Energy Market Commission

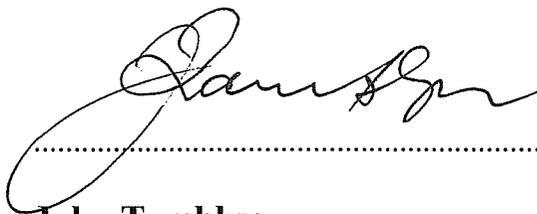
Draft Rule Determination

National Electricity Amendment (Advocacy Panel) Rule 2006

Rule Proponent: Ministerial Council on Energy

Date: 6 April 2006

Signed:

A handwritten signature in black ink, appearing to read 'John Tamblyn', is written over a horizontal dotted line.

John Tamblyn
Chairman

For and on behalf of:

Australian Energy Market Commission

Commissioners: Tamblyn
Carver
Woodward

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Summary

The Ministerial Council on Energy (MCE) lodged a Rule change proposal on 15 December 2005 to implement governance and accountability changes and address funding arrangements for the Advocacy Panel (the Panel) established by clause 8.10 of the National Electricity Rules.

The Panel was established under the (then) National Electricity Code by the National Electricity Code Administrator in 2001. The Panel provides funding to end users to allow them to participate in National Electricity Market (NEM) decision making processes.

Under the proposal, Panel membership would be on the basis of capacity and experience rather than constituency representation and the Commission would be responsible for the appointment, and removal, of the Chair and the Panel members, in consultation with the MCE. The Commission would also have a role in approving the Panel's funding criteria, the amount of funding required each year and application for funding guidelines. The Commission is to also have an oversight role in the Panel's annual reporting requirements.

Twelve submissions were received at the initial consultation (section 95) stage. In adopting the MCE's Rule change proposal, the Commission has been mindful of enhancements suggested by submissions and has made a number of drafting amendments designed to incorporate these within the MCE's proposal.

These changes are intended to enhance and clarify the operation of the Panel. The Commission has also made a number of drafting changes to the clauses to improve its clarity and practical implementation. The Commission has made the drafting amendments to ensure that the MCE's policy intent is appropriately reflected in the draft Rule.

The Commission is satisfied that the Draft Rule is likely to contribute to the National Electricity Market objective, and that it therefore satisfies the Rule Making Test, by empowering end use consumers with the necessary resourcing, funding and understanding to contribute to the long term operation and development of the NEM.

Accordingly, the Commission has determined that, subject to further comment as part of the second round consultation, it intends to make a Rule to address the issues raised in the proposal. This Draft Rule determination sets out the reasons of the Commission in accordance with the requirements of the National Electricity Law.

1. The Ministerial Council on Energy's Rule Proposal

The Ministerial Council on Energy (MCE) lodged a proposal on 15 December 2005 to implement governance and accountability changes and address funding arrangements for the National Consumers Electricity Advocacy Panel (the Panel) established by clause 8.10 of the National Electricity Rules.

The Panel was established under the (then) National Electricity Code (now the National Electricity Rules) by the National Electricity Code Administrator (NECA) in 2001. The Panel provides funding to end users to allow them to participate in National Electricity Market (NEM) decision making processes. The Panel determines the total funding available for advocacy assistance, establishes criteria and guidelines for funding and allocates funds in accordance with these criteria and guidelines.

The MCE is also proposing a long term model for consumer advocacy arrangements for both electricity and gas, to be dealt with by the same funding body. To implement the long term model, legislative changes are required in 2006, and the MCE anticipates that the new model will take effect from 1 January 2007. The MCE has proposed this interim Rule change to resolve accountability issues and funding arrangements for the Panel to assist in the transition to the long term model.

In this interim Rule change, the MCE proposes that Panel membership would be on the basis of capacity and experience rather than constituency representation and give the Commission responsibility for the appointment, and removal, of the Chair and the Panel members, in consultation with the MCE. The Commission would also have a role in approving the Panel's funding criteria, the amount of funding required each year and application for funding guidelines. The Commission is to also have an oversight role in the Panel's annual reporting requirements.

On 9 January 2006, the MCE clarified, in a letter to the Commission, that its intention in requiring the Commission to consult with the MCE in the appointment and removal of the Chair and/ or Panel members is to consult with the Ministers of the NEM participating jurisdictions.

In this proposal, the MCE noted that under the current National Electricity Rules (the Rules), there is a perception that the Panel members are unable to make objective decisions on funding allocation due to their representation of particular constituencies; and that there is insufficient accountability for the Panel, and its activities, overall. In addition, the funding for the Panel expires on 30 June 2006 which would leave end users without recourse to advocacy funding.

The MCE indicated that its proposal would contribute to the achievement of the NEM objective by:

- promoting efficient use of electricity services by empowering end users to contribute to the formation of Rules and building up the capacity for effective end user advocacy in the NEM; and
- addressing the long term interests of end users by allocating funding on merit to provide for effective end user input in the ongoing development of Rules.

On 12 January 2006, under section 94 of the National Electricity Law (NEL), the Commission determined to commence initial consultation on this proposal by publishing a notice under section 95 of the NEL. This Rule change proposal was open for public consultation for four weeks. Submissions closed on 10 February 2006.

2. Draft Rule determination

The Commission has determined to make the Draft Rule, in accordance with section 99 of the National Electricity Law (NEL). A draft of the Rule to be made (the Draft Rule) is attached to this determination, which incorporates amendments to the proposed Rule put forward by the proponent.

This draft determination sets out the Commission's reasons for making the Draft Rule. The Commission has taken into account:

1. the Commission's powers under the NEL to make the Rule;
2. the proponent's Rule change proposal and proposed Rule;
3. submissions received;
4. relevant MCE statements of policy principles; and
5. the Commission's analysis as to the way(s) in which the Draft Rule will or is likely to contribute to the achievement of the National Electricity Market objective so that it satisfies the statutory Rule making test.

2.1 The Commission's power to make the Rule

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

The Draft Rule relates specifically to item 36 of Schedule 1 of the NEL, which states that

“any other matter or thing that is the subject of, or is of a kind dealt with by, a provision of the National Electricity Code as in operation and effect immediately before commencement of section 12”

of the NEL may form the subject matter for the National Electricity Rules. The Panel was established in 2001 under the National Electricity Code by NECA.

2.2 Assessment of the Draft Rule: the Rule making test and the national electricity market objective

The Rule making test requires the Commission to be satisfied that a Rule that it proposes to make will contribute to the NEM objective.

The test requires the Commission to consider the implications of the proposed new Rule, for the efficient investment in, and efficient use of these electricity services, in respect of specified elements which impact on the long term interests of end users of electricity. The Commission has applied the Rule making test to the Draft Rule, as modified by the outcomes of analysis and discussion in section 2.6.

The Commission recognises that:

- in particular, the small to medium end user participants in the NEM largely lack the necessary resourcing, funding and understanding to actively contribute to the effective operation and development of the NEM and the Rules; and

- from the submissions received on this proposal, there is a view that the current arrangements for the Panel have been ineffective in building up the capacity for end users to provide meaningful input in the development of the Rules.

That said, the Commission considers incorporating the views of electricity end users may help provide a balanced approach to the long term operation and development of the NEM.

Building up the capacity of end users to actively contribute to the development of the NEM is a gradual process, particular for small to medium end users who have limited understanding of NEM operations. However, as end users create the demand for electricity, their understanding of the consequential impacts on the price, quality, reliability and security of supply through their actions is vital.

Larger end users may be able to forecast their demand for electricity for a given time, due to the nature of their operations or business. However, small to medium end users, eg households and small businesses, often do not consider that their actions have any impact on the investment in and efficient use of electricity services. For example, in a newly developed suburb of a metropolitan capital city, the uptake of technological advances in electricity reliant appliances, such as computers and air conditioners, may have a dramatic effect on the local substation and distribution wires to supply the necessary electricity to the end user. Such a dramatic increase in demand would also have implications for efficient investment in the NEM.

The benefit in giving end use consumers access to the necessary resourcing, funding and understanding of the NEM, through the activities of the Panel, may only appear to be marginal at present, but over time should yield valuable insight into the efficient investment in and efficient use of electricity services for the long term interests of end users.

The Commission is satisfied that continuation of the Panel, with improved governance and accountability through this draft Rule, will contribute to the long term interests of end users.

2.2.1 Amendments to the proposed Rule

The Commission has incorporated a number of amendments to the proposed Rule put forward by the MCE.

Firstly, the Commission has sought to clarify the structure of the new draft of clause 8.10 of the Rules by grouping related matters under meaningful headings, to improve the readability and transparency of clause 8.10.

Clauses 8.10.5(h) and (i), have also been added to enable NEMMCO to recover and provide to the AEMC the necessary funds for Advocacy Panel purposes. In accordance with clause 2.11.1 of the Rules, “*NEMMCO must develop, review and publish...the structure (including the introduction and determination) of Participant fees*”. Previously, NECA’s funds, which included funding for the Panel, were completely recovered from Market Customers. On 24 March 2006, NEMMCO published its new determination of the structure of Participant fees, to apply from 1 July 2006 to 30 June 2011. Because NEMMCO no longer recovers funds for NECA purposes, it must be

capable of recovering from Participant fees of Market Customers, approved funding amounts for Advocacy Panel purposes. The Draft Rule enables NEMMCO to do so.

Amendments to the proposed Rule, consistent with the Commission's findings in section 2.6 of this draft determination, are intended to enhance and clarify the operation of the Panel. This includes an "Appointment guidelines" section to manage stakeholder expectations of the content of such guidelines.

Savings and transitional Rules have also been added to the proposed Rule, in recognition that there must be a smooth transition from the operations and functioning of the current (interim) Panel and any new Panel to be appointed under the new Rule, when made. These transitional matters include:

- the saving of existing appointments of members of the interim Panel, pending appointment of a new Panel, even where this occurs before AEMC appointment guidelines have been finalised;
- recognition of funding applications for end-user advocacy that were determined prior to the new Rule being made;
- recognition of existing funding applications submitted to the Panel for consideration which have not yet been assessed or decided, prior to the new Rule being made;
- recognition of any work done by the current Panel for the 2006/07 financial year provisional funding requirements that would be available for distribution under the Rules to applicants for end user advocacy funding in 2006/07; and
- continuation of existing guidelines for funding applications and funding criteria until 1 March 2007, which gives sufficient time for new guidelines and criteria to be fully consulted.

Finally, a number of changes have been included because they reflect current practice of the Panel (such as the inclusion of its financial statements in its annual report) and other changes to improve the clarity and practical implementation of the Rules.

2.3 Submissions received

The Commission received 12 submissions on the proposed Rule:

- AGL;
- Consumer Law Centre Victoria Ltd;
- Consumer Utilities Advocacy Centre;
- Energy Networks Association;
- Energy Retailers Association of Australia;
- Energy Users Association of Australia;
- Ergon Energy;
- Major Energy Users Inc;
- National Consumers Electricity Advocacy Panel;

- Public Interest Advocacy Centre;
- Tasmanian Council of Social Service; and
- Total Environment Centre Inc.

Nine submissions were broadly supportive of the proposal to improve the accountability and governance framework of the Panel, but raised issues concerning operational aspects of the proposal. Three submissions did not support the proposal but conceded that, as the proposal would be likely to proceed, also raised issues concerning the operational aspects of the proposal. These are discussed in section 2.6.

2.4 Relevant MCE statements of policy principles

The NEL requires the Commission to have regard to any MCE statements of policy principles in applying the Rule making test. The Commission notes that currently, there are no relevant MCE statements of policy principles.

2.5 The public hearing

No public hearing has been held on this Rule change proposal, to date.

2.6 Matters arising from consultation and the Commission's analysis

In this section, the Commission addresses a number of issues that have been raised in submissions or that have emerged during the Commission's analysis.

2.6.1 Panel membership

MCE's proposal

The MCE proposal indicates that the Panel currently established by the Rules is governed by inadequate accountability arrangements. The current Panel is comprised of four members, appointed by the Chairperson, representing particular interests in the NEM and there is a perception that the Panel cannot make an objective assessment of the applications before it. The proposal indicates that the key concern in appointing Panel members should be for them to have the best ability to assess applications against the criteria.

The MCE proposal also identifies that:

- there is limited opportunity to appoint the Chairperson for a period of less than three years, if necessary, to take into account changing circumstances;
- removal of the Chairperson can only be made on limited grounds; and
- there is no provision for the removal of Panel members by the Commission, except by the Chairperson in limited circumstances.

To address these issues, the MCE proposes that:

- Panel membership be on the basis of relevant capacity and experience rather than on representation of particular constituencies;
- the Commission should issue guidelines on the appointment of Panel members, in consultation with the MCE;

- Panel members are to be appointed by the Commission, having regard to nominations from the MCE;
- the Chairperson should be appointed for a period of up to three years; and
- the current criteria for dismissing the Chairperson be extended to other members of the Panel and will only be exercised by the Commission after consultation with the MCE.

By delinking Panel members from constituency representation, the proposal aims to eliminate the “*potential for conflict, resulting in more streamlined and efficient decision-making by the Panel*”.

Submissions

Regarding Panel membership:

Tasmanian Council of Social Services stated:

...we support in particular the proposal that the Panel no longer comprise members who represent specific interest groups within the national electricity market.

Major Energy Users Inc stated:

All appointments to the Panel must be strictly independent and not representative of any sectoral interests, directly or indirectly.

Energy Users Association of Australia stated:

The EUAA supports the proposed Rules change to de-link panel member representation from a particular constituency. The current structure of membership based on constituents creates a real and/ or perceived conflict of interest for the supply side representatives as proposals before the Advocacy Panel are often based on end users undertaking advocacy that challenges the supply side position.

Further, the EUAA supports the proposal that end user Panel members should not be directly involved with any particular end user advocacy group. While it is vital to have Panel members with sound knowledge of energy end user issues, it creates a perceived conflict of interest if the Panellists are members of any particular advocacy group or “class”.

Energy Networks Association stated:

The ENA agrees that the Panel needs to maintain a perception that members as a collective can make objective funding allocation decisions. The ENA does not, however, agree that to achieve this requires the exclusion of all persons associated with Registered Participants from eligibility for membership of the Panel.

...The ENA considers this limitation to be unnecessary. Currently, only the Chairperson has this restriction. This substantial amendment is unnecessary to overcome the perception that the members cannot make objective funding allocation decisions when representing particular constituencies.

...The reasoning behind requiring a majority of independent members and not requiring every member to be independent is that often, members that do have affiliations which result in them not being independent have significant expertise, background and understanding that results in them providing a substantial contribution to the board or

committee that they are part of. As long as the majority of members are independent, then the perception and actual existence of independence of the board or committee is maintained.

Consumer Utilities Advocacy Centre stated:

CUAC does not agree with the view expressed in the MCE paper that delinking Panel members from representing a particular constituency is the best solution to a perception that funding decisions lack objectivity. The Panel members' overarching obligation is, rightly, to the good governance of that body, but there are numerous examples where consumer representatives are able to balance their fiduciary obligations to a Board or Committee and accurately reflect the interests of their constituency.

Consumer Law Centre Victoria stated:

In our view, the perception that members who are representative of particular constituencies as being necessarily unable to make decisions objectively is unfounded.

...Panel members should have an overriding obligation to act in accordance with the purposes of the Panel. This should ensure that members who are nominated as representatives of particular constituencies make decisions objectively in accordance with the purposes of the Panel.

Nevertheless, it is important that members of the Panel, in their role of overseeing the independence and operation of the Panel, have a balance of consumer, industry and, if relevant, other key stakeholder interests.

...In June 2005, the Commonwealth Consumer Affairs Advisory Council... released Principles for the Appointment of Consumer Representatives: A process for Government and Industry... [which] provides six appointment principles which provide guidance in appointing consumer representatives, while maintaining flexibility so that appointments can be adapted for particular circumstances. These principles should be used in the appointment of consumer representatives to the Panel to ensure independence as well as robust decision-making.

Considering that the Panel grants funds for advocacy to representatives of end-users of electricity, and that there are a wide range of business and consumer stakeholders affected, it is appropriate that Panel members continue to be appointed as representing particular interests.

Energy Retailers Association of Australia stated:

The ERAA is concerned that the proposal (and the MCE arrangements that will replace the Panel) remove a retailer representative. We consider that our involvement in the Panel has assisted its operations and reject the unsupported suggestion made in the proposal that our representatives were and are unable to be unbiased. The ERAA considers that no evidence has been produced to warrant removal of the participant representatives from the Panel.

Regarding other Panel membership related considerations:

Consumer Utilities Advocacy Centre stated:

In this transitional period, and in going forward, we would strongly recommend that in drawing up the criteria for appointment, the AEMC use the Principles for the

Appointment of Consumer Representatives: a Process for Government and Industry, which was published last year by the Commonwealth Consumer Affairs Advisory Council and the result of extensive consumer, industry and government consultation.

National Consumers Electricity Advocacy Panel stated:

...it would be prudent to also designate the Australian Energy Regulator (the AER) and state and territory energy regulatory bodies, such as the Essential Services Commission of Victoria, as organisations from which the chairperson and members of the panel must be independent.

Total Environment Centre Inc stated:

Our preferred structure is for a company limited by guarantee, with a governing board and a consultative committee, rather than a Panel.

...In the current Rules the [chair]person should be appointed after “consultation with representatives of end-users...”. There is no argument presented as to why consultation with end-users is unnecessary, therefore the principle should stand as input from consumer organisations will widen the pool from which to choose.

...Constitution of the Panel (if this is unavoidable) – it is essential that the four members be end user representatives, with one representative specialising in environmental issues. The Panel was originally established to assist consumer participation in the National Electricity Market (NEM), not to represent those directly involved in the market.

The Panel should also include one member to represent vulnerable consumers since their interests too are currently excluded from the NEM at the national level, and are restricted to customer service obligations at the jurisdictional level (which vary widely).

The Panel should be independent of ministerial and government direction, therefore the MCE should have no role in appointing members to the Panel. It should be a truly independent body, directed only by the AEMC in order to avoid political interference... It is sensible for the AEMC to appoint members, unlike the previous situation where they were appointed by the Chair; this should assist impartiality of decisions by the membership.

AGL stated:

...the AEMC should modify the proposal so that members are appointed by the MCE, funding is not provided by NEMMCO and the sunset date is merely extended until 1 January 2007.

Energy Users Association of Australia stated:

We support the need to have an “independent” Chair and Panel members and believe that they should be appointed on the basis of criteria such as:

- 1. A demonstrated ability to understand the subject matter of eligible applications made to the Panel.*
- 2. A demonstrated ability to understand energy end users and their issues.*
- 3. A demonstrated ability to maintain contact with energy end users, their representatives and develop a constructive relationship with them.*

4. *An ability to contribute to the objectives of the Panel and the Single Market Objective of the National Electricity Rules.*
5. *An ability to contribute to good decision-making and governance by the Panel, including the avoidance of conflicts of interest and bringing the Panel into disrepute.*
6. *An ability to show leadership and effectively chair Panel meetings (in the case of the Chair).*

However, we do not support the proposed Rules change on the process of appointing Panel members... We believe that this change does not satisfy the SMO. In particular, this proposed change fails to acknowledge end user groups and the knowledge they possess when it comes to identifying appropriate Panel members.

The proposed MCE Rules change assumes that the AEMC and MCE are in the best position to make decisions on the appropriate skills required to appoint Panel members. The EUAA believes that this is a false presumption and it is not obvious that this change would be in the long-term interests of consumers of electricity.

...In particular, the EUAA recommends that the Rules should require the AEMC to consult with and require direct input from key end user advocacy groups and involve them formally and meaningfully in the development of guidelines for the appointment of Panel members. Further, the AEMC should review the guidelines every three years to ensure their continued relevance and efficacy.

...The EUAA recommends that clause 8.10.2(b)(1) be broadened to require the AEMC to “consult with key end user groups on appointments and have close regard to any nominee recommended by the MCE and/ or end user advocacy group...”.

The EUAA supports the proposed MCE Rules change that the Chair be appointed for a period of three years.

The EUAA recommends that the proposed Rules should also specify the length of appointment for all Panel members. In particular, all Panel members should have tenure for three years. However, not all members should cease at the same time. Rather, their appointment and end of tenure should be staggered, whereby two Panel members are replaced at any given time, with the staggering occurring evenly one and half years. This will ensure that existing members can pass on Panel experience to new members. It will also ensure that there is continuity in decision making.

...we recommend that the proposed Rules change be broadened to allow end user groups to have the authority to seek the removal of Panel members. In particular, end user groups should be entitled to request a review of the performance of Panel member(s) if they believe that the decision-making by member(s) is ‘biased’, ‘prejudiced’, ‘unfair’ or involves ‘conflicts of interest’.

...we are concerned that the severe reduction in remuneration for Panel members imposed by the AEMC is poorly thought out and is creating problems in attracting good quality people to the Panel.

The Commission's consideration and reasoning

Regarding Panel membership:

The MCE proposal is very clear in identifying that the need to improve the accountability mechanisms in the governance framework for the Panel requires urgent attention. The MCE is also concerned to ensure that there is no perception of a conflict of interest.

The Commission considers that Panel membership on the basis of relevant capacity and experience rather than on representation of particular constituencies is the best solution, as it avoids the perception that one or more Panel members may favour a particular group of end user stakeholders. It should also enable Panel members to allocate end user funding objectively, in the long term interests of end users of electricity, and also minimise any actual or perceived conflicts of interest for Panel members. However, appointing members who are independent of the AEMC, NEMMCO and all Registered Participants but still have an understanding of end user advocacy issues may be more difficult. Developing timely and robust guidelines for the appointment of Panel members will be paramount in managing stakeholder expectations in this area.

Other Panel membership related considerations:

The Commission considers that there is merit in the suggestion of some submissions to use the Commonwealth Consumer Affairs Advisory Council document *Principles for the Appointment of Consumer Representatives: a Process for Governments and Industry* in developing the criteria for the appointment of Panel members. It believes, however, that any reference to the document and its principles would be better incorporated as part of the Commission's guidelines for the appointment of Panel members, rather than specifically included in this Rule change. Similarly, submissions which suggest specific criteria to be applied in the appointment of the Chair and Panel members may be considered for incorporation in the Commission's guidelines for the appointment of Panel members. In addition, as the guidelines are developed in accordance with the Rules consultation procedures, consultation with end user representatives will be undertaken at that time.

The Advocacy Panel's submission suggesting that the Chair and the Panel members should also be independent of the AER also has merit, given that the subject of funding applications include "*the monitoring, investigation or enforcement responsibilities of the AER*". Similarly, independence from the State and Territory regulatory bodies has merit, as applications for funding may focus on reviews being undertaken by these regulatory bodies.

The Total Environment Centre submission suggesting a complete change to the structure of the Panel to a company limited by guarantee, and the consequential implications of such a change, is beyond the scope of this Rule change proposal and is better considered as part of the MCE's longer term legislative process.

The requirement to consult with the MCE in the MCE's proposed clauses 8.10.2(d1) and (e), do not challenge the independence of the Commission (as suggested in the Total Environment Centre submission) but rather can be seen as a measure to ensure that there is no perception that the Commission would act in its own self interests eg avoid the funding of advocacy projects critical of the Commission and its Rules. Consultation with

the MCE (ie, Ministers of the NEM participating jurisdictions) is not seen to be an onerous requirement.

There is also merit in requiring the Commission to review the guidelines for the appointment of Panel members to ensure the continued relevance and efficacy of the guidelines.

The Commission notes that the MCE proposal does not specify the length of appointment of the Panel members (as raised in the Energy Users Association of Australia submission). For consistency with the Chair, Panel members should also be appointed for a period up to three years. This would also allow staggering so that the entire Panel's terms do not expire at the same time.

Any action to remove a Panel member is not expected to be taken lightly by the Commission, and the suggestion by the Energy Users Association of Australia to give end user groups the authority to seek the removal of a Panel member is not supported. However, where a Panel member is not acting in accordance with the terms and conditions of appointment, end users should be encouraged to raise their issues with the Panel member(s) in writing to the Commission, for investigation and action, as necessary.

Lastly, the appropriate level of remuneration for Panel members forms part of the terms and conditions of appointment of Panel members and would be assessed by the Commission at that time.

The Commission's finding in relation to Panel membership

In assessing the issues raised in these submissions, the Commission has concluded that the following requirements in relation to Panel membership are appropriate:

- clause 8.10.2 as proposed by the MCE;
- requiring the Chair and Panel members to be independent of the AER and State and Territory regulatory bodies;
- requiring the Commission to review the guidelines for the appointment of Panel members; and
- specifying the appointment of Panel members for a period of up to three years.

In accordance with the MCE's proposed clause 8.10.2(e), the Commission will include in the guidelines:

- the definition of independence for the Chair and Panel members;
- the expertise, experience, and different perspectives required of Panel members;
- levels of remuneration for the Chair and Panel members;
- good governance practices for the Panel; and

will have regard to the Commonwealth Consumer Affairs Advisory Council document *Principles for the Appointment of Consumer Representatives: a Process for Government and Industry* as a guide in the formulation of these guidelines.

2.6.2 Panel operations

MCE's proposal

The MCE proposal mainly addresses the composition and appointment of the Panel, rather than the specific operational aspects of the Panel. The proposal recognises that currently, *“whether the Panel’s guidelines, policies and funding needs are adequate are largely left up to the Panel itself”*.

However, as the proposal provides for the Commission to appoint the Panel members, a consequential amendment is that the Commission also issue guidelines on the appointment of the Panel, in consultation with the MCE.

Submissions

Major Energy Users Inc stated:

Certain guiding principles for good governance and accountability should be provided to shape the operations of the Panel.

...These principles should comprise:

- *independence and objectivity, in terms of decision making by Panel members;*
- *accountability, in that grants approved must meet the guidelines and criteria approved for funding;*
- *achieving outcomes, in that advocacy activities are performed within the allowed time constraints, and that clearly identified outcomes of the advocacy are achieved;*
- *transparency and communication with stakeholders, in terms of decision making by the Panel, deliberations by the Panel and interactions of Panel members with wider constituencies; and*
- *consistency, in terms of applying criteria and guidelines, to avoid, inter alia, ad hoc decision making.*

...Comments are also provided to improve the modus operandi of the Panel, viz.:

- *The Panel should abide by a majority decision, with the Chairperson having a casting vote in the event of a tied vote (8.10.2(a)).*
- *Whilst it is important that the AEMC must, to the extent that is reasonably practicable, ensure the persons approved to the Panel are independent of the AEMC, NEMMCO, etc and must remove persons who cease to be independent (8.10.2(b)), it would be useful to also place an onus on the Chairperson and Panel Members to advise the AEMC should such independence cease to exist, or because of any other extenuating circumstances that may provide any, or even a perception of, conflicts of interest.*
- *With respect to 8.10.2(d), the AEMC should remove any Panel member if the person fails to discharge the obligations imposed by the Rules or in terms of 8.10.2(e), as well as the Chairperson’s guidelines in respect of members obligations.*
- *With respect to 8.10.2(e), we suggest the AEMC should empower the Chairperson to develop and publish guidelines regarding Panel members’ obligations.*

Total Environment Centre Inc stated:

Any consumer advocacy body must be free of ministerial and government direction. Therefore it is not appropriate to insert the MCE in the Rules as arbitrator for Panel decisions (in the proposed versions of clauses 8.10.2[b], 8.10.2[d1], 8.10.2[e]). The appropriate arbitrator is the Australian Energy Market Commission (AEMC) since the MCE could equally be charged with conflict of interest in directing decisions.

Energy Users Association of Australia stated:

The EUAA believes that the AEMC should use the current Rules change process to embed in the Rules guidelines and procedures for the conduct of panel meetings, decision-making and the conduct of Panel members.

...The guidelines and procedures should be structured around normal accepted conduct for similar 'public' funding organisations, consistent with the SMO and be accountable back to end users.

The Commission's consideration and reasoning

Currently, the Panel has a 'Standards of Conduct' document for its Panel members which includes its meeting rules and administrative practices. This document is easily accessible from the Panel's website, as required under its Constitution.

As the MCE proposal includes the requirement that the Commission publish guidelines and terms and conditions for the appointment of Panel members, many of the suggested good governance practices raised in submissions may be considered and possibly incorporated into these guidelines.

Furthermore, although the standards of conduct document mentioned above defines a quorum for attendance at Panel meetings, there is no provision in the Rules for the Panel to meet without all its members appointed. To avoid difficulties in progressing the functions of the Panel where a Panel member is not yet appointed or not able to participate in a meeting at all, the Rules should include a provision defining a quorum for the Panel to still be able to meet, to ensure funding applications can continue to be considered.

Improved governance in the operations of the Panel are in the long term interests of electricity end users.

The Commission's finding in relation to Panel operations

In considering the issues raised in these submissions, the Commission considers that defining a quorum for the Panel is appropriate.

The Commission may also consider incorporating the suggested good governance practices into the guidelines and terms and conditions for the appointment of Panel members, as mentioned previously.

2.6.3 Focus of Panel

MCE's proposal

The MCE has indicated that its policy intent is for the long term body established for consumer advocacy in both the gas and electricity schemes to focus on small to medium

consumers. However, this interim Rule change proposal is only intended to resolve accountability issues and funding arrangements for the Panel until the MCE's legislation is put in place.

Submissions

Tasmanian Council of Social Service stated:

We support the Ministerial Council on Energy in its longer term intentions to reorganise consumer advocacy arrangements with a focus on small and medium consumers...

The interim measure of amending the Rules to improve governance, accountability and funding of the existing Advocacy Panel is also a welcome initiative; however we are disappointed to see that the proposals do not include a requirement for the Panel to prioritise the advocacy needs of small to medium consumers as intended by the MCE.

Public Interest Advocacy Centre stated:

What clearly is missing from the proposal is an obligation for the Panel to focus on the interests of, and applications concerning, small to medium end-users. This new focus for the Panel was part of the decision made by the MCE for the new arrangements for the Panel and as announced in Energy Market Reform Bulletin No. 57 released on 15 December 2005.

Consumer Utilities Advocacy Centre stated:

...the MCE's intention that the new consumer advocacy body should have a particular focus on small to medium consumers, recognising that the interests of those classes of consumers are often not effectively heard in national regulatory decisions. Given that the transitional period now looks to be in place (at least) until the end of this year, it would seem entirely appropriate that the amended funding criteria reflect the MCE's recognition of that need.

CUAC would therefore strongly recommend that in developing the funding criteria for the Advocacy Panel, the AEMC incorporates a focus on the interests of small to medium consumers.

Consumer Law Centre Victoria stated:

Given this delay in establishing the long term model for consumer advocacy arrangements, and the existence of the current proposed rule change, it seems appropriate that any current rule change include a requirement that the Panel, in its allocation of funding, give particular focus to small and medium consumers. This would ensure that the interim changes to the operation of the Panel will be in accordance with the MCE's direction, until the long term model is established.

Ergon Energy stated:

Ergon Energy acknowledges that the Rule proposal reflects the MCE's decision that consumer advocacy should be administered by a long term body established by legislation, accountable to the MCE and AEMC and focussed on small to medium energy consumers. This approach is supported by Ergon Energy...

Total Environment Centre Inc stated:

TEC proposes that additional focus should be placed on the environment as a key area for advocacy, as environmental externalities caused by the NEM have direct impacts on small and medium consumers, as well as the wider community and national economy.

Energy Users Association of Australia stated:

...it is imperative that users have access to funding to effectively participate in the current MCE gas reform agenda to ensure that end users views are appropriately considered in the policy formation stage.

The EUAA recommends that the AEMC implement appropriate Rules changes that allows end user groups to access Panel funding for gas policy and regulatory issues as part of the current Rules change process...

..the EUAA strong recommends that the AEMC broaden provision 8.10.3(2)(ii)(B) as part of the current Rules change process to include access to Advocacy Panel funding for end users wishing to run and/or participate in a review of AER's regulatory decision-making.

The Commission's consideration and reasoning

There is no specific requirement in the Rules for the Panel to focus end user advocacy funding on small to medium consumers. However, the Panel may keep the MCE's long term policy intent in mind when assessing funding applications, provided the other principles for allocating funding in the Rules are addressed in the applications. The Commission recognises the MCE's long term policy intent, but considers that it would not be appropriate to pre-empt such a Rule change in this interim proposal.

Similarly, as the Panel's current funds are received via NEMMCO's collection of fees from the NEM, it would not be appropriate to allocate funding to applications on gas matters until funding from the gas market is received – which is also part of the MCE's long term model.

Furthermore, there is no MCE policy intent to focus the Panel's advocacy funding on environmental issues or appeals against AER regulatory decision making. Broadening the scope of the Panel to focus funding on such areas should be raised with the MCE.

The Commission's finding in relation to the focus of the Panel

Having considered the issues raised in these submissions, the Commission has concluded that to focus the Panel's allocation of advocacy funding on any specific subset of end use consumers or subjects would not be appropriate at this time, and the continuation of the guidance for the allocation of funding in clause 8.10.3(d) would be appropriate for this interim proposal.

2.6.4 Operational aspects of determining funding

MCE's proposal

The MCE proposal identifies a lack of accountability in relation to the amount of funding allocated for consumer advocacy or how it was determined, as it *“is unilaterally determined by the Panel”*. To address this issue, the MCE proposes that the Panel continue to determine what amount of funding is required, but submit this to the

Commission for approval, and as long as the requirements are reasonable, the Commission must approve them.

Similarly, the MCE proposal identifies the “*lack of separation between rule making (developing funding criteria) and rule application (applying funding criteria)*” as an issue. To address this, the MCE proposes that the Panel continue to develop the funding criteria, which is then submitted to the Commission for approval. The Panel then applies the funding criteria in its assessment and decisions on funding applications.

Submissions

Tasmanian Council of Social Services stated:

Although it is not a proposed change, the other issue we would like to comment on in relation to the Rules governing the Panel and its functions, is the ‘principle’ in 8.10.3(d)(4) that applicants ‘must fund a share of the project costs from a source other than funding provided by the Advocacy Panel’. Although a waiver of this requirement is allowed, this is at the Panel’s discretion and no criteria for granting waivers are provided. As a small organisation with a limited budget, we find it impossible to make either an in-kind or cash contribution to project funding from the Panel and suspect that this would be the case with most organisations representing small, and possibly medium, consumers. Given that the MCE intends that the Panel support advocacy efforts on behalf of these groups, we question the wisdom and need for such a principle.

National Consumers Electricity Advocacy Panel stated:

The clause [8.10.3(a)] does not specify for which financial year the panel must provide a determination of the funding requirement.

...recommended that the date for submitting the [funding] determination [to the AEMC] should be 12 February and the latest date for approval, 14 March, in order to allow sufficient time for the panel to complete its annual report.

The MCE’s proposed cl 8.10.3(a) makes no provision for the process to be followed in the event the AEMC refuses to approve the panel’s funding determination.

...In the interest of clarity, the clause [8.10.3(b)] should accurately describe the financial year to be reported on... The clause should also include a requirement that the panel report the date on which the AEMC approved the determination so readers of the annual report will know whether or not the determination is final (if it is confirmed that the AEMC will have this responsibility).

...The national electricity market (the NEM) and end-users would expect the criteria [8.10.3(d)] to be approved if they are consistent with the principles set down in the Rules. If the criteria are consistent with the principles but are not approved by the AEMC, this could only be because the AEMC has effectively introduced a principle not set down in the Rules and which has not been considered and debated by the NEM and end-users as Rules are during the Rule change process. To avoid the perception that the AEMC may introduce a principle that has not been previously debated through the Rule change process, it is recommended that the AEMC be required to approve the criteria if they are consistent with the principles set down in the Rules.

...A further issue that the panel raises for consideration is the practical problem of what happens if the panel has an unforeseeable need for additional funding...The funding requirement is based on a number of factors including the number and cost of projects that end-users wish to undertake and the issues covered in the work programs of regulatory and policy making bodies such as the AEMC, AER and MCE that end-users wish to advocate on.

Total Environment Centre Inc stated:

There is no real budget allocated to the Panel nor upper and lower limits placed on spending. The Rules as they stand and these proposed changes will not deal with this problem... The Panel simply assesses applications then notifies the AEMC of the amount required from NEMMCO. This is not an efficient system, and is not so critical in this transition stage, but provisions need to be developed in the long-term model to deal with this.

...The AEMC should ensure the guidelines developed by the Panel (under Clause 8.10.3[e]) give some clarity to the nature of the “diversity” required of the Panel. This is important not only to ensure that the spirit of the clause is honoured, but also to give some certainty to potential applicants as to their likelihood of success.

Energy Users Association of Australia stated:

...The EUAA supports the proposal that the Panel must determine the funding requirements for end user advocacy in accordance with the Rules consultation procedures...However, the proposed Rules change should provide for more flexibility for the Panel to seek top up funding outside of the formal review process during March each year.

The EUAA has concerns with the proposal that the “AEMC must approve the funding requirements by 31 March each year, unless satisfied that there are no reasonable grounds for approving the funding requirements”. In particular, the EUAA is concerned that the AEMC seems to have unilateral power to deny the Panel’s funding requirements. The AEMC’s grounds to deny the funding requirements are not made clear in the Rules proposal.

If the AEMC decides to deny the Panel’s provisional funding requirements as it considers “there are no reasonable grounds”, then the Rules must state that the AEMC be required to conduct a public consultation process (such as a fast tracked Rules Change Consultation process) to determine the new level of funding requirements and consultation process should be finalised within 30 business days.

Further, if the AEMC decide to decline the Panel’s provisional funding requirements and therefore conduct its own formal consultation, the Rules must allow for interim funds to be made available to the Panel to allow it to process end user applications that may arise during the AEMC consultation period.

...In particular, the EUAA supports the proposal that the Panel must determine the funding criteria in accordance with the Rules consultation procedures... However, the EUAA has concerns with the unilateral authority given to the AEMC under clause 8.10.3(d) to decline funding criteria if they consider the criteria are not consistent with the principles outlined in clause 8.10.3(2).

...The EUAA supports the proposed Rules change to “remove the sunset clause bearing in mind that the arrangements will be replaced on 1 Jan 2007 by the long term model”.

...The EUAA recommends that the AEMC use the current Rules change process to better clarify the relative importance of the seven criteria as outlined in clause 8.10.3(d). In particular, the EUAA recommends that the AEMC should stipulate in the Rules that all criteria are relevant and that the Panel should give significant weight to criteria (2) and (3) in deciding on funding applications.

...The EUAA also recommends that the AEMC outline in the Rules that the Panel should aim to minimise its administrative and overheads costs. In particular, the AEMC should consider introducing a Rule that stipulates that the Panel must maintain overhead and administrative costs at or below 10% of total Advocacy Panel funding for any given financial year (we understand this to be an acceptable benchmark for funding schemes). In its most recent funding year, the administrative and overhead costs of the panel were more like 30%. The Panel should be required to report on its financial performance against this benchmark in its Annual Report.

The Commission’s consideration and reasoning

The Total Environment Centre submission acknowledges that this interim MCE proposal does not change clause 8.10.3(d)(4) regarding the waiver of the requirement to fund a share of the project costs. As each project is assessed on a case-by-case basis, so should the possible waiver of the requirement to fund a share of the project costs. Defining the criteria for the granting of such a waiver for each possible circumstance would be difficult.

For clarity and operation of the Rules, clause 8.10.3(a) should be amended to clarify that the funding requirement is to be determined for the next financial year, as intended. Similarly, to give certainty and improve the transparency of the Panel’s funding, amending the timeframes for the Commission’s consideration of the funding determination should be made so the Panel may report on the forward funding in its annual report, if it chooses to do so.

The MCE proposal also indicates that as long as the funding requirements determined by the Panel are reasonable, the Commission must approve them. However, in the event that the funding requirements are not approved by the Commission, it may be prudent to include a process that the Commission should follow to determine the funding requirements for the Panel – to manage the expectations of the Panel, stakeholders and the Commission.

A number of submissions suggest there should be more flexibility in the Panel’s funding requirements to provide additional funding during the year, or to set upper and lower limits for the funding. These suggestions are impractical as NEMMCO sets its fees to recover the funds required for the Panel’s operations prior to the commencement of each financial year – in accordance with clause 2.11.3 of the Rules and to give market participants certainty of their fees. NEMMCO would not be able to adjust its fees during the year to provide supplementary funds to the Panel, as suggested.

The MCE proposal also indicates that as long as the funding criteria developed and published by the Panel are consistent with the principles in clause 8.10.3(d) and have been developed in accordance with the Rules consultation procedures, the Commission may approve them. However, in the event that the funding criteria are not approved by the Commission, discussions between the Commission and the Panel should address any uncertainties or principles that the Commission considers not sufficiently addressed in the funding criteria prior to approval. Such discussions are not expected to be onerous or protracted.

Given the independence of the Panel's decisions and operations from the Commission, it would not be appropriate for the Commission to amend the Rules to influence the Panel's allocation of funding (eg importance of diversity, as suggested by the Total Environment Centre submission) beyond the principles already provided in clause 8.10.3(d) of the Rules.

The issue raised in the Energy Users Association of Australia submission regarding the administrative and overhead costs of the Panel should be addressed as a consequence of this Rule change proposal, through the greater accountability of the Panel's operations to the Commission.

Improving the operational aspects and practical implementation of the Panel's funding decisions should result in a more efficient use of advocacy funding.

The Commission's finding in relation to the determination of funding

Having considered the issues raised in these submissions, the Commission has concluded that the following measures are appropriate:

- clarifying that the funding requirement is to be determined for the next financial year;
- amending the timeframes in clause 8.10.3(a) to enable the Panel to include the forward funding in its annual report, if it so chooses; and
- including a process that the Commission should follow to determine the funding requirements for the Panel, if the Commission does not approve the funding requirements as determined by the Panel.

2.6.5 Panel meetings

MCE's proposal

The MCE proposal is silent on this issue.

Submissions

Public Interest Advocacy Centre stated:

...It appears the proposed change to the Rules may have the effect of limiting the frequency of meetings of the Panel. We cannot think of a reason why this would be a desirable change from the current arrangements.

Consumer Utilities Advocacy Centre stated:

...CUAC would like to emphasise the need for the Panel to continue to have the capacity to consider urgent grant applications. In drafting the new funding guidelines, clause 8.10.3(f) should not be interpreted in a restrictive manner. The timelines for public

consultation in AEMC, AER and MCE processes are rarely longer than eight weeks, and often – as was the case with this proposed Rule change – shorter. To be effective, the Panel needs the flexibility to provide support to consumers as it is required.

National Consumers Electricity Advocacy Panel stated:

The MCE’s proposed clause [8.10.3(f)] requires the panel to determine applications for funding on a quarterly basis prior to the commencement of a quarter. The clause is undesirable and impractical as it will severely restrict the range of projects that could be funded... It is recommended that in the interests of end-users being able to respond to all relevant issues, not only those that arise in the next quarter and for which there is sufficient notice to submit an application for funds prior to the commencement of the quarter, the clause should be amended to permit the panel to meet as often as circumstances require and to approve projects irrespective of when they are to commence.

Total Environment Centre Inc stated:

In practice the Panel is meeting every two months and there is no reason this could not be inserted into the Rules. In the Panel’s guidelines there is provision for assessing “Stream 3” applications, where the applicant is requesting funds on an urgent basis, particularly in response to procedures within the energy market reform program. It is therefore reasonable to insert a statement that the Panel can meet more often to deal with urgent cases.

The Commission’s consideration and reasoning

In practice, the Panel meets every quarter but may call extraordinary Panel meetings to discuss urgent funding applications eg a funding application to provide comments on a Commission Rule change proposal where the consultation period is only four weeks.

However, the Commission recognises that this clause may be interpreted in a restrictive sense. Given that there will, at least, be short consultation periods for some of the Commission Rule change proposals, allowing the Panel to meet at least quarterly, but more often if necessary, would be reasonable.

The Commission’s finding in relation to Panel meetings

In considering the issues raised in these submissions, the Commission has concluded that the clause should be clarified to the effect that the Panel must meet at least quarterly, and more often if necessary, to consider funding applications.

2.6.6 Audits

MCE’s proposal

The MCE proposal is silent on this issue.

Submissions

Public Interest Advocacy Centre stated:

The proposed 8.10.3(g) also raises issues of the role of the AEMC with its requirement for an independent auditor to be appointed to examine the affairs of successful applicants. Again, PIAC supports improved governance and accountability – including of those receiving funding for the Panel. However, we believe it is more appropriate to give to the AEMC the power to determine the circumstances under which audits would be

required. A reasonable approach in the case of smaller grants of funding is to reserve the right to require an audit rather than imposing the obligation in all cases.

More importantly, it should be recognised that many community groups and potential applicants for funding already have established a practice of appointing and paying independent auditors to examine and report on their financial affairs. In many cases this is done at least partly to fulfil the requirements of other funding bodies. For PIAC it would be preferable to have the independent auditor already appointed by our governing Board also tasked with preparing reports on the acquittal of any grants from the Panel. This, too, points to the need for some matters of governance and administration to be left to the discretion of the AEMC rather than being incorporated into the Rules.

National Consumers Electricity Advocacy Panel stated:

It is impractical to expect the panel to potentially bear the costs of auditing the financial records and accounts and expenditure reports prepared and maintained by successful applicants for funding. The cost of this audit task could be significant, for example in financial year 2005/2006 the panel approved twenty projects submitted by nine applicants who are located in four different States.

If the intention of the clause is to give to the panel the power to audit an applicant's records where it sees a need to do so, it would be preferable to make specific provision for such a power.

The Commission's consideration and reasoning

In practice, audits do not appear to have been undertaken of successful applicants for funding. While the Panel's financial records are audited each year by an auditor appointed by the Panel, it is unclear whether NECA has been involved in past years.

Even though this clause has not been altered as part of this Rule change proposal, on the basis of the submissions on this issue, the Commission considers that there is a case for clarifying and improving the practical operation of this clause.

Given the small nature of some of the successful funding applications, an annual audit may be prohibitive and make a project unfeasible. However, each successful applicant must provide a project completion report to the Panel, in accordance with clause 8.10.3(7) of the Rules, as part of the project assessment and funding criteria process.

The Panel should also be able to conduct spot audits of a successful applicant, either at the completion of a project or during the term of the project, to ensure that all records are well maintained by the successful applicant. It is the responsibility of the Panel to ensure that any funding allocated to projects have been appropriately expended. Audits conducted at the request of the Panel will be paid for by the Panel.

Submissions received on this Rule change proposal have also identified a range of issues regarding the operation of the Panel. As part of good governance processes, there should be transparency in the systemic approach of the Panel, without interference in the performance of the Panel to manage its decisions and obligations under the Rules. As a consequence, and to better manage these matters in the medium to long term, the Commission considers it should have the capacity to request management audits of the

Panel, if required, by an auditor selected and engaged by the Commission, and paid for by the Panel.

For the annual financial audits, the Panel should continue to select the auditor, but the Commission must approve the auditor before the audit proceeds.

Improved governance of the Panel should lead to a more efficient use of advocacy funding, in the long term interests of end users.

The Commission’s finding in relation to audit requirements

In assessing the issues raised in these submissions, the Commission has concluded that the following measures are appropriate:

- requiring successful applicants to provide a project completion report as part of the project assessment and funding criteria process;
- providing the Panel with the power to conduct spot audits of successful applicants, and any such audits will be paid for by the Panel;
- requiring the Commission to conduct management audits of the Panel, if required, by an auditor selected and engaged by the Commission and paid for by the Panel; and
- requiring the Panel to continue to select the auditor for its annual financial audits, and requiring the Commission to approve the auditor before the audit may proceed.

Attachment 1: Draft Rule