

17 August 2020

Stephen Kraus

By email:

Dear Mr Kraus

### **Distributor liability under deemed standard connection contracts – response to rule change request**

I am writing in response to the rule change request you submitted to the Australian Energy Market Commission (**AEMC** or **Commission**) on 14 May 2019 that seeks to amend the National Energy Retail Rules (**Retail Rules**) to vary the model terms and conditions for deemed standard connection contracts regarding the liability of distribution network services providers (**DNSPs**).

Under section 249(2) of the National Energy Retail Law (**Retail Law**), the AEMC has decided not to take any action in relation to your request because the subject matter of your request is outside of the scope of the AEMC's rule making power. This means that the AEMC will not be commencing the rule making process for your rule change request. The reasons for this decision are set out below.

#### **The AEMC's rule making process**

In considering requests to amend the Retail Rules, the AEMC is required to follow the rule making process set out in the Retail Law. In deciding whether to 'initiate'/ commence the rule making process in response to a request, under section 249(1) of the Retail Law, the AEMC must consider whether:

1. the minimum content requirements for rule change requests have been met;
2. the request appears not to be misconceived or lacking in substance;
3. the subject matter of the request appears to relate to a matter that the AEMC has the power to make a rule in relation to; and
4. the subject matter of the request appears to relate to a matter in relation to which the AEMC has made a rule, or considered in a request for rule in the 12 months preceding your request, or is currently considering making a rule in relation to.

Having regard to these matters, the Commission can make a decision either to take no action in relation to a request (section 249(2) of the Retail Law) or to initiate the rule making process (section 249(6) of the Retail Law).

Your request for a rule does not meet the requirements set out in items 3 for the reasons outlined below.

#### *The AEMC's power to make a rule*

Under section 221 of the Retail Law, the AEMC may make rules that amend the Retail Rules. However, the AEMC does not have the power to amend the Retail Law or other laws or legal instruments that have been enacted in state and territory jurisdictions. The issue raised in your rule change request and your proposed solution to amend the existing limitation of liability of DNSPs would not only require amendments to the Retail Rules but also to the Retail Law and potentially jurisdictional laws and other legal instruments, as the Retail Law and jurisdictional laws and instruments contain provisions that deal with the liability of DNSPs and the prohibition on persons other than DNSPs interfering with network assets. For example, section 316 of the Retail Law states:

*(1) A retailer or distributor, or an officer or employee of a retailer or distributor, does not incur any civil monetary liability for any partial or total failure to supply energy unless the failure is due to an act or omission done or made by the retailer or distributor or the officer or employee of the retailer or distributor, in bad faith or through negligence.*

Similarly, section 31 of the *Utilities (Technical Regulation) Act 2014* (**Utilities Act**) in the Australian Capital Territory states:

*A person commits an offence if the person—*

- (a) does something that interferes with a regulated utility network, or a network facility; and*
- (b) is reckless about whether doing the thing would interfere with the regulated utility network, or a network facility.*

*Maximum penalty: 200 penalty units, imprisonment for 2 years or both.*

These provisions would need to be amended in order to implement your proposed solution (and likely any alternative solution that addresses the subject matter of the issues as framed in your request), however, as stated earlier, the AEMC does not have the power to amend the Retail Law or the Utilities Act.

We also note that regulations relating to unauthorised interference with network assets are in place to ensure that persons who conduct repairs, maintenance or upgrades on network assets are suitable qualified and the work itself can be planned by the relevant DNSP. If members of the public are able to initiate works at their own volition it would not only undermine these safety measures but would also create uncertainty around who is responsible and liable for network assets.

After careful consideration, for the reasons outlined above the AEMC will not be commencing the rule making process in relation to your request.

Thank you for taking the time to submit this rule change request. If you would like further information on this matter or would like to discuss, please contact Meredith Mayes at [meredith.mayes@aemc.gov.au](mailto:meredith.mayes@aemc.gov.au) in the first instance.

Yours sincerely

A handwritten signature in black ink, appearing to be 'BB' with a stylized flourish.

Benn Barr

Chief executive