SUBMISSION

AEMC IMPROVING CONSULTATION IN THE RULES | 26 MAY 22

EUAA
Energy Users Association of Australia

The Energy Users' Association of Australia (EUAA) is the peak body representing Australian commercial and industrial energy users. Our membership covers a broad cross section of the Australian economy including significant retail, manufacturing, building materials and food processing industries. Combined our members employ over 1 million Australians, pay billions in energy bills every year and in many cases are exposed to the fluctuations and challenges of international trade.

As large energy users, our members are highly exposed to movements in both gas and electricity prices and have been under increasing financial stress due to escalating energy costs. These increased costs are either absorbed by the business, making it more difficult to maintain existing levels of employment or passed through to consumers in the form of increases in the prices paid for many everyday items.

The EUAA are becoming increasingly concerned by what we believe to be a gradual decline in good engagement process and sound governance of many aspects of the NEM. If this trend continues consumers will lose confidence in the ability of our peak regulatory and market bodies to deliver outcomes that are consistent with the NEO.

The EUAA welcomes the opportunity to comment on the Draft Rule Determination. We find a lot to support in the Draft as the Commission seeks to ensure best practice governance for consultation on subordinate instruments.

The focus of this submission is on two aspects:

- the proposed flexibility to switch to the standard process, and
- the governance arrangement around consideration of a stakeholder's application to switch to a standard process

<u>Elements for deciding whether a standard or expedited process should be used</u>

We propose that the initial test should be more specific than 'unlikely to have a significant impact on the NEM' which is too broad. By their very nature, subordinate instruments tend to focus on one particular aspect of the NEM and are therefore, individually, unlikely to have a significant impact on the NEM as a whole. But they can, collectively, have an impact on the costs that consumers are being asked to bear. The analogy is with network "willingness to pay" discussions in the past where networks have represented that a particular change a network sought only costs a 'cup of coffee'. But consumers were presented with multiple proposals all of which that were supposed to only cost "a cup of coffee" which collectively added up to a large cost increase for consumers. In the end consumers will end up paying for the most expensive "coffee machines".

So we support an alternative test based on the impact on a class of participant.

Stakeholders should not be constrained in only challenging the initial test for an expedited process. Just as the consulting party is able to switch from the expedited process to the standard process at their discretion by publishing a notice, stakeholders should be able to challenge not only a consulting party's initial decision to go the expedited route but also be able to seek a change to the standard process if they believe circumstances have changed subsequent to publication of the draft instrument/explanatory paper. This should not be left solely to the discretion of the consulting party.

Governance arrangements in assessing whether to switch to a standard process

Our concern here is twofold:

- that it is the consulting party that assess whether a stakeholder's arguments against the consulting parties' original decision to go the expedited route, are sound, and
- that stakeholders do not have the ability, as they do with a rule change to the AEMC, to initiate a change if they consider market conditions have changed to the extent that the original subordinated instrument is no longer meeting the NEO.

In the former, the consulting party is both judge and jury. In our earlier submission on this matter, we supported Shell Energy's proposal to have a formal dispute resolution mechanism to give stakeholders confidence in the governance framework for the rule change process. The Draft Determination's response to their proposal was (pp 33-34):

> "Including access to the disputes resolution procedure is likely to create unnecessary burdens on consulting parties, as it risks encouraging stakeholders to use this clause whenever they disagree with a decision. The process will involve two rounds of consultation as a default and a consulting party is required to publish reasons for its decision, and stakeholders can still access judicial review in certain circumstances."

It is difficult to understand the logic behind this reasoning:

- The criteria for assessing a rule change is around the NEO and an efficient outcome for consumers, not around whether it might 'create an unnecessary burden on consulting parties'
- We do not see how a well-defined disputes mechanism with specific time frames is likely to be contrary to the NEO

The Commission's assumption seems to be that a disputes process adds unnecessary time and inconvenience to the process and places an unwarranted burden on the consulting party. We would suggest that the purpose of having a dispute process is to influence behaviour which results in effective and transparent consultation. If this works as intended, stakeholders will have no need to utilise the disputes process.

The best disputes process is the one that is never called on. The existence of the dispute mechanism provides an incentive on the consulting parties to effectively and transparently consult including justification of their reasons for their determination to avoid a dispute. We do not consider this to be an 'unnecessary burden' but an important part of achieving the intent of the rule change and to ensure the proper governance framework for the consultation process.

On the latter, the Commission received a number of submissions supporting a review mechanism or the ability of stakeholder to apply for a review of a subordinate instrument (similar the ability to submit a rule change to the Commission). The Commission rejection of this (p.25):

> "The Commission considers that going further than this by requiring a consulting party to act within a certain timeframe on requests for a review of instruments and/or determinations is not, on balance, aligned with good regulatory practice. While it may aid predictability and transparency, it could require that

> the consulting party invest significant resources in a review, limiting its ability to allocate resources to and deliver on priority areas and to efficiently group together related areas of work."

And p. 32:

> "While formal reviews and sunsetting clauses can help to make sure consulting parties keep instruments fit for purpose, these can create unnecessary burden on a consulting party and may not be necessary, if for instance an instrument remains fit for purpose."
>
> Consulting parties are required to review some instruments periodically, under the NER, and will also review instruments where there are material changes in circumstances. The recommended instrument register (see chapter 2) is a lighter touch approach that will also reduce transaction costs and provide greater transparency for market participants.

again seems to be based on a criteria of the level of inconvenience to the consulting parties rather than what is in the interests of consumers under the NEO.

In considering the need for stakeholder led requests for a change to a subordinate instrument, the Commission should also consider that the consulting party alone that determines what areas of a subordinate instrument will be open to consultation and what areas will not. This means that stakeholders will have no opportunity to request changes that they consider beneficial to the market and better meet the NEO. It is simply the consulting party's view that prevail.

We do not consider this outcome meets good regulatory practice and in fact results in a poor governance framework for the rules consultation process.

Do not hesitate to be in contact should you have any questions.

Kind regards,

Andrew Richards
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