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Dear Mr Goh

### Advice on possible amendments to the National Electricity Rules

1. Thank you for your instructions relating to the operation of, and possible changes that could be made to, Chs 6 and 6A of the National Electricity Rules<sup>1</sup> (NER). We set out below your questions and our short answers (paragraph 3), a summary of the relevant background (paragraphs 4 ff), a summary of the relevant legislative provisions and the determination-making process (paragraphs 10 ff), and our detailed reasons (paragraphs 17 ff).
2. Your questions relate to the process by which the Australian Energy Regulator<sup>2</sup> (AER) makes distribution determinations or transmission determinations under Ch 6 and Ch 6A of the NER respectively. In particular, you are concerned with problems that are caused by Distribution Network Service Providers (DNSPs) and Transmission Network Service Providers (TNSPs) making submissions late in the process, and more particularly, with DNSPs and TNSPs making late submissions that contain material that you consider should more properly have been incorporated in the initial or revised regulatory or revenue proposal.

#### QUESTIONS AND SHORT ANSWERS

3. Your questions, and our short answers, are as follows.

**Q1**      *What changes, if any, to the relevant provisions of the NER could address the problems described above, and how would these changes operate?*

**A1**      We consider that these problems could be addressed by:

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<sup>1</sup> Made by the Australian Energy Market Commission pursuant to s 103 (read with ss 29 and 34) of the National Electricity Law (the NEL), which is set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA).

<sup>2</sup> Established under Pt IIIA of the *Competition and Consumer Act 2010*.

- a) restricting what submissions can be made by DNSPs and TNSPs during the determination process – see paragraphs 20 ff
- b) enforcing provisions that restrict what changes can be made to revised proposals and other documents – see paragraphs 24 ff.

We have attached some draft proposed amendments to various clauses of Chs 6 and 6A of the NER.

If there are any examples that illustrate the intended operation of the rule changes in particular circumstances, we recommend that you consider setting those out in your request for the making of a Rule.

Q2 *Would such amendments further the national electricity objective?*

A2 In our view, there are strong arguments that these amendments would further the national electricity objective.

#### **BACKGROUND**

4. Chapters 6 and 6A of the NER respectively set out the process which leads to the AER making a distribution determination for a DNSP or a TNSP. These processes prescribe timeframes by which the DNSP or TNSP is to submit various documents, and timeframes by which other participants in the determination process may make submissions. The processes are outlined in more detail at paragraphs 14 and 15.
5. You advise that, in practice, these time limits are not always adhered to. Further, DNSPs and TNSPs often make submissions that contain information which you consider could and should have been supplied with the original revenue or regulatory proposal, and which supplements or further justifies or supports their regulatory or revenue proposals. Submissions of this nature can be made quite late in the process; as late as just prior to when the AER is required under the NER to publish its draft or final decision. As a result of these late submissions:
  - other parties making submissions are not always able to comment properly on the entirety of the DNSP's or TNSP's regulatory or revenue proposal
  - the AER has less time than it ought to have under the NER to properly assess the DNSP's or TNSP's regulatory or revenue proposal before it publishes its draft or final decision
  - DNSPs and TNSPs have an opportunity to raise new issues in their submissions, and comment on matters that the AER had no concerns with.
6. You consider that the policy underlying Chs 6 and 6A of the NER is that the DNSP or TNSP should include all relevant information in their initial proposal; they should not have subsequent opportunities to provide further information to the AER that is of a nature that it should have been included in the initial proposal. Rather, opportunities for DNSPs and TNSPs to provide additional information should be restricted to revising proposals to respond to concerns of the AER. This policy is

reflected by provisions such as cll 6.9.2(b), 6.10.3(b), 6A.11.2(b) and 6A.12.3(b) of the NER, which limit the changes that can be made when DNSPs and TNSPs resubmit or revise proposals or other documents. In this regard, you consider that the only matters on which a DNSP or TNSP should legitimately be able to comment are on the AER's proposed negotiated distribution and transmission service criteria, and on *other* DNSPs' and TNSPs' proposals (including the pricing methodology and negotiating framework in Ch 6A), to the extent that those proposals differ from their own; the process is not advanced by allowing them an opportunity to make further written submissions in respect of their own proposal.

7. You consider that, in addition to reflecting the policy intent of the distribution or transmission determination process, restricting what can be contained in submissions from DNSPs and TNSPs would:
  - ensure that other parties making submissions to the process have all of the relevant information from the DNSP or TNSP before them when they make their submissions
  - better enable the AER to meet the timeframes for its decision-making under the NER.
8. You acknowledge that s 28ZC of the National Electricity Law<sup>3</sup> (the NEL) and rules 6.14(a) and 6A.16(a) of the NER permit the AER to disregard late submissions. However, these provisions do not address issues relating to submissions, or portions of submissions, from DNSPs and TNSPs that are made within time, but which provide information that more properly should have been provided with the original proposal or other documents.
9. Finally, you refer to comments by the Australian Competition Tribunal in *Application by EnergyAustralia*,<sup>4</sup> in the context of a late report submitted by EnergyAustralia as part of the 2009-14 distribution determination process. The Tribunal commented that:

The NEL and the Rules mandate a sequence of, and timetable for, a DNSP's regulatory proposal, the AER's draft decision, the DNSP's revised regulatory proposal and the AER's final determination. To avoid gaming of the sequence, the NEL and the Rules are quite detailed about what is to occur in each sequence, when it is to occur and about the rights and obligations of a DNSP and the AER . . . A line must be drawn by the AER in its engagement with a DNSP, else it fails to meet the deadlines imposed on it.

#### RELEVANT LEGISLATIVE PROVISIONS

10. We first outline briefly the relevant legislative provisions.

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<sup>3</sup> Set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA).

<sup>4</sup> [2009] ACompT 8 at [257].

### Relevant definitions

11. The procedures for making distribution and transmission determinations are set out in the NER. These terms are defined in s 2 of the NEL as follows:

**distribution determination** means a determination of the AER under the Rules that regulates any 1 or more of the following:

- (a) the terms and conditions for the provision of electricity network services that are the subject of economic regulation under the Rules including the prices an owner, controller or operator of a distribution system charges or may charge for those services;
- (b) the revenue an owner, controller or operator of a distribution system earns or may earn from the provision by that owner, controller or operator of electricity network services that are the subject of economic regulation under the Rules;

**transmission determination** means a determination of the AER under the Rules that regulates any 1 or more of the following:

- (a) the terms and conditions for the provision of electricity network services that are the subject of economic regulation under the Rules including the prices an owner, controller or operator of a transmission system charges or may charge for those services;
- (b) the revenue an owner, controller or operator of a transmission system earns or may earn from the provision by that owner, controller or operator of electricity network services that are the subject of economic regulation under the Rules;

12. The making of a distribution or transmission determination is an 'AER economic regulatory function or power' (paragraph (c) of the definition of that expression, s 2 of the NEL).

13. The procedures for making distribution and transmission determinations are primarily set out in the NER. There are 2 provisions in the NEL which apply throughout the process:

- s 16(1)(b), which governs when and how the AER is to keep certain parties abreast of material issues under consideration and how they are to make submissions
- s 28ZC, which relates to consideration by the AER of late submissions.

### Process for making distribution determinations

14. Part E of Ch 6 of the NER sets out the procedures for making distribution determinations (cl 6.1.2(b)(5) of the NER). The process is, in brief:

14.1. The AER prepares and publishes a 'framework and approach paper' (cl 6.8.1).

- If a distribution determination is in force, this must be prepared at least 19 months before the end of the regulatory control period (cl 6.8.1(f)).

- In any event, it must be completed sufficiently in advance of the making of a distribution determination to be of use to the DNSP in preparing its regulatory proposal (cl 6.8.1(e)).
  - The AER is required to consult the DNSP and other interested stakeholders in preparing the paper.
- 14.2. The DNSP submits a regulatory proposal to the AER (cl 6.8.2).
- If a distribution determination is in force, this must be submitted at least 13 months before the expiry of that determination (cl 6.8.2(b)(1)).
  - Otherwise, it must be submitted within 3 months after the AER requires it (cl 6.8.2(b)(2)).
- 14.3. If the AER considers that the regulatory proposal does not comply with the NEL or the NER, it may notify the DNSP, and require resubmission (cl 6.9.1).
- The AER must give this notification as soon as practicable (cl 6.9.1(b)).
  - The DNSP has 20 business days to comply (cl 6.9.2(a)).
  - Clause 6.9.2(b) restricts the changes the DNSP can make to its regulatory proposal to those that address deficiencies identified by the AER.
- 14.4. The AER then publishes a regulatory proposal (cl 6.9.3(a)) and possibly an issues paper (cl 6.9.3(b)) for consultation.
- There is no statutory time period for the AER to comply with these rules.
  - The AER must allow at least 30 days for consultation (cl 6.9.3(c)).
- 14.5. The AER is then required to consider any written submission which has been made (cl 6.10.1). This obligation is stated to be subject to rule 6.14(a):

#### **6.14 Miscellaneous**

- (a) The AER may, but is not required to, consider any submission made pursuant to an invitation for submissions after the time for making the submission has passed.

Even despite this rule, s 28ZC of the NEL would apply:

#### **28ZC-Consideration by the AER of submissions made to it under this Law**

If, under this Law or the Rules, the AER publishes a notice inviting submissions in relation to the making of an AER economic regulatory decision, the AER, in making the decision—

- (a) must consider every submission it receives within the period specified in the notice; and
  - (b) may, but need not, consider a submission it receives after the period specified in the notice expires.
- 14.6. The AER then publishes a draft distribution determination (cl 6.10.2(a)).
- Any person may make a written submission to the AER on that draft determination (cl 6.10.2(c)).
  - The AER must allow at least 30 days for written submissions (cl 6.10.2(c)).
- 14.7. The DNSP may additionally submit a revised regulatory proposal to the AER (cl 6.10.3(a)). This must be done 'not more than 30 business days after publication of the draft distribution determination' (cl 6.10.3(a)).
- Clause 6.10.3(b) limits the DNSP's revision of its regulatory proposal to addressing any matters raised in the draft distribution determination or the AER's reasons for the determination.
  - A revised regulatory proposal is also required to comply with any general regulatory information order (s 28C of the NEL) or regulatory information notice (s 28D of the NEL) (cl 6.10.3(d)).
  - The AER is required to publish a revised regulatory proposal provided under cl 6.10.3(a) as soon as practicable after receipt (cl 6.10.3(d)).
  - The AER may (but need not) invite written submissions on the revised regulatory proposal (cl 6.10.3(e)).
- 14.8. The AER is required to consider any submissions that are made to it on the draft distribution determination or on any revised regulatory proposal, and then make a distribution determination in relation to the DNSP (cl 6.11.1).
- The obligation to consider submissions is again subject to rule 6.14(a).
- 14.9. The AER must then publish the distribution determination (and associated documents), at least 2 months before the commencement of the regulatory control period (cl 6.11.2).

***Process for making transmission determinations***

15. Part E of Ch 6A of the NER sets out the procedure for making transmission determinations (cl 6A.1.1(d) of the NER). The process is, in brief:
- 15.1. The TNSP submits a revenue proposal and proposed pricing methodology to the AER (cl 6A.10.1(a)).

- If a transmission determination is in force, the proposal must be submitted at least 13 months before the expiry of that determination (cl 6A.10.1(a)(1)).
  - Otherwise, it must be submitted within 3 months after the AER requires it (cl 6A.10.1(a)(2)).
- 15.2. If the AER determines that the regulatory proposal does not comply with various regulatory provisions, it must notify the TNSP of that determination (cl 6A.11.1).
- If so notified, the TNSP has 1 month to resubmit its proposal (cl 6A.11.2(a)).
  - Clause 6A.11.2(b) limits the TNSP's changes of its revenue proposal to addressing matters raised by the AER in its determination.
- 15.3. The AER then publishes the revenue proposal (or resubmitted proposal) and other related documents (cl 6A.11.3(a)) and possibly an issues paper (cl 6A.11.3(b)) for consultation.
- The revenue proposal and other related documents are required to be published as soon as practicable after the AER determines that the proposal complies with the regulatory provisions mentioned above.
  - The AER must allow at least 30 business days for consultation (cl 6A.11.3(c)).
- 15.4. The AER is then required to consider any written submission which has been made (cl 6A.12.1). This obligation is stated to be subject to rule 6A.16(a), which is identical to rule 6.14(a) (see paragraph 14.5 above). (Additionally, s 28ZC would also apply.)
- 15.5. The AER then makes a draft decision in relation to the TNSP (cl 6A.12.1(a)).
- The draft decision and related documents must be published no later than 6 months after the date of submission of the revenue proposal (paragraph 15.1 above) (cl 6A.12.2(a)).
  - The AER is required to hold a predetermination conference (cll 6A.12.2(a)(3) and (b)).
  - Any person may make a written submission to the AER on that draft determination (cl 6A.12.2(c)). The AER must allow at least 45 business days from the date of the predetermination conference for written submissions (cl 6A.12.2(c)).
- 15.6. The TNSP may additionally submit a revised revenue proposal, proposed negotiating framework or revised pricing methodology to the AER

(cl 6A.12.3(a)). This must be done not more than 30 business days after publication of the draft decision (cl 6A.12.3(a)).

- Clause 6A.12.3(b) limits the TNSP to making revisions which incorporate the substance of any changes required by, or to address matters raised in, the draft decision.
- The AER is required to publish a revised proposal provided under cl 6A.12.3 as soon as practicable after receipt (cl 6A.12.3(f)).

15.7. The AER is then required to make a final decision in relation to the TNSP (cl 6A.13.1(a)). The AER must publish the final decision, together with related documents, not later than 2 months before the commencement of the regulatory control period (cl 6A.12.3). The AER must make its transmission determination as soon as practicable after making its final decision (cl 6A.13.4).

16. The documents supplied by the TNSP under cl 6A.10.1 must comply with the submission guidelines (cl 6A.10.1(c)). These guidelines are developed and amended in accordance with the transmission consultation procedures (cl 6A.10.2(d) and (e)). A TNSP would have an opportunity to participate in this consultation procedure (noting rule 6A.20, Pt H of Ch 6A of the NER).

## REASONING

### Question 1 – Changes that can be made to the National Electricity Rules

17. Question 1 relates to changes to the NER that could address the issues you have described. As a general point, there are many possible changes that could be made to the NER to address the issues you raise. We do not attempt to set out a complete set of possible rule changes, and we doubt that any set of rule changes would be guaranteed to fully address the issues you raise. Having said that, we consider that the following changes could help to address these issues:
- a) restricting what submissions can be made by DNSPs and TNSPs during the determination process – see paragraphs 20 ff
  - b) enforcing provisions that restrict what changes can be made in revised proposals – see paragraphs 24 ff.
18. We discuss each of these suggested changes in turn. The attachment sets out 8 sets of possible amendments to the NER which implement these suggestions, which we discuss also.



19. Further, if there are any examples that illustrate the intended operation of the rule changes in particular circumstances, we recommend that you consider setting those out in your request for the making of a Rule.<sup>5</sup>

**a) Restricting submissions that can be made during the determination process**

20. The NER does not currently restrict what submissions by DNSPs and TNSPs can cover. There is accordingly nothing in the NER at present to prevent submissions from DNSPs and TNSPs dealing with material that you consider should properly have been in an initial or revised regulatory or revenue proposal.
21. Accordingly, one option would be to amend the NER to restrict the content of submissions, or at least the content of submissions which are provided by a DNSP or TNSP in relation to regulatory or revenue proposals that they submit. Possible ways of doing this are as follows:
- If there are particular matters on which you consider a DNSP or TNSP should be able to comment in the submissions they are able to make under the NER, then the NER could restrict the scope of the DNSP's or TNSP's submissions only to those matters.
  - Alternatively, if there are particular matters on which you consider a DNSP or TNSP should *not* be able to comment in its submissions, the NER could permit submissions on any matter, other than those matters.
22. To support this, there could be a provision which permitted or required the AER to disregard any submissions, or portions of submissions, which the AER considered did not comply with these requirements.
23. You have advised us of the matters in relation to which you consider DNSPs and TNSPs should be entitled to make submissions – see paragraph 6 above. The attached proposed rule changes reflect this. Otherwise, and subject to s 16(1)(b) of the NEL, the opportunity to submit a revised regulatory proposal under Ch 6 of the NER, or a revised revenue proposal and associated documents under Ch 6A of the NER, is thought to provide an adequate opportunity for a DNSP or TNSP to make submissions in respect of material issues under consideration by the AER.

**b) Enforcing provisions that restrict what changes can be made to revised proposals**

24. A DNSP or TNSP has 1 opportunity to submit a revised proposal (and other associated documents) during the determination process (see paragraphs 14.7 and 15.6 above). In each case, the NER places restrictions on what revisions can be made (summarised in those paragraphs). However, there are no provisions in the NER giving the AER an express means of enforcing these restrictions. We make no

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<sup>5</sup> Note in this regard reg 8(1)(c) of the *National Electricity (South Australia) Regulations* (SA).

observation about whether it is implicit in these rules that the AER may reject revised proposals that fail to comply with those requirements.

25. One possible rule would be to provide that the AER would not be able to consider any parts of a revised proposal that did not comply with these restrictions.

***Discussion of specific suggested amendments***

*[1] Amendment to cl 6.9.3*

26. The first set of amendments is to cl 6.9.3. This clause sets out the requirements for preliminary consultation on a regulatory proposal.
27. Clause 6.9.3 would be amended to:
- clarify in cl 6.9.3(a)(2) that any person other than the DNSP that submitted the regulatory proposal is able to make a written submission on the regulatory proposal, and that any person (including the relevant DNSP) is able to make a written submission on the Negotiated Distribution Service Criteria
  - insert a new cl 6.9.3(a)(3), referring to the date by which submissions are due in that paragraph rather than in cl 6.9.3(c), removing some repetition in language
  - amend cl 6.9.3(c) to clarify that, apart from written submissions that are allowed under cl 6.9.3(a)(2), a DNSP is only able to make written submissions in respect of distribution determinations that relate to *other* DNSPs
  - introduce cl 6.9.3(d) to limit the scope of submissions that can be made in accordance with cl 6.9.3(c) when the AER is making 2 or more distribution determinations at the same time. Under this provision, when the AER is making concurrent distribution determinations, submissions from DNSPs would only be able to address 'material differences' between the regulatory proposal submitted by the DNSP making the submission, and a regulatory proposal submitted by another DNSP.
28. The reason for including this provision is as follows. You have advised that, when the AER is making concurrent distribution determinations, 2 or more DNSPs sometimes agree to address particular issues in their regulatory proposals in the same or a similar manner. Without cl 6.9.3(d), a DNSP would be able to make a written submission in relation to another DNSP's regulatory proposal that addresses an issue of this nature. You are concerned that this may provide a DNSP with an opportunity to make a submission that contains additional material relating to its own regulatory proposal. Such an outcome is not consistent with the policy you are seeking to implement. The object of this provision is to address this concern.

*[2] Amendment to rule 6.10*

29. The second set of amendments is to rule 6.10. This rule requires the AER to publish and consult on a draft distribution determination, and permits the DNSP to submit a revised regulatory proposal.
30. Rule 6.10 would be amended to:
  - amend cl 6.10.1 so that it is subject to the whole of rule 6.14 (which would be amended – see below), and to make express that it is subject to the NEL (in particular, to s 28ZC)
  - amend cl 6.10.2(a)(5), to limit written submissions on the draft distribution determination to persons other than the DNSP that submitted the regulatory proposal
  - insert a new cl 6.10.2(a)(6), setting out in that provision the date by which submissions are due, rather than in cl 6.10.2(c), removing some repetition in language
  - amend cl 6.10.2(c) to clarify that a DNSP is only able to make written submissions in respect of distribution determinations that relate to other DNSPs
  - introduce cl 6.10.2(d), which would mirror cl 6.9.3(d), with appropriate modifications
  - amend cl 6.10.3(a) to remove the reference to the DNSP making a written submission – its opportunity to respond to a draft distribution determination based on its own regulatory proposal would be to submit a revised proposal under that provision, and it would have to address all relevant matters in that document
  - amend cl 6.10.3(e) in a similar manner to cll 6.9.3(a)(2) and 6.10.2(a)(5)
  - introduce a new cl 6.10.3(f)-(i):
    - under cl (g), if the AER invited written submissions on a revised regulatory proposal, any person would be able to make a submission, other than the DNSP that submitted the revised proposal
    - cll (h) and (i) would mirror cll 6.9.3(c) and (d), with appropriate modifications.

*[3] Amendment to cl 6.11.1*

31. The third set of amendments is to cl 6.11.1. This clause provides that the obligation of the AER to consider any submissions made to it is subject to rule 6.14(a).
32. This clause would be amended so that it is subject to the whole of rule 6.14 (which would be amended – see below), and to make express that it is subject to the NEL (in particular, to s 28ZC).

*[4] Amendment to rule 6.14*

33. The fourth set of amendments is to rule 6.14. This is a provision that deals with miscellaneous matters.
34. Rule 6.14(a) presently permits, but does not require, the AER to consider late submissions made pursuant to an invitation. This rule would be deleted, and replaced with the clauses described below.

**New clause 6.14.1**

35. A new cl 6.14.1 would be inserted, consisting of 3 paragraphs, (a) to (c).
36. Paragraph (a) of this clause would prevent the AER from considering submissions or related material that did not comply with any rules restricting the content of submissions (for example, any submission by a DNSP which related to its own regulatory proposal).
37. Paragraph (b) of this clause would prevent the AER from considering any late resubmitted or revised regulatory proposal, or any material in a revised regulatory proposal that addressed matters other than those specified in cl 6.10.3 (see paragraph 14.7).
38. Paragraph (c) of this clause would clarify that the clause does not prevent the AER from accepting corrections of a fairly narrow class of errors.

**New clause 6.14.2**

39. This clause consists of existing paragraphs (b) to (f) of rule 6.14, but re-numbered to account for the deletion of paragraph (a).

*Amendments [5], [6], [7] and [8]*

40. Amendments [5], [6], [7] and [8] replicate amendments [1], [2], [3] and [4], but with modifications appropriate to Ch 6A of the NER.

**Question 2 – National electricity objective**

41. Question 2 is whether such amendments would further the national electricity objective.

42. Section 7 of the NEL provides that the national electricity objective is:

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.

43. The Australian Energy Market Commission (AEMC) must have regard to the national electricity objective in performing or exercising its functions and powers (s 32 of the NEL), including its rule-making functions and powers (s 29(1)(a) of the NEL). In this regard, the AEMC is only able to make a rule if it is satisfied that the rule will or is likely to contribute to the achievement of the national electricity objective (s 88(1) of the NEL).
44. The AEMC has issued a document 'National Electricity Rules – Guidelines', which sets out guidelines for proponents in preparing a rule change proposal. These guidelines include, relevantly, the following:

**7 Explaining how a proposed Rule contributes to the National Electricity Objective**

The National Electricity Objective (NEO) is stated in section 7 of the NEL where the object of the NEL 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;*
- (b) the reliability, safety and security of the national electricity system.”*

Before the AEMC can make a Rule that becomes part of the National Electricity Rules, it must apply the Rule making test set out in the National Electricity Law. The test requires that the AEMC be satisfied that the Rule will or is likely to contribute to the NEO.

Therefore, as part of a Rule change proposal, a proponent is required:

- to support propositions of fact made in the proposal by evidence;
- to support propositions as to effects by analysis (both quantitative and/or qualitative)
- to identify how the proposed Rule (if made) will contribute or is likely contribute to the achievement of this objective.

Proponents should demonstrate why and how they consider that the Rule they are proposing satisfies the same criteria of the Rule making test that the AEMC is obliged to apply in assessing that proposed Rule.

A Rule change proposal presents the proponent with the opportunity at the earliest stage of the Rule making process (ie when preparing and initiating a Rule change proposal) to clearly and comprehensively set out the reasons why the proponent considers the proposed Rule satisfies the NEO.

45. Whether the AEMC would be satisfied that the amendments discussed in this advice would, or would be likely to, contribute to the achievement of the national electricity objective is ultimately a matter for the AEMC to decide.

46. However, in our view, there are strong arguments that the amendments discussed in this advice would further the national electricity objective by promoting efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity, by:
- improving the administrative efficiency of the AER
  - making the distribution and transmission determination processes more rigorous, streamlined, certain and transparent, by seeking to ensure that:
    - all relevant information is provided by DNSPs and TNSPs early on in the process
    - third parties making written submissions to the determination process have a full picture of the regulatory or revenue proposal on which to base their submission
    - the AER is able to consider fully-informed submissions from third parties, and has sufficient time to consider the full proposal from the DNSP or TNSP.
47. Through this, it could be argued that the amendments would promote efficient operation and use of electricity services for the long term interests of consumers of electricity, particularly with respect to price.
48. Ms Jenny Francis, Senior General Counsel, has read this advice and agrees with it.
49. Please contact me on the number below if you have any further queries, or if we can be of any further assistance.

Yours sincerely



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**Proposed amendments to Chapter 6 of the NER**

[1] Clause 6.9.3 would be amended as follows:

**6.9.3 Consultation**

- (a) Subject to the provisions of the Law and the *Rules* about the disclosure of *confidential information*, the *AER* must *publish* a *regulatory proposal* submitted or resubmitted to it by the provider under this Part, together with:
- (1) the *AER's* proposed *Negotiated Distribution Service Criteria* for the provider; and
  - ~~(2) an invitation for written submissions on the *regulatory proposal* and the proposed *Negotiated Distribution Service Criteria*;~~
  - (2) a notice inviting written submissions:
    - (i) on the *regulatory proposal*, from any person other than the *Distribution Network Service Provider* that submitted the *regulatory proposal*; and
    - (ii) on the proposed *Negotiated Distribution Service Criteria*, from any person; and
  - (3) the date by which submissions must be made, which must not be earlier than 30 *business days* after the notice inviting submissions is *published*.
- after the *AER* decides that the *regulatory proposal* complies (or that there is sufficient compliance) with the requirements of the Law and the *Rules*.
- (b) The *AER* may *publish* an issues paper examining issues related to the *regulatory proposal* and the proposed *Negotiated Distribution Service Criteria*, at the same time as, or subsequent to, *publication* of the notice invitation referred to in paragraph (a)(2).
- ~~(e) Any person may make a written submission to the *AER* on the *regulatory proposal* or the proposed *Negotiated Distribution Service Criteria* within the time specified in the invitation referred to in paragraph (a)(2), which must be not earlier than 30 *business days* after the invitation for submissions is *published* under that paragraph.~~
- (c) Subject to subparagraph (a)(2), a *Distribution Network Service Provider* may only make a written submission in response to a notice *published* under subparagraph (a)(2) in respect of a *regulatory proposal* that was submitted by another *Distribution Network Service Provider*.

(d) Where:

(1) the AER is making distribution determinations in relation to two or more Distribution Network Service Providers at the same time; and

(2) a Distribution Network Service Provider makes a written submission referred to in paragraph (c),

that written submission may only address material differences between:

(3) the regulatory proposal that was submitted by it; and

(4) a regulatory proposal that was submitted by another Distribution Network Service Provider.

[2] Rule 6.10 would be amended as follows:

## **6.10 Draft distribution determination and further consultation**

### **6.10.1 Making of draft distribution determination**

Subject to the Law and rule 6.14(a), the AER must consider any written submissions made in accordance with ~~under~~ rule 6.9 and must make a draft distribution determination in relation to the *Distribution Network Service Provider*.

### **6.10.2 Publication of draft determination and consultation**

(a) The AER must *publish*:

(1) the draft distribution determination; and

(2) notice of the making of the draft distribution determination; and

(3) the AER's reasons for suggesting that the distribution determination should be made as proposed including the draft constituent decisions i.e. the decisions made in accordance with rule 6.12 on which the draft distribution determination is predicated; and

(4) notice of a predetermination conference; and

(5) a notice inviting an invitation for written submissions on its draft distribution determination, from any person other than the Distribution Network Service Provider that submitted the regulatory proposal on which the draft distribution determination was based; and

(6) the date by which submissions must be made, which must not be earlier than 30 business days after the draft determination is published.

(b) The AER must hold a predetermination conference at the time, date and place specified in the notice under paragraph (a)(4) for the purpose of



explaining the draft distribution determination and receiving oral submissions from interested parties. Any person may attend such a predetermination conference but the procedure to be adopted at the conference will be at the discretion of the senior *AER* representative in attendance.

~~(e) Any person may make a written submission to the *AER* on the draft distribution determination within the time specified in the invitation referred to in paragraph (a)(5), which must be not earlier than 30 *business days* after the making of the draft determination.~~

(c) A *Distribution Network Service Provider* may only make a written submission in response to a notice published under subparagraph (a)(5) in respect of a draft distribution determination that has been made in relation to another *Distribution Network Service Provider*.

(d) Where:

(1) the *AER* is making distribution determinations in relation to two or more *Distribution Network Service Providers* at the same time; and

(2) a *Distribution Network Service Provider* makes a written submission referred to in paragraph (c).

that written submission may only address material differences between:

(3) the draft distribution determination that has been made in relation to it; and

(4) a draft distribution determination that has been made in relation to another *Distribution Network Service Provider*.

### 6.10.3 Submission of revised proposal

(a) ~~In addition to making a written submissions,~~ The *Distribution Network Service Provider* may, not more than 30 *business days* after the publication of the draft distribution determination, submit a revised *regulatory proposal* to the *AER*.

(b) A *Distribution Network Service Provider* may only make the revisions referred to in paragraph (a) so as to incorporate the substance of any changes required to address matters raised by the draft distribution determination or the *AER*'s reasons for it.

(c) A revised *regulatory proposal* must comply with the requirements of, and must contain or be accompanied by the information required by, any relevant *regulatory information instrument*.

(d) Subject to the provisions of the Law and the *Rules* about the disclosure of *confidential information*, the *AER* must *publish* a revised *regulatory proposal* submitted by the *Distribution Network Service Provider* under

paragraph (a), together with the accompanying information, as soon as practicable after receipt by the *AER*.

- (e) The *AER* may, but need not, publish a notice inviting, from any person other than the *Distribution Network Service Provider* that submitted the revised *regulatory proposal*, invite written submissions on the revised *regulatory proposal*.
- (f) Paragraphs (g), (h) and (i) apply if the *AER* publishes a written notice under paragraph (e).
- (g) Any person, other than the *Distribution Network Service Provider* that submitted the proposal, may make a written submission to the *AER* on the revised *regulatory proposal* within the time specified in the notice, which must be not earlier than 30 *business days* after the publication of the notice.
- (h) A *Distribution Network Service Provider* may only make a written submission in response to a notice published under paragraph (e) in respect of a revised *regulatory proposal* that was submitted by another *Distribution Network Service Provider*.
- (i) Where:
  - (1) the *AER* is making distribution determinations in relation to two or more *Distribution Network Service Providers* at the same time; and
  - (2) a *Distribution Network Service Provider* makes a written submission referred to in paragraph (h),  
that written submission may only address material differences between:
    - (3) the revised *regulatory proposal* that was submitted by it; and
    - (4) a revised *regulatory proposal* that was submitted by another *Distribution Network Service Provider*.

[3] Clause 6.11.1 would be amended as follows:

## 6.11 Distribution determination

### 6.11.1 Making of distribution determination

Subject to the Law and rule 6.14(a), the *AER* must consider any submissions made on the draft distribution determination, any revised *regulatory proposal* submitted to it under clause 6.10.3, or and any submissions on any revised *regulatory proposal* submitted to it under clause 6.10.3, and must make a distribution determination in relation to the *Distribution Network Service Provider*.

[4] Rule 6.14 would be amended as follows:
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## 6.14 Miscellaneous

- ~~(a) The *AER* may, but is not required to, consider any submission made pursuant to an invitation for submissions after the time for making the submission has expired.~~

### 6.14.1 Out-of-scope submissions and late proposals

- ~~(a) Subject to the Law, where the *AER* publishes a notice inviting submissions under this Part E, the *AER* must not consider any submission, any parts of a submission, or any material supplied with a submission, that, in the *AER*'s opinion, does not comply with clause 6.9.3, 6.10.2 or 6.10.3, or is otherwise not relevant to the purpose of the invitation.~~
- ~~(b) Where a *Distribution Network Service Provider* resubmits a *regulatory proposal* under clause 6.9.2 or submits a revised *regulatory proposal* under clause 6.10.3, the *AER* must not consider:~~
- ~~(1) a resubmitted or revised *regulatory proposal* that was submitted late;  
or~~
- ~~(2) if the revised *regulatory proposal* includes material that is not permitted under clause 6.10.3—that material.~~
- ~~(c) This clause does not prevent the *AER* from accepting typographical corrections, corrections of miscalculations and corrections of other errors that do not affect the substance of a *regulatory proposal*.~~

### 6.14.2 Other matters

- ~~(a**b**) Nothing in this Part E is to be construed as precluding the *AER* from *publishing* any issues, consultation and discussion papers, or holding any conferences and information sessions, that the *AER* considers appropriate.~~
- ~~(b**e**) Subject to paragraph (c**d**), as soon as practicable after the *AER* receives a submission in response to an invitation referred to in clause 6.9.3(a)(2) or 6.10.2(a)(5) (whether or not the submission was made before the time for making it has expired), the *AER* must *publish* that submission.~~
- ~~(c**d**) The *AER* must not *publish* a submission referred to in paragraph (b**e**) to the extent it contains information which has been clearly identified as confidential by the person making the submission.~~
- ~~(d**e**) The *AER* may give such weight to *confidential information* identified in accordance with paragraph (c**d**) in a submission as it considers appropriate, having regard to the fact that such information has not been made publicly available.~~

- (ef) Paragraph (cd) does not apply to the extent that any other provision of the Law or the *Rules* permits or requires such information to be publicly released by the *AER*.

**Proposed amendments to Pt E of Ch 6A of the NER**

[5] Clause 6A.11.3 would be amended as follows:

**6A.11.3 Resubmission of proposal, framework, pricing methodology or information**

(a) Except to the extent that the *submission guidelines* or the *pricing methodology guidelines* provide that it will not be publicly disclosed (and, in that case, the relevant *Transmission Network Service Provider* has not otherwise consented), the *AER* must *publish*:

- (1) the *Revenue Proposal*;
- (2) the proposed *negotiating framework*;
- (3) the proposed *pricing methodology*; and
- (4) the information,

submitted or resubmitted to it by the provider under rule 6A.9, 6A.10 or this rule 6A.11, together with:

- (5) the *AER's* proposed *Negotiated Transmission Service Criteria* for the provider; and
- (6) ~~aa invitation for a notice inviting written submissions on the documents and information referred to in subparagraphs (1)-(4);~~
  - (i) on the documents and information referred to in subparagraphs (1)-(4), from any person other than the *Transmission Network Service Provider* that submitted those documents and that information; and
  - (ii) on the document referred to in subparagraph (5), from any person; and
- (7) the date by which submissions must be made, which must not be earlier than 30 *business days* after the invitation for notice inviting submissions is published,

as soon as practicable after the *AER* determines that the documents and information referred to in subparagraphs (1)-(4) ~~*Revenue Proposal*, proposed *negotiating framework*, proposed *pricing methodology* and information~~ comply with the requirements of the *submission guidelines*, clause 6A.9.5 or clause 6A.10.1(e) (as applicable).

- (b) The *AER* may *publish* an issues paper examining the issues raised in connection with the *Revenue Proposal*, the proposed *negotiating framework*, the proposed *pricing methodology* and the proposed *Negotiated Transmission Service Criteria*, at the same time as, or subsequent to, *publication* of the notice inviting invitation to make submissions referred to in paragraph (a)(6).
- ~~(e) Any person may make a written submission to the *AER* on the *Revenue Proposal*, the proposed *negotiating framework*, the proposed *pricing methodology* or the proposed *Negotiated Transmission Service Criteria* for the provider within the time specified in the invitation referred to in paragraph (a)(6), which must be not earlier than 30 *business days* after the invitation for submissions is *published* under that paragraph.~~
- (c) Subject to paragraph (a)(6), a *Transmission Network Service Provider* may only make a written submission in response to a notice *published* under subparagraph (a)(6) in respect of documents and information referred to in subparagraphs (a)(1)-(4) that were submitted by another *Transmission Network Service Provider*.
- (d) Where:
- (1) the *AER* is making transmission determinations in relation to two or more *Transmission Network Service Providers* at the same time; and
- (2) a *Transmission Network Service Provider* makes a written submission referred to in paragraph (c),
- that written submission may only address material differences between:
- (3) the documents and information referred to in subparagraphs (a)(1)-(4) that were submitted by it; and
- (4) the documents and information referred to in subparagraphs (a)(1)-(4) that were submitted by another *Transmission Network Service Provider*.

[6] Rule 6A.12 would be amended as follows:
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## **6A.12 Draft decision and further consultation**

### **6A.12.1 Making of draft decision**

- (a) Subject to the Law and rule 6A.16(a), the *AER* must consider any written submissions made under rule 6A.11 and must make a draft decision in relation to the *Transmission Network Service Provider*.
- (b) The *AER's* draft decision must be made in accordance with, and must comply with, the relevant requirements of rule 6A.14.

- (c) If the *AER* refuses to approve any of the amounts or values referred to in clause 6A.14.1(1), the *AER*'s draft decision must include details of the changes required or matters to be addressed before the *AER* will approve those amounts or values.
- (d) If the *AER* refuses to approve the proposed *negotiating framework*, the *AER*'s draft decision must include details of the changes required or matters to be addressed before the *AER* will approve the framework.
- (e) If the *AER* refuses to approve any aspect of a proposed *pricing methodology*, the *AER*'s draft decision must include details of the changes required or matters to be addressed before the *AER* will approve the proposed methodology.

### 6A.12.2 Publication of draft decision and consultation

- (a) The *AER* must, as soon as practicable but not later than 6 months after the relevant date referred to in clause 6A.10.1(a), *publish*:
  - (1) its draft decision and reasons under clause 6A.12.1 and rule 6A.14;
  - (2) notice of the making of the draft decision;
  - (3) notice of a predetermination conference; and
  - (4) a notice inviting an invitation for written submissions on its draft decision, from any person other than the *Transmission Network Service Provider* in relation to which the draft decision was made; and
  - (5) the date by which submissions must be made, which must not be earlier than 45 *business days* after the date that the predetermination conference is to be held.
- (b) The *AER* must hold a predetermination conference at the time, date and place specified in the notice under paragraph (a)(3) for the purpose of explaining its draft decision and receiving oral submissions from interested parties. Any person may attend such a predetermination conference but the procedure to be adopted at the conference will be at the discretion of the senior *AER* representative in attendance.
- ~~(c) Any person may make a written submission to the *AER* on the draft decision within the time specified in the invitation referred to in paragraph (4), which must be not earlier than 45 *business days* after the holding of a predetermination conference.~~
- (c) A *Transmission Network Service Provider* may only make a written submission in response to a notice *published* under subparagraph (a)(4) in respect of a draft decision that has been made in relation to another *Transmission Network Service Provider*.
- (d) Where:

(1) the AER is making transmission determinations in relation to two or more Transmission Network Service Providers at the same time; and

(2) a Transmission Network Service Provider makes a written submission referred to in paragraph (c),

that written submission may only address material differences between:

(3) the draft decision that has been made in relation to it, or any revised proposal, framework or pricing methodology that it submits under clause 6A.12.3; and

(4) a draft decision that has been made in relation to another Transmission Network Service Provider, or any revised proposal, framework or pricing methodology that provider submits under clause 6A.12.3.

### **6A.12.3 Submission of revised proposal, framework or pricing methodology**

~~(a) In addition to making such other written submissions as it considers appropriate, the Transmission Network Service Provider may, not more than 30 business days after the publication of the draft decision, submit to the AER:~~

~~(1) a revised Revenue Proposal;~~

~~(2) a revised proposed negotiating framework; or~~

~~(3) a revised proposed pricing methodology.~~

~~(b) A Transmission Network Service Provider may only make the revisions referred to in paragraph (a) so as to incorporate the substance of any changes required by, or to address matters raised in, the draft decision.~~

~~(c) A revised Revenue Proposal or revised proposed negotiating framework must comply with the requirements of, and must contain or be accompanied by such information as is required by, the submission guidelines.~~

~~(d) The revised proposed negotiating framework must also comply with the requirements of clause 6A.9.5.~~

~~(e) A revised proposed pricing methodology must:~~

~~(1) give effect to and be consistent with the Pricing Principles for Prescribed Transmission Services; and~~

~~(2) comply with the requirements of, and must contain or be accompanied by such information as is required by, the pricing methodology guidelines.~~

~~(f) Except to the extent that the submission guidelines or the pricing methodology guidelines (as the case may be) provide that it will not be~~



publicly disclosed (and, in that case, the *Transmission Network Service Provider* has not otherwise consented), the *AER* must *publish*:

- (1) any revised *Revenue Proposal*;
- (2) any revised proposed *negotiating framework*; or
- (3) any revised proposed *pricing methodology*,

(as the case may be), that is submitted by the *Transmission Network Service Provider* under paragraph (a), together with the accompanying information, as soon as practicable after receipt by the *AER*.

[7] Clause 6A.13.1 would be amended as follows:

### 6A.13.1 Making of final decision

- (a) Subject to the Law and rule 6A.16(a), the *AER* must consider any submissions made on the draft decision, or on any revised *Revenue Proposal*, revised proposed *negotiating framework* or revised proposed *pricing methodology* submitted to it in accordance with ~~under~~ clause 6A.12.3, and must make a final decision in relation to the *Transmission Network Service Provider*.
- (b) The *AER's* final decision must be made in accordance with, and must comply with, the relevant requirements of rule 6A.14.

[8] Rule 6A.16 would be amended as follows:

### 6A.16 Miscellaneous

- ~~(a) The *AER* may, but is not required to, consider any submission made pursuant to an invitation for submissions after the time for making the submission has expired.~~

#### 6A.16.1 Out-of-scope submissions and late proposals

- (a) Subject to the Law, where the *AER* publishes a notice inviting submissions under this Part E, the *AER* must not consider any submission, or any material supplied with a submission that, in the *AER's* opinion, does not comply with clause 6A.11.3 or 6A.12.2, or is otherwise not relevant to the purpose of the invitation.
- (b) Where a *Transmission Network Service Provider* resubmits a *Revenue Proposal*, proposed *negotiating framework*, proposed *pricing methodology* or information under clause 6A.11.2 or submits a revised *Revenue Proposal*, proposed *negotiating framework*, proposed *pricing methodology* or information under clause 6A.12.3, the *AER* must not consider:

- (1) a resubmitted or revised *Revenue Proposal*, proposed *negotiating framework*, proposed *pricing methodology* or information that was submitted late; or
- (2) if the revised *Revenue Proposal*, proposed *negotiating framework*, proposed *pricing methodology* or information includes material that is not permitted under clause 6A.12.3—that material.
- (c) This clause does not prevent the *AER* from accepting typographical corrections, corrections of miscalculations and corrections of other errors that do not affect the substance of a written submission or document.

#### **6A.16.2 Other matters**

- (ab) Nothing in this Part E is to be construed as precluding the *AER* from *publishing* any issues, consultation and discussion papers, or holding any conferences and information sessions, that the *AER* considers appropriate.
- (be) Subject to paragraph (cd), as soon as practicable after the *AER* receives a submission in response to an invitation referred to in clause 6A.11.3(a)(6) or 6A.12.2(a)(4) (whether or not the submission was made before the time for making it has expired), the *AER* must *publish* that submission.
- (cd) The *AER* must not *publish* a submission referred to in paragraph (be) to the extent it contains information which has been clearly identified as confidential by the person making the submission.
- (de) The *AER* may give such weight to confidential information identified in accordance with paragraph (cd) in a submission as it considers appropriate, having regard to the fact that such information has not been made publicly available.
- (ef) Paragraph (cd) does not apply to the extent that any other provision of the *Rules* permits or requires such information to be publicly released by the *AER*.