22 February 2007

Manager, MCE Secretariat,
Department of Industry, Tourism and Resources,
GPO Box 9839
Canberra ACT 2601

By email: MCEMarketReform@industry.gov.au

Dear Sir/Madam

The Energy Users Association of Australia (EUAA) appreciates the opportunity to provide comments on the documents attached to MCE Energy Market Reform Bulletin No. 77, being:

- the Exposure Draft of the Amendments to the National Electricity Law (**Exposure Draft**);
- an Explanation of the Electricity Amendment Package including a Description of Further Amendments to the Gas and Electricity Rule Change Process (**Explanation of Further Amendments**).

This submission also comments on the Exposure Draft of the Australian Energy Market Commission Establishment (Consumer Advocacy Panel) Amendment Bill 2006 attached to MCE Energy Market Reform Bulletin No. 71.

The attached submission sets out the considered views of the EUAA on the issues raised by the Exposure Drafts and the Explanation of Further Amendments.

If you have any questions about the submission or would like to discuss it further please do not hesitate to get in contact with the EUAA's Director Policy and Regulation, Mr Bob Davenport, on telephone number (03) 9898 3900.

Yours sincerely,

Roman Domanski
Executive Director

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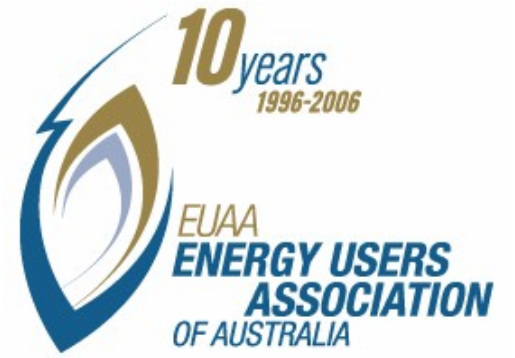

COMMENTS OF NATIONAL ELECTRICITY LAW EXPOSURE DRAFT AND RELATED DOCUMENTS RELEASED BY THE MINISTERIAL COUNCIL ON ENERGY

This submission was prepared by the Energy Users' Association of Australia (EUAA) with assistance from Phillips Fox. The National Consumers Electricity Advocacy Panel provided funding assistance. Their assistance is gratefully acknowledged but all views expressed are those of the EUAA.

February 2007

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Introduction

1 The Energy Users Association of Australia (EUAA) appreciates the opportunity to provide comments on the documents attached to MCE Energy Market Reform Bulletin No. 77, being:

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- the Exposure draft of the Australian Energy Market Commission Establishment (Consumer Advocacy Panel) Amendment Bill 2006 attached to MCE Energy Market Reform Bulletin No. 71.

2 The EUAA has limited its comments to the following issues and sets out its concerns in relation to each of these issues in greater detail in the remainder of the submission:

- The Exposure draft provides for costs to be awarded against parties (including parties such as the EUAA) to a review. The EUAA does not consider this to be appropriate. Further, such costs may be awarded on an indemnity basis unless there are exceptional circumstances. This is unusual and inappropriate in the circumstances.
- The Exposure Draft does not do anything to address the problem previously identified in relation to the objectives of the Consumer Advocacy Panel. It is currently proposed that the panel must pay primary regard to benefiting small to medium consumers of electricity. This objective does not recognise the interests of large consumers of electricity, their rights to be able to undertake effective advocacy, their significant contribution to the advocacy fund or their right to be equally heard.
- The Exposure Draft provides for merits review. The EUAA does not consider merits review necessary in the context of the NEL and the Rules.
- The Exposure Draft provides additional powers to the AER to collect information. The EUAA strongly supports these additional powers.
- The Exposure Draft proposes a new National Electricity Objective, which is of fundamental importance to the legislative regime. The EUAA supports the basis behind the objective, which we understand to be the conferring of long terms benefits to end users from an economically efficient market, but considers that this objective is difficult to apply and relatively uncertain. This may, in turn, have an adverse impact on the quality of the decisions that are made on the basis of this objective.
- The Exposure Draft proposes new pricing principles. The EUAA considers that these principles are unnecessarily complex and infused with unnecessary and uncertain economic concepts. This is likely to make the application of these principles unnecessarily expensive.
- The proposals outlined in the Explanation of Further Amendments have the potential to significantly increase the scope of the AEMC's powers. In particular, the EUAA is concerned that the proposals may have the effect of allowing the AEMC to make policy, as well as making Rules. The EUAA does not consider the allocation of such dual roles to the AEMC to be an

appropriate distribution of power and is contrary to the role for the AEMC set by MCE.

- The Exposure Draft provides for the South Australian Minister to make Rules in relation to distribution determinations on the recommendation of the MCE. The EUAA seeks information concerning the policy objective behind this proposed amendment and queries whether this additional rule making process should in general be subject to more rigour.

Costs in a review

3 Proposed sections 71R and 71S of the Proposed Amendments relate to costs in a review. These costs provisions are inappropriate, as they relate to users and user or consumer interest groups or associations (**Consumer Groups**), such as the EUAA, for the reasons set out below. Two recommended solutions are set out in Table 2 below.

4 These provisions are inappropriate for a number of reasons including:

- They may reduce the quality of decision making by the Tribunal. This is because:
  - the provisions jeopardise the ability of users and Consumer Groups to bring, or intervene in, appeals to the Tribunal. Consumer Groups are relatively poorly funded by comparison to the network businesses. The effect on a Consumer Group could be catastrophic if it was forced to pay the costs of another party to a review, particularly on an indemnity basis. For this reason, the mere risk of such an event would be likely to dissuade Consumer Groups from becoming parties to a review; and
  - Users and Consumer Groups play an important role in ensuring that the Tribunal (and other decision-makers such as the MCE and regulators) have an understanding of disputed issues from the perspective of consumers (ie the ultimate end users of electricity). The absence of Consumer Groups from a review increases the risks of unbalanced decision-making. If the MCE persists with this position, then we argue that it must expressly provide for the regulator to represent the interests of end users in appeals, as there will be no other effective way for their interests to be considered, even though this would be a far from perfect approach.[1]
- There is inconsistency between sections 71R(2) and 71R(3) which creates unnecessary ambiguity (See Table 1 below). Both sections apparently limit the ability of the Tribunal to award costs against a party. However, while s71R(2) clearly states that costs must not be awarded unless the AER has engaged in inappropriate conduct, s71R(3) provides only that costs may be

[1] In accordance with the *Hardiman Principle* (see *R v The Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13), it may be considered inappropriate for the AER to advocate for these interests in any review process. As noted by the High Court in that case: "If a tribunal [or, in this case, the AER] becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings…" (at pages 35-36). We note that this could threaten the very nature of the performance and the credibility of the AER and its standing. This would not be in the interests of either end-users or market participants.

awarded against a consumer intervener if it has engaged in inappropriate conduct. In our submission, the words of s71R(2) are more certain and should also be adopted in respect of s71R(3).

Table 1

Current proposed s71R(2)	Current proposed s71R(3)
71R(2) The Tribunal **must not** make an order requiring the AER to pay the costs of another party to the review **unless** the Tribunal considers that the AER has engaged in inappropriate conduct during the review.	**71R(3)** The Tribunal **may** make an order requiring a user or consumer intervener that has intervened in the review to pay all or part of the costs of another party to the review **if** the Tribunal considers that it has engaged in inappropriate conduct during the review.

- Furthermore, section 71R(3) does not achieve its intended purpose and is inconsistent with s71R(1). It is provided in s71R(1) that the Tribunal may award costs against a party. It is clear from s71L that an intervener is a party. As such, it is clear from s71R(1) that the Tribunal may award costs against a consumer intervener. Arguably therefore, s71R(3) serves no purpose. However, in our submission, the insertion of s71R(3) is evidence of a legislative intention to treat consumer interveners differently from other parties. In order to achieve this objective, it is necessary to positively state that the Tribunal may not award costs against a consumer intervener (ie to use language mirroring that in s71R(2) in respect of the AER).
- The award of costs conflicts with the stated objects of the NEL because it tends to increase the formality of proceedings. In this respect the EUAA notes:
    - The TPA provides that Tribunal proceedings are to be conducted with as little formality and technicality and with as much expedition as the circumstances permit.[2]
    - It has been noted in a different Tribunal, namely the Administrative Appeals Tribunal, that:
    - 'awarding costs has the potential to reduce informality in the tribunal's administrative proceedings and disadvantages parties who are not legally represented.[3]
    - As such, the EUAA considers that the ability of the Tribunal to award costs generally is in conflict with the stated and important principle of the operation of the Tribunal to operate with as little formality and as much expedition as possible.
- Consumer Groups, such as the EUAA, engage in litigation which may be considered public interest litigation. The fact that Consumer Groups, such as the EUAA, engage in public litigation supports the proposition that they should not be subject to an adverse award of costs.[4]

[2] See section 103(1)(b) of the TPA.

[3] *Re Verus Capital Limited and Australian Securities and Investments Commission* (2001) 39 ACSR 430 per Handley P.

[4] For support, see *Oshlack v Richmond River Council* (1998) 193 CLR 72 in which a majority of the High Court held that whether a matter can be classified as 'public interest litigation' is a factor relevant to determining whether there existed sufficient special circumstances to justify a departure from the ordinary rule as to costs. The High Court determined not to award costs against a public interest litigant in that case.

5 The EUAA sets out in Table 2 below proposed amendments to the wording of s71R(3) to address these issues.

Table 2 - Recommended Solution

Priority of solutions	Proposed wording of clauses
Best solution	71R(3) The Tribunal must not make an order requiring a user or consumer association or interest group that is a party to a review to pay all or part of the costs of another party to that review unless the Tribunal considers that the user or consumer interest group has engaged in inappropriate conduct during the review.
Second best solution	71R(3) The Tribunal must not make an order requiring a user or consumer interest intervener that is a party to a review to pay all or part of the costs of another party to that review unless the Tribunal considers that the user or consumer interest group has engaged in inappropriate conduct during the review.'

Indemnity costs

6 In the event that a Tribunal determines to award costs against a party, proposed section 71S provides that:

> '… the Tribunal must, unless there are exceptional circumstances, fix the amount of costs payable by a party to the review on an indemnity basis.'

7 The EUAA considers it inappropriate that, where the Tribunal awards costs, it would be required to do so on an indemnity basis, unless there are exceptional circumstances.

8 Indeed the EUAA considers that the converse position would be more appropriate - ie where costs are awarded, they should not be awarded on an indemnity basis unless there are exceptional circumstances. A recommended solution is set out in Table 3 below.

9 The EUAA notes the words of s71R(3) which concern the ability to award costs in circumstances where the consumer intervener has engaged in inappropriate conduct. However, the EUAA also notes that it may also be (or in addition be) a party such that the Tribunal would arguably be empowered, under the current proposal, to award costs against it even if it had not engaged in inappropriate conduct.

10 The normal position in courts is that costs should be awarded on a party and party basis unless there has been 'some relevant delinquency' on the part of the unsuccessful party, in which case the award of costs on an indemnity basis will be appropriate.[5]

11 The circumstances in which a court or tribunal would ordinarily depart from the principle that costs be awarded on a party and party basis are limited. In *Baillieu Knight Frank (NSW) Pty Ltd*[6] Powell J stated that:

> 'As a general rule, an order that costs be taxed on an indemnity basis is justified only where the action taken, or the action threatened, by the defendant constituted, or would have constituted, an abuse of the process of court, or where the actions of the defendant, in the conduct of any defence to the proceedings, **have involved an abuse of the process of court**, in the sense that the court's time, and the litigants' money, has been wasted on totally frivolous and thoroughly unjustified defences.' [emphasis added]

[5] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 124.
[6] *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359.

12 Some types of conduct which have been held to justify the award of costs on a special basis (ie other than a party and party basis) include the following:

- Actions commenced with no chance of success;[7]
- Unjustified allegations of fraud or other allegations prejudicial to the defendant;[8]
- Prolongation of litigation or the existence of an ulterior purpose amounting to abuse of process;[9]
- Fraud, deception and contempt;[10] and
- Rejected offers of compromise.[11]

13 The EUAA sets out in Table 3 below a proposed amendment to the wording of s71S to address these issues.

Table 3 - Recommended Solution

Priority of solution	Proposed wording of clauses
Best solution	**71S Amount of costs** (1) If the Tribunal makes an order for costs in a review, the Tribunal must, unless there are exceptional circumstances, fix the amount of costs payable by a party to the review on a party and party basis. (2) If the Tribunal considers there are exceptional circumstances, the Tribunal may in an order for costs, fix the amount of costs payable by a party to the review on— (a) an indemnity basis; or (b) a solicitor and client basis; or (c) any other basis as the Tribunal may decide.

Consumer Advocacy Panel

14 The Australian Energy Market Commission Establishment (Consumer Advocacy Panel) Amendment Bill 2006 proposes as section 30(b) that:

> The [Consumer Advocacy] Panel must pay primary regard to benefiting small to medium consumers of electricity or natural gas.

15 The EUAA considers this clause to be inappropriately limited and that it has significant implications in the context of the Exposure Draft and the Explanation of Further Amendments which are being considered in this submission.

16 The EUAA made a detailed submission in relation to this issue in its submission to the MCE dated January 2007 in respect of the proposed Australian Energy Market Commission Establishment (Consumer Advocacy Panel) Amendment Bill 2006. The EUAA refers the MCE to its comments on pages 13-16 (inclusive) of that submission, which it considers apply equally in the present context.

[7] *Dooney v Henry* (2000) 174 ALR 41 per Callinan J [31] (HCA).
[8] *Walton v McBride* (1995) 36 NSWLR 440 at 451 (NSWCA).
[9] *Re Wilcox (No. 2)* (1996) 72 FCR 151 (Full Federal Court).
[10] *Degmam Pty Ltd (in Liq) v Wright* [1983] 2 NSWLR 354 (NSWSC), *Packer v Meagher* [1984] 3 NSWLR 486.
[11] *Multicon Engineering Pty Ltd v Federal Airports Corportation* (1996) 138 ALR 425 (NSWSC). Note that there are differing approaches as to whether rejection of a Calderbank Offer (as opposed to a formal offer made pursuant to court rules) will give rise to the award of indemnity costs.

Merits Review

17 The EUAA submits that merits review provisions proposed as Division 3A of Part 6 of the NEL are unnecessary and should be removed. The reasons for this are that judicial review combined with the provisions governing the AER set out in the National Electricity Rules provide ample discipline on the AER to get the decision right.

18 Introducing a merits review model on top of the new measures seems like an additional and unnecessary insurance policy that is likely to impose unnecessary costs and delays. The costs of merits review are clearly outlined in paragraphs 2.50 to 2.59 of the Standing Committee of Officials' Discussion Paper on MCE Review of Decision-Making in the Gas and Electricity Regulatory Frameworks (**Discussion Paper**).

19 The imposition of additional delays and costs is contrary to the stated objective of the MCE in reforming and streamling the regulatory structure and institutions of the NEM, and gas access, to make them less costly, more efficient and less time consuming.

20 We note that regulated businesses strongly supported regulatory 'streamlining' when it came to the role of regulators, but now (quite inconsistently) they are advocating for added costs and delays through appeals mechanisms, presumably because this type of 'burden' is likely to work in their favour.

21 We note also that this is contrary to the COAG objective of reducing the regulatory burden on business.

22 Paragraph 6.10 the Discussion Paper states that it is "our [SCO's] understanding that industry participants do not support an open standing for any person to seek merits review (so called third party appeal rights), because of the costs imposed".

23 The EUAA strongly argues that this is a false presumption by SCO and therefore the limited standing provisions offered to end users under the proposed Division 3A of Part 6 are inappropriate and seriously biased against end users. They also ignore the points we have made directly to SCO about this matter on several occasions and seem to imply that the SCO is paying more attention to industry participants than to end users?

24 The EUAA submits that, if a merits review mechanism is to be retained, the grounds for appeal should be limited.

25 The experience of the EUAA with virtually every regulatory review to date is that the network owners know full well that they can lodge an appeal and be virtually guaranteed of recouping the costs of the appeal many times over if they win it. In fact, the track record is that they have done this on most occasions. The 'pay back' period on appeals for monopoly network service providers is among the lowest available to them. We calculate it to be around "one month" and provides a very handsome 'return on their investment'.

26 Network owners also know full well that they have a number of other advantages in terms of review that 'stack the decks' massively in their favour:

- They are appealing to bodies that have limited technical and economic knowledge of the complex matters before them; and
- They are most unlikely to strike opposition from consumers (or their representatives), who are not sufficiently commercially motivated to appeal (as the gains/losses to consumers are wide spread and dispersed) and their representatives do not/will not have sufficient standing to make up for this.

27 This high reward coupled with wide appeal grounds encourages a 'shotgun approach' from network owners of appealing a large number of matters in the hope of winning some. This approach imposes a strain on the review mechanism, imposes significant additional costs on the industry and tends to swamp any real issues that may emerge.

28 It is for this reason that the EUAA considers the costs of a review regime are centred on the breadth of the appeal grounds rather than who has standing. In particular, a review model with wide merits review and limited standing will be far more costly than a limited merits review and open standing model. That is, an open grounds merits review model provides for more opportunities for network owners to challenge a regulator's decision based on their own vested interests. Hence, network service owners will use more resources reviewing regulators' decisions for possible appeals and delay decisions. Limiting the grounds of appeal will limit these costs of appeal.

29 The EUAA submits that the grounds of appeal set out in proposed s71G (ie error of fact, incorrect exercise of discretion and unreasonableness) are not suitably confined and are not likely to limit the ability of network owners to seek review.

30 Further and importantly, network service owners are able to recoup the costs of determining a decision through the revenue/price re-set. Hence, the discipline on network service providers to appropriately consider if there are legitimate grounds for review are diminished. Network service owners know that if they run an appeal (regardless of the strength of their case) they will be able to re-coup these costs.

31 Allowing for merits review of AER's economic decisions is likely to lead to a situation whereby network service owners see merits review as another step in the Determination process. This is counter to the objective of the MCE that a merits review mechanism is one of a number of tools to ensure that the AER will undertake economic regulation in an objective manner.

32 In fact, the EUAA's strong fear is that it will create an additional incentive for the regulator to err on the side of generosity to the network businesses in the hope of avoiding an appeal. This would be contrary to the objective of the MCE, to the Market Objective and to the interests of end users.

Collection and dissemination of information

33 The EUAA supports the provisions in the current Exposure Draft and considers it important that these provisions be retained.

34 The EUAA submits that there exists a significant information asymmetry between the AER and the Network Service Providers that it is required to regulate and that the powers in the proposed Divisions 3 and 4 of Part 2 of the NEL in the Exposure Draft appropriately and adequately address this asymmetry.

35 The EUAA submits that without such powers, the AER would be hopelessly uninformed and would therefore be likely to make ill informed decisions which would inevitably lead to more challenges to the AER's decisions.

36 We also submit that any weakening of the information powers in response to complaints from regulated businesses will produce outcomes that are contrary to the Market Objective and disadvantage end users. EUAA experience in more than 20 regulatory reviews over the past ten years is that strong information powers are needed by a regulator in order to do their job. The collection and provision of the necessary information is a price that any monopoly business should have to pay for its privileged position.

National Electricity Objective

37 Proposed section 7 in the Exposure Draft sets out the National Electricity Objective (**NE Objective**):

> 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.

38 The EUAA supports an objective that focuses on the needs of end users in an economically efficient market and agrees with the MCE's view that an amendment is required to the current National Electricity Market Objective.

39 However, the EUAA considers that the solution proposed by the MCE - the NE Objective - requires further improvement. The EUAA submits that the NE Objective is overly complex and that a simpler objective would lead to increased clarity and potentially better decision making. In particular:

- The concepts of 'efficiency' and 'long term interests' are economic terms of art which are not defined in the NEL. There is significant room for debate around the meaning of these words in the context of the electricity industry. The EUAA notes that it may not be necessary to use the language of economics to describe the objective of a law about electricity;
- The EUAA notes the significant complexity associated with the interpretation of the phrase 'the long term interests of consumers" are to be measured with respect to eight different factors.
- The order of the concepts of 'reliability' and 'safety' are reversed between proposed section 7(a) (regarding electricity) and section 7(b) (regarding the national electricity system). This suggests the factors are listed in a particular order. However, it is not clear whether the factors listed first should be given more weight, and if so, how much. Furthermore, it is not clear why, or even how, 'reliability' could be of a lesser importance to 'electricity' than it is to the 'national electricity system'.
- The proposed section 7(a) is ambiguous as to whether the factor referred to is 'quality of supply of electricity' or 'quality of electricity'. Arguably, the other words in this section variously do and do not refer to 'the supply' of electricity. For example, other factors set out in proposed s7(a) are:
  - The price of electricity; and
  - The reliability of supply of electricity.

Pricing Principles

40 Proposed section 7A of the Exposure Draft sets out the revenue and pricing principles (**Principles**).

41 The EUAA considers that the Principles are unnecessarily complex and that the economic concepts written into the Principles could make the application of the Principles expensive and difficult. Nevertheless, the EUAA appreciates the objectives behind the pricing principles and the desire to enshrine these in legislation.

42 In particular the EUAA notes that all of the following economic concepts are written into the Principles:

- 'efficient costs';
- 'effective incentives in order to promote economic efficiency';
- 'efficient investment';
- 'efficient provision of network services';
- 'efficient use of the distribution system or transmission system';
- 'economic costs … of the potential for under and over investment'; and
- 'economic costs … of the potential for under and over utilisation'.

43 The EUAA considers that the interpretation of principles based upon concepts such as those set out above could be open to significant debate amongst economists, lawyers and Q.C.s.

44 For this reason, the EUAA queries the utility of using specialist economic concepts in a statute regulating electricity. The use of such specialist terms can only increase the difficulty of their application by the AER, the regulated businesses and consumers.

Increased Rule making power conferred upon the AEMC

45 Part 3 of the Explanation of Further Amendments sets out additional amendments that the MCE proposes to make to the draft bill but which have not yet been drafted in such a form as to be included in the Exposure Draft.

46 The EUAA is particularly concerned that the MCE is contemplating undertaking a public consultation on this basis (ie prior to drafting the relevant provisions).

47 The EUAA is strongly of the view that such amendments should not be made to the proposed bill without public consultation on the actual provisions that would be included.

48 Nevertheless, on the basis of the text in Part 3 of Explanation of Further Amendments the EUAA is concerned about the apparent significant expansion in the power of the AEMC to influence policy and actual Rule changes.

49 In particular, the EUAA notes that it is proposed to confer a power on the AEMC to:

- Unilaterally reject a Rule Change Application without seeking public comment (page 20);
- Consolidate Rule Change Applications even where they do not relate to the "same subject matter" (page 20); and
- Make Rule Changes which are significantly removed from any Rule Change Application provided that the AEMC solution is 'in the nature of that proposed by the rule change applicant' (page 21).

50 In its Report to COAG on the Reform of the Energy Markets dated 11 March 2003, the MCE appeared to have a clear intention to set meaningful limits on the role of the AEMC in relation to rule changes in order that rule changes respond to the needs of the market:

> 'The Australian Energy Market Commission will have no regulatory enforcement responsibilities, and will not itself be able to initiate code changes other than of a minor administrative nature.'[12]

[12] MCE, Report to COAG, Reform of the Energy Markets, 11 March 2003, section 4.2.1(a).

> 'The AEMC will have no power to initiate amendments to market and regulatory rules … other than those of a minor or administrative nature, to ensure that rule making is responsive to the needs of the market.'[13]

51 The EUAA submits that the MCE was correct at the first instance and supports the above statements. In the EUAA's view, the text in the Explanation of Further Amendments suggests that the MCE's initial position is being eroded.

52 The EUAA considers that it is inappropriate for the AEMC to have the power to unilaterally reject Rule Change Applications without seeking public comment. The national electricity market is a very complicated market which has a significant range of effects on a large number of individuals and businesses. Although the AEMC may use its best endeavours in attempting to considers the effect of an aspect of the market on all of these individuals and businesses, the EUAA is of the strong view that the AEMC could be provided with this information more efficiently by allowing those individuals or businesses to inform the AEMC through a public comment process.

53 The EUAA is concerned about the suggestion, on page 20 of the Explanation of Further Amendments, that the AEMC be given greater discretion to consolidate 'rule change applications'. Under section 93 of the current NEL, the AEMC already has the power to consolidate rule change applications that relate to 'the same subject matter'. The EUAA does not consider it appropriate to consolidate rule change applications that do not relate to the same subject matter.

54 It is stated on page 21 of the Explanation of Further Amendments that:

> 'To solve this problem the NEL will explicitly allow the AEMC to make a rule change which implements a solution to the problem posed by the rule change application best meeting the electricity/gas objective, which
>
> - is of the nature of that proposed by the rule change applicant; or
> - is raised during the consultation process and has been open to comment by the public; and;
> - is focused on solving the problem raised by the rule change application.'

55 The EUAA notes that the text surrounding the first two dot points in the above extract suggests that these dot points should be joined by an 'and' as opposed to an 'or'.

56 In addition, the EUAA is concerned about the potential for the AEMC to make Rule changes without public consultation and to draft its own solutions so long as it remains 'in the nature of that proposed by the rule change applicant'. This test is not a rigorous one and may potentially allow the AEMC significant latitude to draft Rule changes which are largely of its own making.

57 The EUAA looks forward to receiving an exposure draft of the proposed amendments in relation to the matters set out in Part 3 of the Explanation of Further Amendments in order that it can provide more fulsome comments in relation to the changes that are actually proposed.

Rule making power conferred on South Australian Minister

58 Proposed section 90A of the NEL provides for the South Australian Minister to make Rules in relation to distribution determinations on the recommendation of the MCE.[14]

[13] MCE, Report to COAG, Reform of the Energy Markets, 11 March 2003, Appendix 2.

[14] This is in consequence of proposed s90A(1) and (6)

59 In the view of the EUAA, the explanatory memorandum does not set out the policy reasoning behind this proposed change. The EUAA requests that the policy behind this proposed change be explained in order that:

- The policy can be debated; and
- Proposed s90A can be assessed against that policy (ie assess whether the proposed section 90A effectively implements the relevant policy).

60 If the policy underlying the proposed change is to allow changes to be made to the Rules more quickly than would otherwise be possible, the EUAA queries whether even the achievement of such an objective would justify allowing the making of Rules without the checks and balances that are inbuilt into the AEMC rule making process.

61 The EUAA queries the lack of a right to consultation in relation to Rules made by the South Australian Minister. Section 95 of the NEL provides that the AEMC must publish a notice of the proposed Rule. This allows for parties to comment on the proposed Rule. However, section 95 of the NEL only governs the AEMC - it does not govern the South Australian Minister.

62 Further, the manner in which the MCE may make a 'recommendation', as required by proposed section 90A(6) is not clear from the NEL.

63 The Australian Energy Market Agreement (**AEMA**) provides that decisions concerning the NEM will be made by agreement of the MCE Ministers representing NEM jurisdictions.[15]

64 Further, the AEMA provides that the MCE may make its own rules as to how it will make 'recommendations'.[16] The MCE's 'Meeting Communique' No. 8 implies that all decisions will be by majority (except for in situations 'where the agreement of all eligible MCE Ministers is considered necessary'), which situations are stated to include proposals to amend the national legislative framework applying to the Australian Energy Market. The EUAA is not satisfied from the documents available to it that a recommendation to amend the Rules falls within this category.

65 As such, the EUAA queries whether it is appropriate that the MCE may be able to change the Rules be making the necessary recommendation without the unanimous support of the Ministers representing NEM jurisdictions.

66 In addition, the EUAA notes that proposed section 90A(1)((b)(i) contains an apparent error in that it specifies 'items 25 to 26J' when the EUAA considers that it should specify 'items 25 to 26H'. If the former is correct, this would arguably have two effects, both of which the EUAA does not think were intended or, if they were, the EUAA does not support:

67 To expand the power granted from a power to make Rules in relation to distribution determinations to a more general power that would also encompass transmission determinations; and

68 To render proposed section 90A(1)((b)(ii) superfluous, as it refers only to items 25I and 25J which would both be covered under section 90A(1)((b)(i).

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[15] Clause 4.7 of the Australian Energy Market Agreement.

[16] Clauses 4.6 and 4.11 of the Australian Energy Market Agreement.