



AUSTRALIAN ENERGY MARKET COMMISSION

RULE DRAFTING PHILOSOPHY

8 OCTOBER 2020



INQUIRIES

Australian Energy Market Commission
GPO Box 2603
Sydney NSW 2000

E aemc@aemc.gov.au
T (02) 8296 7800

Reference: CRP0102

CITATION

AEMC, Rule Drafting Philosophy, 8 October 2020

ABOUT THE AEMC

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

This work is copyright. The Copyright Act 1968 permits fair dealing for study, research, news reporting, criticism and review. Selected passages, tables or diagrams may be reproduced for such purposes provided acknowledgement of the source is included.

SUMMARY

THE AEMC AND THE PURPOSE OF THE DRAFTING PHILOSOPHY

- 1 The Australian Energy Market Commission (**AEMC**) is an independent statutory body with two key roles: making and amending Rules for the National Electricity Market, elements of the natural gas market and related retail markets; and providing strategic and operational advice to Energy Ministers.
- 2 Under the National Energy Laws,¹ the AEMC's work (including its rule-making function) is guided by the three legislated national energy objectives: the national electricity objective, the national gas objective and the national energy retail objective.²
- 3 The National Electricity, Gas and Energy Retail Rules (the **Rules**) maintained by the AEMC have the force of law and form a fundamental part of the framework for the regulation and operation of the national energy markets in Australia.³
- 4 The AEMC recognises that well-drafted Rules contribute to the effective implementation of energy policy and, in turn, the proper and effective operation of energy markets. To that end, the AEMC has developed the principles below, supported by the detailed guidance in chapters 1– 3, as a Drafting Philosophy to guide how the AEMC approaches the task of drafting Rules for the energy markets.⁴

KEY PRINCIPLES FOR RULE DRAFTING

The AEMC adopts the following key principles for clear, effective, certain and consistent Rules:

A Rule must be consistent with its legal context.

- 5 When making or amending Rules, the AEMC must consider whether the relevant change falls within its rule-making power and is consistent with the broader legislative context. We must also consider how the Rule will be interpreted and applied.
- 6 Key considerations:
- Any new or amended Rule must be within the power conferred on the AEMC under the relevant National Energy Law and, more generally, must be consistent with the legislative scheme set out in that law. Inconsistencies or a conflict between a Rule and the relevant National Energy Law will create uncertainty in how the Rule is to be applied and may ultimately render the Rule (or part of it) invalid.

1 These are the National Electricity Law, the National Gas Law and the National Energy Retail Law.

2 Information on how the AEMC applies the national energy objectives is available in *Applying the energy market objectives – a guide for stakeholders*.

3 The National Energy Market relates to five physically connected regions within Australia. The operation of the energy market and the energy systems for that market are governed by a range of State and Territory laws, including a national set of energy laws and rules that are applied by legislation of the participating jurisdictions. The AEMC is established under the *Australian Energy Market Commission Establishment Act 2004* (South Australia) as part of the legislative framework for the establishment, administration and operation of the national energy market. See <https://www.aemc.gov.au/our-work/changing-energy-rules>.

4 This Drafting Philosophy is intended to provide guidance on those matters that the AEMC must consider under the national energy laws and those matters that should be considered as a matter of best practice regulation. However, the Drafting Philosophy is not binding on the AEMC or any other market body or person. Nor is it intended to be a technical drafting manual.

- The AEMC must take into account how a Rule will be read and interpreted as a matter of statutory interpretation. To draft clear, effective and certain Rules, we need a contemporary understanding of statutory interpretation (notably, how the Courts derive meaning from contested provisions by considering the relevant text, context and purpose of the provision).

7 **Chapter 1** discusses in more detail the importance of legal context when making Rules.

A Rule must be proportionate and appropriate.

8 When making or amending a Rule to implement a particular policy outcome, the AEMC needs to consider whether the nature and scope of a proposed Rule is appropriate and proportionate to the issue it is intended to address. We must also strike a balance between precision and simplicity.

9 Key considerations:

- A principles-based approach to Rule drafting is appropriate unless an alternative approach is necessary. However, a desire to reduce prescription should not compromise the achievement of good policy outcomes.
- A particular policy outcome may require a Rule that contains prescriptive provisions where the behaviour being regulated, or the intended compliance outcome, demands a significant degree of certainty and clarity. Conversely, where there is a need for flexibility in how activities are regulated or compliance is achieved, we will take a more principles-based approach to regulation.
- The level of prescription contained in a Rule and the allocation of provisions at the level of the Rules or in supporting instruments (such as guidelines and procedures) must be appropriate to the subject matter it is intended to regulate. We will consider matters such as: the flexibility of regulation to change over time; the appropriate level of discretion afforded to market bodies or participants; and the cost of, and ability to enforce, compliance with a general Rule compared to a prescriptive Rule.
- An appropriate and proportionate Rule may comprise elements of both prescriptive and principles-based Rule drafting.

10 **Chapter 2** provides guidance on what matters the AEMC considers when determining whether a Rule is proportionate and appropriate in a particular circumstance.

A Rule must be clear, concise and well-organised.

11 When making or amending a Rule, the AEMC must adopt a drafting approach that best achieves well-organised, coherent, concise and consistent Rules. Rules must be clear and logical to the reader and assist them in easily navigating the framework and understanding its nature, scope and effect.

12 Key considerations:

- The structure of Rules (from Chapters and Parts down to the placement of definitions) should be well-organised having regard to the subject matter being regulated. A reader should be able to easily find those aspects of the framework that are relevant to them.

- A Rule should be coherent and consistent with the existing broader regulatory framework in which it is located. We will avoid circularity, inconsistency and unnecessary complexity in concepts and definitions.
- A Rule should be as concise as possible, avoiding verbosity and unnecessary repetition. We will adopt a plain English approach to drafting to avoid unnecessarily technical or legalistic language.
- The Rules should clearly articulate the nature and scope of a right or obligation, the person or class of persons to whom it applies and how compliance is to be monitored and enforced.
- A Rule should conform with best-practice approaches to regulation. For example, the principles and approach taken in this Drafting Philosophy are informed by well-established guidelines such as the Commonwealth Office of Parliamentary Counsel approach in its *Plain English Manual*, which emphasises (among other things) the need to minimise the number and complexity of concepts in regulation, and to structure content with the subject matter and reader in mind.⁵

13

Chapter 3 provides guidance for drafting clear, concise and well-organised Rules.

⁵ See Commonwealth Office of Parliamentary Counsel *Plain English Manual*, especially paragraphs 23 – 35.

1 THE LEGAL CONTEXT

1.1 Whether or not a Rule should be made

Anyone can request the AEMC to make a new Rule (or amend an existing Rule) in the National Electricity Rules (NER), National Gas Rules (NGR) or National Energy Retail Rules (NERR).⁶

When the AEMC receives a Rule change proposal, we assess whether a new or amended Rule is necessary. The AEMC considers best practice in regulation when determining whether or not to make a Rule, as well as the specific legal tests outlined in section 1.2 below.

This section 1.1 describes best practice in regulation and provides context for the AEMC's policy making process.

The other sections of this drafting philosophy apply where the AEMC has determined that it is necessary to make or amend a Rule in response to a Rule change proposal.

1.1.1 Best practice in regulation: the COAG Principles

The COAG guide to best practice regulation sets out the principles for regulatory processes that are to be applied by governments, ministerial councils and national standard setting bodies (the **COAG Principles**):⁷

- establishing a case for action before addressing a problem
- a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed
- adopting the option that generates the greatest net benefit for the community
- in accordance with the Competition Principles Agreement⁸, legislation should not restrict competition unless it can be demonstrated that:
 - the benefits of the restrictions to the community as a whole outweigh the costs, and
 - the objectives of the regulation can only be achieved by restricting competition
- providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear
- ensuring that regulation remains relevant and effective over time
- consulting effectively with affected key stakeholders at all stages of the regulatory cycle
- government action should be effective and proportional to the issue being addressed.

⁶ The NER, NGR and NERR are collectively referred to as the "Rules" in this drafting philosophy.

⁷ COAG *Best Practice Regulation: A guide for Ministerial Councils and National Standards Setting Bodies*, October 2007 (the **COAG Guide**), page 4.

⁸ The Competition Principles Agreement forms a part of a series of initiatives adopted by Australian governments to promote competitive markets in Australia. This agreement sets out principles for implementing competition policies, including the review and reform of restrictive regulation, competitive neutrality and third party access to infrastructure services.

These principles reflect a commitment to establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition.⁹

1.1.2

Best practice in regulation: a regulation should be appropriate and required

Consistent with the COAG Principles, an important step when considering a proposed change to the Rules is to examine whether there is actually a problem, and then to decide whether any action is in fact required and, if so, whether a Rule is the most appropriate response.

A Rule or other form of regulation may initially be seen as the only option to guarantee certainty of results and deliver direct and prompt outcomes. On the other hand, unnecessary regulation creates another layer of complexity which should be avoided if possible.

A policy may be given effect through a variety of means, including by:

- a Rule, which may operate alone or may provide for a guideline or procedure to be prepared
- changes to existing guidelines or procedures
- a standard or code
- an agreement between an administrator or regulator and industry or market members or representatives
- a combination of any of the above.

It is important to adopt the most efficient and effective regulatory solution in a particular case.

It is not unusual to implement a particular policy by a means that is different to the one that was originally envisaged by a Rule change proponent, or through a variety of strategies and mechanisms. A proposed outcome may be more suited to a procedure, guideline, standard, agreement or other form of instrument or process rather than a Rule. Alternatively, a Rule may be the most appropriate solution to be implemented given the nature and significance of the issue to be addressed.

1.2

Rule making tests and limitations under the national energy laws

The AEMC determines whether to make a Rule by applying the relevant energy market objective:

- in the case of the NER, the National Electricity Objective in section 7 of the National Electricity Law (NEL)
- in the case of the NGR, the National Gas Objective in section 23 of the National Gas Law (NGL)
- in the case of the NERR, the National Energy Retail Objective in section 13 of the National Energy Retail Law (NERL).

⁹ See the COAG Guide, page 1.

In general terms, the objective of the relevant law is described as the achievement of economic efficiency in the long-term interests of consumers.

The AEMC may only make a Rule if it is satisfied that the Rule will, or is likely to, contribute to the achievement of the relevant energy objective. Further details of how the AEMC applies the energy objectives are set out in its [guide to applying the energy market objectives](#).

The national energy laws also set out various other Rule making tests for the AEMC which are applicable in certain cases,¹⁰ for example the form of regulation factors and the revenue and pricing principles.



The AEMC is also required to have regard to any relevant MCE statement of policy principles.¹¹

The energy laws impose some additional restrictions on the AEMC's Rule-making powers. For example, the AEMC cannot create new civil penalty provisions in a Rule (though it can recommend that provisions in new Rules it has made be designated as civil penalty provisions in the regulations).¹² Further, amendments to a Rule cannot affect a right, privilege or liability acquired, accrued or incurred under the original Rule.¹³

1.3 Making Rules that are consistent with the legal context

The Rules made by the AEMC under the national energy laws are a form of subordinate legislation.

¹⁰ For example, see Part 7, Division 1, Subdivision 2 of the NEL; Chapter 9, Part 1, Division 2 of the NGL; and Part 10, Division 1, Subdivision 2 of the NERL.

¹¹ See section 33 of the NEL, section 73 of the NGL and section 225 of the NERL.

¹² Section 36 of the NEL. Section 2AA(1)(c) of the NEL provides that a provision of the Rules that is to be designated as a civil penalty provision is prescribed by the Regulations as a civil penalty provision.

¹³ Clause 33(1)(c) of Schedule 2 to the NEL.

Subordinate legislation must be within the power conferred by the principal legislation and must be consistent with that legislation. Specifically, the Rules made by the AEMC must be consistent with the national energy law under which they are made. The Rule should be appropriate to, and enhance the operation of, that legislative scheme. Inconsistencies or a conflict between a Rule and the relevant national energy law will create uncertainty in how the Rule is to be applied and may ultimately render the Rule (or part of it) invalid.

Consistency with relevant legislation also requires that the Rule has a sound structure and is clear and unambiguous in its meaning and effect. There are inherent uncertainties associated with the use of language that make written documents an imperfect means of communication. This creates a special challenge for the drafting of Rules as they are a very specialised type of document.

When drafting Rules we:

- take into account how legal instruments are read and interpreted, including how the Courts derive meaning from contested provisions by considering the relevant text, context and purpose of the provision¹⁴
- aim to avoid legal or practical problems when it comes to the interpretation, implementation and application of the Rule.

For example, a Rule may address issues that are also addressed in the relevant national energy law, but should avoid repeating obligations that are set out in the law. Where a Rule addresses a subject that is also addressed in the law, the Rule must be drafted carefully to ensure the resulting combination of obligations and powers is clear to the affected parties and can be applied in practice.

¹⁴ In this regard, guides, such as Pearce and Geddes, *Statutory Interpretation in Australia*, 8th edition (LexisNexis) can be of assistance.

2 DRAFTING PROPORTIONATE AND APPROPRIATE RULES

2.1 Drafting a proportionate and appropriate Rule

If, after considering the principles and Rule-making tests outlined above, the policy position is to make a Rule, we then need to consider the form of the Rule. This involves two key assessments:

LEVEL OF PRESCRIPTION

What level of prescription is required in order to achieve the policy objectives?

LOCATION

Where should the necessary provisions be located – in the Rules alone, or should the Rules provide for certain details, processes or guidance to be set out in a subordinate regulatory instrument such as a guideline or procedure?

Section 2.2 discusses the level of prescription a Rule should contain, and how to decide whether a principles-based approach or a prescriptive approach (or some combination of the two) is appropriate. Section 2.3 contains guidance on instances where it may be appropriate for Rules to provide for a regulatory instrument to operate in conjunction with the Rule.

2.2 Levels of prescription

2.2.1 Introduction

Rules should be as simple, precise and consistent as possible. A Rule may range between being prescriptive or principles based:

PRESCRIPTIVE

The manner or means of obtaining the objectives are specified in the Rule, or in other regulatory instruments with which the Rule requires regulated entities to comply.

PRINCIPLES BASED

The objectives are specified in the Rule, but the regulated entities are able to choose how they meet the objectives.

A principles-based approach to Rule drafting is appropriate unless an alternative approach is necessary, taking into account the nature of the subject matter to be addressed by the Rule.

We need to consider the best drafting approach in the circumstances, focusing on the desired outcome. Where necessary to achieve the desired policy outcome, a Rule may have detailed provisions (whether included in the Rule itself, or which the Rule provides for another

regulatory instrument to contain) which should be clearly expressed, legally effective, and fit-for-purpose.

A desire to reduce prescription should not compromise the achievement of good policy outcomes.

Guidance on the appropriate level of prescription is provided in this section 2.2.

2.2.2 Prescriptive drafting

Essentially, prescriptive drafting seeks to specify the application and operation of the relevant provisions in all circumstances. Prescriptive provisions (which may be included in Rules or other regulatory instruments such as procedures) focus on inputs, processes and procedures of a particular activity.

A prescriptive drafting approach is intended to provide certainty and clarity regarding what constitutes compliance. By setting out requirements in detail, the provisions provide standardised solutions and facilitate straightforward enforcement.¹⁵

2.2.3 Principles based drafting

Principles based drafting may include provisions that focus on desired outcomes or objectives, without setting out in great detail how those outcomes or objectives are to be met or achieved.¹⁶ The emphasis is on the end result rather than set processes or procedures. Provisions drafted in this way may provide greater adaptability to different factual scenarios and more flexibility as to how an outcome may be achieved, encourage innovation and reduce costs.

In other words, there is more room for the entity responsible for the relevant outcome (which may be the regulator, the market operator or an industry participant) to determine the way in which the outcome is to be achieved. It may be preferable to allow regulated entities to “reverse engineer” what they need to do to meet the relevant outcomes and, if necessary, to justify their approach to compliance.¹⁷

The regulatory task is then to monitor outcomes and work with industry to ensure that the desired outcomes are achieved.

Effectively, this approach to drafting adopts various levels of “generality”, depending on the subject matter and the level of detail required. As outlined in section 2.3 of this drafting philosophy, in some cases it may be appropriate for principles-based Rules to provide for other instruments, such as guidelines, to provide additional guidance on desired outcomes.

¹⁵ See *Victorian Guide to Regulation*, Department of Treasury and Finance, page 6.

¹⁶ This form of drafting may also be referred to as outcome-based or performance-based.

¹⁷ See the discussion in Frantz, Pascal et al, *Rules v Prescriptive Based Financial Regulation*, London School of Economics, SSRN publication, 25 November 2014.

2.2.4 General guidance

In the COAG Guide, Principle 5 states that regulatory processes are to provide effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear.

The COAG Guide then provides as follows:

Regulation should have clearly identifiable outcomes and unless prescriptive requirements are unavoidable in order to ensure public safety in high-risk situations, performance-based requirements that specify outcomes rather than inputs or other prescriptive requirements should be used.

Good regulation should attempt to standardise the exercise of bureaucratic discretion, so as to reduce discrepancies between government regulators, reduce uncertainty and lower compliance costs. Regulatory measures should contain compliance strategies which ensure the greatest degree of compliance at the lowest cost to all parties.¹⁸

A later part of the COAG Guide reinforces a preference for performance-based drafting, focusing on outcomes rather than inputs.¹⁹

Furthermore, the Victorian Government's *Guide to Regulation* suggests that where appropriate and permitted by the enabling legislation, drafters should avoid prescriptive rules and instead consider using:

- performance-based standards (or principle-based regulation in cases where it is not feasible to set objective performance-based standards)
- process-based regulation, where there are substantial risks that need to be managed simultaneously
- targeted regulatory requirements proportionate to risk.²⁰

2.2.5 Specific guidance

The level of detail to be included in a set of Rules and any associated instruments will depend on the nature of the subject matter. A case by case approach is necessary. The choice between drafting a provision with a high level of prescription, and a provision with an outcomes focus, should be determined according to the circumstances.

The first box below sets out circumstances where it may be appropriate to adopt a principles-based approach, where performance goals are set and entities are free to determine the best way to achieve those goals. The second box below notes circumstances where it may be appropriate to adopt prescriptive drafting (which may include Rules providing for parties to follow prescriptive procedural documents). Some of the key risks and benefits associated with each approach are also noted.

¹⁸ COAG Guide, page 5.

¹⁹ See Appendix A of the COAG Guide, page 17.

²⁰ See *Victorian Guide to Regulation*, Department of Treasury and Finance, page 7.

BOX 1: PRINCIPLES-BASED APPROACH

When to use and the benefits

- There are new products and services, constant innovation, market participants with significantly different characteristics or capabilities, or diverse participant preferences. A principles-based approach may be more accommodating and adaptive to market developments.
- The regulatory standard can be clearly expressed and measured.
- There are different potential compliance methods.^[1] A “one size fits all” approach is not necessary.

Risks to consider

- May create uncertainty in some situations.^[2]
- May increase the burden on participants to justify their approach to compliance.
- May make monitoring and enforcement more difficult in some circumstances.
- May increase disputes about the application of a particular Rule (or subordinate procedure or guideline) in a particular set of circumstances. This may be especially problematic where the provision is a civil penalty or conduct provision.

Note: [1] See *Victorian Guide to Regulation*, Department of Treasury and Finance, page 7.

Note: [2] The Australian Government Office of Parliamentary Counsel’s Plain English Manual notes, at para.15, that general principles drafting, while easy to read and understand, can have a significant disadvantage: the precise meaning is uncertain.

BOX 2: PRESCRIPTIVE APPROACH

When to use and the benefits

- **Consistency:** A standard set of rules should be followed in all cases and by all relevant entities. A prescriptive Rule will maximise consistency in approach.
- **Certainty:** A high level of certainty as to compliance is required.^[1] It may be advantageous for industry participants to know exactly what must be done in a particular case to achieve compliance.^[2] An industry participant does not need to work out what needs to be done to achieve compliance, as this is clear from the Rule. A prescriptive Rule may best provide certainty as to whether or not a particular behaviour is compliant, reducing compliance costs both for regulated entities and for the regulator.
- **Compliance:** The risks or likelihood of non-compliance are high, considering the incentives to comply, the rewards for non-compliance and the risk of being found to be non-compliant (or challenged). A prescriptive Rule can require strict, defined compliance in a particular situation.

Risks to consider

- Prescriptive Rules may be inflexible. They do not allow alternative approaches to achieve the desired outcomes of regulation.^[3]

- A prescriptive provision may lock in inefficient practices and inhibit innovation. They may not be suited to situations where circumstances are subject to change or where the market is constantly evolving.
- A Rule that is overly prescriptive may increase compliance costs and the regulatory burden due to unnecessary or overly complicated requirements.^[4]
- Concentrating too much on covering all potential eventualities may lead to overly complex Rules that are hard to understand and apply.
- Even with a prescriptive approach, it is likely that not all possibilities will be covered.

Note: [1] See *NSW Guide to Better Regulation* (2017) NSW Department of Finance, Services and Innovation, page 31.

Note: [2] It may be preferable to “forward engineer” the implications for compliance with the intended regulatory outcomes. See the discussion in Frantz, Pascal et al, *Rules v Prescriptive Based Financial Regulation*, London School of Economics, SSRN publication, 25 November 2014.

Note: [3] See *Victorian Guide to Regulation*, Department of Treasury and Finance, page 6.

Note: [4] See *NSW Guide to Better Regulation*, (2017) NSW Department of Finance, Services and Innovation, page 31.

A mixture of approaches

In giving effect to a particular policy, a combination of approaches may be necessary and appropriate. It is essential to keep in mind what will produce the best result from the perspective of the users of the relevant Rules or other instrument, and from a regulatory perspective, taking into account the interests of consumers and other stakeholders and the subject matter to be addressed by the relevant provisions.

2.3

Rules and accompanying regulatory instruments

2.3.1

Introduction

Once the appropriate degree of prescription, or balance of prescription and principle, has been determined, we should consider whether it would be appropriate to include all of the relevant provisions in the Rules themselves, or whether certain details should be included in subordinate instruments such as guidelines or procedures.

The national energy laws support the use of other regulatory instruments, such as guidelines and standards, where these are necessary or useful in conjunction with the Rules. They specifically provide that the Rules may:

- confer on the AEMC, AEMO, the AER and other prescribed bodies “a function ... to make, prepare, develop or issue guidelines, tests, standards, procedures or any other document (however described) in accordance with the Rules, including guidelines, tests, standards, procedures or any other document (however described) that leave any matter or thing to be determined [by the relevant entity]”;
- empower or require other persons or bodies to make or issue “guidelines, tests, standards, procedures or any other document (however described) in accordance with the Rules”; and

- confer a power of direction on the AEMC, AEMO, the AER or a jurisdictional regulator to require compliance with guidelines, standards, procedures, etc.²¹

It is important to adopt the most efficient and effective regulatory solution in each particular case. This section 2.3 provides guidance on instances where it may be appropriate for Rules to provide for a regulatory instrument to operate in conjunction with the Rule.

2.3.2 **Deciding whether a Rule alone, or with other instruments, is more appropriate**

A mixture of Rules and other instruments such as guidelines or procedures may often be appropriate. The Rule can set out the legal framework: the requirements, limitations and qualifications. The Rule can then also require that a set of guidelines or procedures provide further detail or guidance on how to achieve compliance with the Rule.

The Rule can specify whether compliance with the accompanying instrument is required. A non-binding guideline may be a good alternative if the matter is better left to an instrument that is expressed for guidance purposes only, without detailed prescription. Alternatively, the relevant Rule may require compliance with the instrument.²²

It may be appropriate for Rules to provide for guidelines or procedures in the following circumstances:

- matters where there may be several acceptable means for regulated parties to achieve the particular outcome specified in the Rules
- matters where industry experience may develop over time
- matters which require frequent adaptation to changes in such things as technology and communications
- matters where detailed procedural matters can be left to the relevant regulatory entity to develop in consultation with industry
- matters that are suited to industry standards or processes developed or applied by a body more closely associated with the management and operations of an industry, but only to the extent that a conflict of interest would not likely arise.

Conversely, matters that should properly be dealt with in the Rules, for example on the grounds of clarity, certainty and enforceability, should not be placed in procedures or guidelines. Further, there may be no overall benefit to regulated parties if regulatory length and complexity is merely moved from Rules to subordinate instruments.

The key is to determine what is the most appropriate option in the circumstances. In some cases, it may be more appropriate for the AEMC to include all material that may be relevant to a particular issue or initiative in Rules made by the AEMC under the relevant national energy law and, in doing so, for the AEMC to manage the whole process. In other cases, it may be more appropriate for the AEMC to make a Rule or set of Rules and to assign or delegate various responsibilities or processes, including to draft any related instruments, to

²¹ For example, see section 34(3) of the NEL.

²² See sections 34(3)(g) and 34(3)(h) of the NEL as an example.

another entity, subject to any conditions, requirements or principles set by the AEMC in the Rule.

2.3.3 Deciding whether a guideline or procedure is more appropriate

This section 2.3.3 provides guidance on whether a guideline or a procedure might be best suited to accompany a Rule, once the decision has been made to make a Rule providing for an accompanying instrument.²³

BOX 3: GUIDELINES AND PROCEDURES

Guidelines

A Guideline may be the most appropriate accompanying instrument in the following instances:

- To indicate the best way to achieve a particular outcome.
- To provide guidance about what is expected to comply with a particular provision.
- To provide guidance to affected parties on how to engage with the decision-maker, and the process the decision-maker will adopt in exercising a new power provided under the Rule.
- As the instrument that will respond to changing circumstances. In this situation, a Rule will prescribe the outcome or requirement that is to be achieved or is to apply in a particular case, while the guideline contains the material that is expected to change from time to time, as circumstances change, without any need to change the outcome or requirement that has been prescribed by the Rule.

Procedures

A Procedure may be the most appropriate accompanying instrument where:

- Detail is best left to be developed by another entity.
- Detail is best contained in a companion document that contains prescriptive requirements.
- A technical manual is required. A procedure is suited to technical requirements, especially if the requirements are developed or settled by experts or advisers in a particular field. If the Rule would be incorporating technical material that has been developed, or is to be developed, by another body, it may be preferable to have that material presented as a procedure that is published separately to the Rule and that operates in conjunction with the Rule.

²³ A wide range of accompanying instruments are envisaged by the national energy laws (see for example section 34 of the NEL), including guidelines, tests, standards and procedures. This drafting philosophy is limited to guidance on the appropriate usage of guidelines and procedures as these are the most common forms of instruments which accompany Rules.

Schedules or tables may be appropriate for the purposes of including detailed material in the Rules if the use of a separate procedure is not warranted.²⁴

2.3.4 **Deciding which entity should be responsible for making and maintaining guidelines or procedures**

If it is appropriate for certain provisions or information to be included in a guideline or procedure rather than in the Rule, the Rule must nominate the entity responsible for making that instrument and updating it over time.

As already indicated, the national energy laws provide for a number of statutory instruments other than Rules, including instruments that may be prepared by another body such as AEMO or the AER, under a form of “delegated power”.²⁵

In determining the appropriate body to prepare these instruments, it is relevant to consider the functions and powers of bodies under the energy governance framework, particularly the national energy laws and the Australian Energy Market Agreement, as well as the capabilities, incentives and potential for conflicts of roles or responsibilities of the relevant body. Where a particular market body is responsible for oversight of a particular area and expected to exercise judgement in the implementation of obligations to achieve a given outcome, that body may be best placed to prepare detailed instruments.

2.3.5 **Consultation processes for guidelines or procedures**

We should consider what type of consultation process should apply to the making and maintaining of guidelines or procedures, where we are making a Rule providing for such instruments.

The requirements for consultation on guidelines or procedures made under the Rules may either be included in a specific Rule,²⁶ or be specified as consultation in accordance with the detailed rules consultation procedures.²⁷ Minor or administrative amendments to guidelines or procedures may not need to be subject to the ordinary consultation processes.²⁸

In determining the form of consultation, it is appropriate to consider factors such as:

- the role of industry knowledge and expertise in relation to the subject matter
- whether the instrument is binding
- the significance and cost to industry of any new obligations being imposed, as more significant obligations may justify more extensive consultation
- how often the instrument is likely to need to be amended
- the appropriate balance of due process and administrative expedience.

²⁴ The use of schedules and tables is also addressed in a later part of this drafting philosophy.

²⁵ See, for example, section 34(3)(e) of the NEL.

²⁶ See, for example, clause 2.2.7 of the NER, where AEMO is required to develop and publish guidelines in consultation with Semi-Scheduled Generators and other interested persons, and also to consult with those generators and other persons when making amendments to those guidelines.

²⁷ For the NER, for example, these consultation procedures are set out in rule 8.9, with additional distribution and transmission consultation procedures in rules 6.16 and 6A.20 respectively.

²⁸ See, for example, rule 3.7D(g) in the NER.

3 DRAFTING CLEAR, CONCISE AND WELL-ORGANISED RULES

While this drafting philosophy is not intended to be a technical drafting manual, this chapter 3 provides guidance on practical measures for drafting clear, concise and well-organised Rules, which may also be applied to subordinate instruments. It includes guidance on:

- the design and structure of Rules (discussed at section 3.1)
- key drafting considerations (discussed at section 3.2).

3.1 The design and structure of Rules

A Rule must be well-organised and coherent.

We should always draft provisions with a view to the reader, aiming for a layout and structure that are clear and logical and that assist the reader to find the relevant provisions and absorb their meaning quickly and easily.

3.1.1 Planning

The structure of a new or amended Rule should be planned. The planning principles below are based on those set out in the Commonwealth Office of Parliamentary Counsel's *Plain English Manual*:²⁹

1. The design of a Rule should be developed before drafting commences. There is a close connection between the clarity of thought that goes into designing a particular scheme and the clarity of the text that embodies it. A well thought-through, clear and simple scheme is much easier to put into a clear and well-organised draft Rule.
2. An instrument prepared without previous planning may be more complicated and less clear than an instrument prepared with the benefit of a detailed plan.
3. In setting a detailed plan, select a structure, terminology and approach that best suits the function of the Rule.
4. Complicated ideas lead to complicated instruments. It is important to consider the extent to which a complex approach can be simplified.
5. An instrument will be simpler if it contains the smallest number of pieces or concepts that are required for the function of the instrument.
6. Look for variations on the same theme and see whether a simpler, combined set of provisions can achieve the same goal.

3.1.2 General principles

The following principles are relevant when considering the design of a Rule (or the order of Parts in a Chapter or Divisions in a Part).³⁰

²⁹ See Commonwealth Office of Parliamentary Counsel *Plain English Manual*, especially paragraphs 23-35.

³⁰ See especially Chapter 3 of the New Zealand Office of Parliamentary Counsel *Drafting Manual*.

1. The order of a Rule should be strictly logical.
2. A Rule, of whatever length, must have a unity of purpose.
3. Consider using signposts and summaries to aid the reader. For example, a long Chapter or Part should outline the contents of the Chapter or Part at the start, for ease of navigation.
4. Each heading should communicate the overall theme of the segment that it introduces, with enough information to be distinguished from other segments of the same level. There should always be consistency in style or approach:
 - Each heading should preview the information that it heads.
 - Headings should be brief enough for readers to scan them yet informative.³¹
 - Consider inserting headings above separate paragraphs in provisions with lots of separate paragraphs.
5. The main message or important parts should be placed as close as possible to the front of the Chapter or Part.
6. Group related ideas together and choose grouping methods that are appropriate to the reader and the purpose of the Rule. Each level of organisation should have a theme.
7. Place the information that most people need before information that only some people need.
8. Place the rest of the information in an order that helps the reader understand or act; list themes in the order that most likely makes sense to the reader.
9. Substantive matters should precede procedural matters.
10. The general should precede the particular.
11. Structure the Rule so that there is a main rule, simply stated, with any exception or more specific rule separately stated.
12. Maintain consistency by adopting an order that already appears elsewhere (if that order remains appropriate).
13. Use well-constructed sentences. A sentence must clearly and concisely communicate information. Use an appropriate sentence length. Avoid overburdening a reader with more than one idea in a single sentence.
14. Use parallel structures, and arrange sentences so that parallel ideas look parallel. This is particularly important when using a list.
15. Consider using schedules, especially for procedural or administrative matters.
16. Consider using tables to present data in a more accessible form.

3.1.3

Clauses/subrules, paragraphs and subparagraphs

The Rules maintained by the AEMC have set naming conventions.³² For example, in the NER a rule may be divided into numbered clauses, rules and clauses may contain numbered

³¹ See ISO, *Plain Language – Part 1: Governing Principles and Guidelines*, page 3.

³² See, for example, Rule 1.3 in the NER.

paragraphs, paragraphs may contain numbered subparagraphs, and subparagraphs may contain numbered items. The convention in the NGR and the NERR is for rules to contain subrules and for subrules to contain paragraphs.

The following principles are relevant when considering how to divide a Rule into clauses/subrules, paragraphs or subparagraphs:

1. Each clause/subrule should have some relevance to the central theme which characterises the Rule.
2. Divide long slabs of text into clauses/subrules (and paragraphs or subparagraphs where appropriate). This is beneficial because:
 - the structure of the sentence is made more apparent to the reader
 - it acts as an analytical tool for the drafter
 - it avoids needless repetition
 - it avoids syntactic ambiguity.
3. There should rarely be more than one sentence in an undivided Rule, or in a clause/subrule or paragraph that has been created as a separate element in a Rule.

3.1.4

Definitions

Definitions essentially perform three functions:

- avoiding ambiguities³³
- avoiding tedious repetition, by means of abbreviation³⁴
- attracting a meaning that a term has in another provision.³⁵

Determining meaning

We should consider the boundaries we are seeking to draw around the stipulated meaning of a defined term. A definition can be delimiting, extending or narrowing:

1. *Delimiting*: A delimiting definition determines completely the limits of the significance to be attached to the defined term. The purpose is not to alter conventional meaning but to provide a necessary degree of definiteness. This form of definition may be useful not only in the case of vague words with a core essential meaning and blurred edges of fringe meaning but also in the case of ambiguous words having a number of separate meanings.
2. *Extending*: An extending definition is one which stipulates for the defined term a meaning which in some respects goes beyond the meaning or meanings conveyed in the ordinary and common usage of the term.
3. *Narrowing*: A definition of this type stipulates a meaning narrower in some respect than the meaning commonly conveyed by the term.

Definition conventions

³³ Thornton's *Legislative Drafting*, page 165.

³⁴ Thornton's *Legislative Drafting*, page 165.

³⁵ Commonwealth Office of Parliamentary Counsel, *Drafting Direction No. 1.5 – Definitions*.

Each of the NER, the NGR and the NERR has definition conventions.

Terms defined in the national energy laws are not italicised in the Rules.

Some definitions in each of the NER, NGR and NERR apply across the whole of a particular Rule set.³⁶ These defined terms are italicised (however, defined terms in headings are not italicised).

Some definitions in each of the NER, NGR and NERR apply locally within that Rule set, for example, within a particular Part, Division or Rule. Definitions which only apply locally can be defined locally.³⁷ These are known as local definitions. Local definitions are not italicised, but they appear in bold where they are first defined.

When to use local definitions

The use of local definitions may be appropriate if the defined term or terms only relate to that section of the particular instrument and it is logical to set out those definitions at the beginning of the place where they are to be used. This can be done where it will assist the reader, in working through the document or in focusing on the relevant provisions, to have the definitions that only apply to those provisions located at that place.

The usual practice is to group local definitions in the one place, most commonly at the beginning of the relevant Chapter, Part, Division, Rule or clause (as the case may be) to which they relate, or at the place where they are first used.

When to use signpost definitions

If a locally defined term is used extensively across a substantial number of provisions, it may be helpful to also include that locally defined term in the main list of definitions for the instrument³⁸ as a signpost definition.³⁹ Alternatively, consider moving the entirety of the local definition to the main list of definitions for the instrument.

Some principles

1. A definition should not include substantive matter.
2. Avoid defining an expression to have different meanings in different provisions of the same instrument. This is the rule “one expression, one meaning”.
3. The word used as the defined term should correspond as much as possible with the meaning assigned to it.
4. Acronyms can be used. It is possible to invent an acronym and to include it in the definitions section.
5. Defined terms should not be lengthy. A defined term should rarely exceed 3 words.

³⁶ Chapter 10 of the NER contains a glossary of the defined terms which apply across the whole of the NER. Rule 3 of the NGR contains the defined terms which apply across the whole of the NGR. Rule 3 of the NERR contains the defined terms which apply across the whole of the NERR.

³⁷ For example, clause 3.1.1A of the NER contains the defined terms which apply to Chapter 3 of the NER; rule 7 of the NGR contains the defined terms which apply to Part 3 of the NGR; and rule 70A of the NERR contains the defined terms which apply to Part 3 of the NERR.

³⁸ That is, in either Chapter 10 of the NER, rule 3 of the NGR, or rule 3 of the NERR, as the case may be.

³⁹ The definition would be as follows: ***defined term*** has the meaning given in rule/clause Z.

6. There is no need to note that the definition of a word is to apply to grammatical variations and cognate expressions.

3.1.5

Schedules

A schedule placed at the end of the relevant instrument (in some cases as a series of schedules), or after a particular part, is often a helpful device for clearer presentation and more efficient communication. The general practice is for matters of principle to be set out in the main part of the instrument and lesser matters of machinery or detail in a schedule or schedules.⁴⁰

Schedules can be a very useful place to include matters of detail which would otherwise overburden or drag out a provision or set of provisions. Including material in a schedule may assist with maintaining the flow of a document. Schedules are particularly suited to technical detail, lists, diagrams and descriptions of areas or plans.

If a schedule contains substantive obligations, the chapter or part to which the schedule is attached should clearly identify that the schedule contains substantive obligations.

A schedule should adopt the same approach to structure and drafting as the rest of the instrument. Consider dividing a schedule into parts. The drafting principles and requirements set out in the other parts of this drafting philosophy apply equally to schedules.

In some cases, Rules have been included as a schedule or schedules of provisions that appear after a particular part of the relevant document.⁴¹ In this case, the schedule or schedules have been used to include matters of detail on specific topics, with one schedule for each topic. This may be used where it is logical to include detailed provisions in a schedule, which sits separately from the main “framework” provisions. In the NER it is easier, because of the size of the document, to have the schedule (or those schedules) appearing at the end of the relevant chapter of the Rules (rather than at the end of the whole set of Rules).

3.1.6

Tables and figures

Tables and figures (such as diagrams or charts) may present data or other information in a more accessible form. They are particularly useful if provisions would otherwise be overloaded or repetitive because they have too many essentially similar statements. A table or figure should be introduced with a narrative statement explaining its application or how the components in the table are linked together. It is helpful to include item numbers in a table to assist with any later amendments to the table.⁴²

⁴⁰ See *Thornton’s Legislative Drafting*, pages 492 – 493.

⁴¹ See, for example, Schedules 5.1a to 5.12 in Chapter 5 of the NER.

⁴² See Chapter 3 of the New Zealand Office of Parliamentary Counsel *Drafting Manual*.

3.2 Key drafting considerations

3.2.1 Drafting principles

The key to producing a well-drafted instrument is to write simply and with precision.⁴³

The following principles should be applied:⁴⁴

1. *Write economically*: Use words sparingly. A word used without purpose adds unnecessarily to a provision and also creates a danger because every word in a piece of legislation or subordinate legislation is construed so as to bear a meaning if possible.⁴⁵ Nothing superfluous should be added and nothing essential should be omitted.
2. *Write with directness*: Writing must be straightforward. Keep everything as simple and logical as possible, while accepting that it may not be possible to express a complex proposition simply, and that a technical matter may require technical provisions.⁴⁶
3. *Write with precision*: The chosen word must express accurately and unequivocally the intended meaning. Where necessary, test the use of technical terms with subject matter experts.
4. *Use technology-neutral language where possible*: Avoid using technology-specific language or drafting a provision in a way that assumes a regulated party will use a particular kind of technology, unless this is necessary to achieve the policy position.
5. *Write with consistency*: Do not use different words to denote the same things. The same word should be used to convey the same thing in different parts of an instrument.⁴⁷
6. *Use familiar words*: Use familiar words, rather than unfamiliar words, unless they do not accurately express the intended meaning. However, do not use informal language or jargon in instruments. Acronyms can be used for the sake of brevity, or because the acronym is the commonly used term for the subject.⁴⁸
7. *Use the active voice*: It is better to draft instruments in the active voice rather than the passive voice.⁴⁹ The active voice eliminates confusion because it forces the drafter to name the actor in a sentence. The active voice makes it clear to the reader who is to perform the duty and the scope of the obligation.⁵⁰ The passive voice makes sentences longer and “roundabout”.⁵¹

43 In relation to this discussion, see especially *Thornton’s Legislative Drafting*.

44 A number of these rules are found in National Archives (USA) *Drafting Legal Documents, Principles of Clear Writing*.

45 See, for example, *Project Blue Sky Inc and Others v ABA* (1998) 194 CLR 355 at 382.

46 If the subject matter is inherently complex, it may be that some classes of audience may need some level of assistance from an adviser to gain a complete understanding of the provision.

47 The practice of comparing and contrasting language used in a particular instrument is very important when it comes to statutory construction.

48 The Commonwealth Office of Parliamentary Counsel *Plain English Manual*, paragraph 65 notes as follows: “It’s best if the acronyms are used in common speech, but there’s nothing wrong with inventing new ones if the full expressions are long and are repeated many times in the text.”

49 See National Archives (USA) *Drafting Legal Documents, Principles of Clear Writing*.

50 An active sentence must have actors, but passive ones are complete without them.

51 See the example cited in the Commonwealth Office of Parliamentary Counsel *Plain English Manual*, paragraph 52: “the Authority serves a notice” rather than “a notice is served by the Authority”.

8. *Use the present tense*: A regulation of continuing effect speaks at the time that it is applied, not as of the time when it is drafted or when it becomes effective. Drafting in the present tense avoids complicated and awkward verb forms. For example:
 - Say: The fine for driving without a licence is \$100.
 - Do not say: The fine for driving without a licence will be \$100.
9. *Write positively*: If an idea can be accurately expressed either positively or negatively, express it positively.
10. *Punctuate effectively*: Punctuate consistently, sparingly and with structural purpose. Use conventional punctuation.⁵²
11. *Use action verbs*: For example:
 - Say “consider” rather than “give consideration to”.
 - Say “applies to” rather than “is applicable to”.
 - Say “pay” rather than “make payment”.
 - Say “concerns” rather than “is concerned with”.
12. Use “*must*” rather than “*shall*”: “Shall” imposes an obligation to act, but may be confused with prediction of future action. “Must” imposes an obligation, it indicates a necessity to act.

3.2.2 Constraints and compromises

Any Rule must be workable, internally consistent, and coherent. However, it may be that a Rule must also reflect an element of compromise and drafting choices because of such things as the requirements of the instructions, a particular policy position, the need to satisfy a number of considerations or conflicting interests, consistency with existing drafting, practical implementation constraints associated with existing systems,⁵³ or constraints imposed by the relevant energy law itself.

For example, new civil penalty provisions are listed in the regulations and cannot be created by the AEMC in a Rule itself (as noted in section 1.2). This may require a new Rule (that would otherwise logically be placed within an existing civil penalty provision) to be drafted in a separate provision, inconsistently with the principles on structure outlined in section 3.1 above.

3.2.3 Amending or replacing existing provisions

We should consider whether, when introducing a new concept or obligation, it would be clearer to add it to an existing provision or establish a separate provision for greater visibility of the change.

⁵² *Thornton’s Legislative Drafting*.

⁵³ Practically, it may only be possible to implement provisions using existing systems (for example AEMO’s systems). The impact on these existing systems, or the existing system requirements, might necessitate a drafting compromise.

Similarly, when amending an existing set of provisions, we should consider whether to make a series of amendments to those provisions, or to revoke all of the provisions and start again, within the scope legally permitted.⁵⁴

BOX 4: AMENDING EXISTING PROVISIONS

Potential advantages

- A series of amendments to an existing provision may be the easiest way to achieve the intended outcome.
- Retaining as much familiar text as possible may assist reader comprehension.

Potential disadvantages

- By making frequent and incremental amendments to a set of provisions the relevant instrument may become excessively complex or difficult to follow.⁵⁶
- The new provisions may not fit particularly well into the existing set of provisions.

Note: [56] See New Zealand Legislation Design and Advisory Committee, *Legislation Guidelines* 2018 edition.

BOX 5: REPLACING WITH NEW PROVISION

Potential advantages

- Opportunity to impose a new, simpler or more logical structure on the whole provision.
- Opportunity to draft in a plain English style.
- Opportunity to consider whether certain details should instead be included in guidelines or procedures.

Potential disadvantages

- May impact on regulatory certainty and comprehension for market participants – for example, it may be hard for participants to determine which, if any, policy positions have changed.
- May inadvertently change the effect of the re-drafted provisions.
- May take longer to draft.
- May have consequential impacts on the broader framework, including requiring changes to subordinate instruments.
- May lead to greater compliance costs or delay in implementation, with industry having to amend a range of internal compliance controls to account for changes in significant number of provisions.

⁵⁴ For example, see section 91 of the NEL which limits the AEMC's ability to make a Rule. With limited exceptions, the AEMC is not permitted to make a Rule unless it receives a request to make a Rule.

ABBREVIATIONS

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
COAG Guide	Council of Australian Governments, <i>Best Practice Regulation: A guide for Ministerial Councils and National Standard Setting Bodies</i> , October 2007
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NER	National Electricity Rules
NERL	National Energy Retail Law
NERR	National Energy Retail Rules
NGL	National Gas Law
NGR	National Gas Rules

REFERENCES

This drafting philosophy brings together materials from a variety of resources that relate to the preparation and drafting of instruments and other documents. In many places, specific references to sources that have been used or quoted have been included in footnotes. In addition, the following sources have been considered in preparing this document.

Better Regulation Task Force (UK), *Principles of Good Regulation* www.brta.gov.uk

Commonwealth Office of Parliamentary Counsel, *Drafting Direction No. 1.5 - Definitions* www.opc.gov.au

Commonwealth Office of Parliamentary Counsel, *Plain English Manual* www.opc.gov.au

Commonwealth Office of Parliamentary Counsel, *Reducing complexity in legislation* www.opc.gov.au

Council of Australian Governments, *Best Practice Regulation: A guide for Ministerial Councils and National Standard Setting Bodies*, October 2007

Frantz, Pascal et al, *Rules v Prescriptive Based Financial Regulation*, London School of Economics, SSRN publication, 25 November 2014

Geoffrey Bowman, *The art of legislative drafting*, *Amicus Curiae*, Issue 64, March/April 2006 <https://journals.sas.ac.uk/amicus/article/view/1117/1000>

Government of South Australia, *Better Regulation Handbook – How to design and review regulation, and prepare a Regulatory Impact Statement*, January 2013

Harris, Kleimann and Mowat, *Setting Plain Language Standards*, Clarity 64 November 2010

House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law*, September 1993

The Hon Michael Kirby, *The Never-Ending Challenges of Drafting and Interpreting Statutes—A Meditation on the Career of John Finemore QC* 36 *Melb ULR* 140

ISO, *Plain Language – Part 1: Governing Principles and Guidelines*, February 2020 <https://www.iso.org>

Law Reform Commission of Victoria, *Plain English and the Law*, Report No 9

National Archives (USA), *Drafting Legal Documents, Principles of Clear Writing*, <https://www.archives.gov>

New Zealand Legislation Design and Advisory Committee, *Legislation Guidelines* 2018 edition

New Zealand Parliamentary Counsel Office, *Drafting Manual – Chapter 3 – Principles of clear drafting*, www.pco.govt.nz

NSW Guide to Better Regulation, (2017) NSW Department of Finance, Services and Innovation www.finance.nsw.gov.au

OECD, *Better Regulation in Europe: United Kingdom – Chapter 4* (2010)

Office of the Parliamentary Counsel and Cabinet Office (UK), *When Laws Become Too Complex – A review into the causes of complex legislation* (March 2013)

www.assets.publishing.service.gov.uk

Pearce and Geddes, *Statutory Interpretation in Australia*, 8th edition (LexisNexis)

Ruhindi, *The Need for Simplicity in Legislation and Challenges in its Attainment* The Loophole, Commonwealth Association of Legislative Counsel, June 2009

David St L Kelly (Editor), *Essays on Legislative Drafting* Adel Law Review Association, Law School, University of Adelaide

Sullivan, *Some Implications of Plain Language Drafting*, Statute Law Review, Volume 22 No 3, pp 175 – 210 (2001)

Victorian Guide to Regulation, Department of Treasury and Finance www.dtf.vic.gov.au

Professor Helen Xanthaki, *Thornton's Legislative Drafting*, 5th Edition (Bloomsbury)