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Ms Anna Collyer  
Chair  
Australian Energy Market Commission (AEMC)  
GPO Box 2603  
SYDNEY 2001

Dear Ms Collyer

### **Re: Improving consultation procedures in the Rules (ERC0323)**

The AER welcomes the opportunity to provide a submission on the draft determination and draft rules for Improving consultation procedures in the Rules.

Overall, we support the proposed changes to the Rules consultation procedure in rule 8.9 of the NER, and the removal of the extended consultation procedure in the NGR. These changes will result in a more efficient and effective Rules consultation procedure by providing the consulting party with additional, streamlined consultation processes depending on the complexity of the matter, and flexibility in extending consultation when complex issues arise or material changes occur.

The AEMC are seeking views on several issues raised in the draft determination document. We are providing views on the following issues:

- retaining current exemptions from consultation for minor or administrative changes
- when a consulting party can use the expedited process
- the grounds on which a consulting party can reject a stakeholder request
- requirement to hold a meeting at the request of an interested party.

#### **Retaining current exemptions**

The AEMC propose to include a new process for minor and administrative changes to instruments consulted on under rule 8.9. The AER does not support including an additional consultation process for minor and administrative amendments, as this will be administratively burdensome for both the consulting party and stakeholders that will need to consider whether to engage in the process. Correcting minor or administrative matters without consultation is a widely understood and accepted process, as evidenced by the common law slip rule which enables Courts and other bodies charged with responsibility for making decisions to make minor or administrative amendments to decisions that do not affect the substance of that decision.

The AEMC also note that several provisions in the NER contain a specific exemption to make a minor or administrative change to an instrument without consulting, and the draft rule does not remove these existing exemptions.

If the AEMC are to implement an additional consultation process for minor and administrative amendments, the AER supports retaining these existing exemptions contained in the NER. The consultation process creates an unnecessary burden on stakeholders, many of whom have limited resources and already face challenges engaging with a broad reform agenda associated with the energy transition. Additional consultation processes for minor amendments also places additional capacity constraints on AER resources, due to internal review and approval processes associated with ensuring consultation material and published content is appropriate and reflective of the AER's priorities and purpose.

While the AER generally takes a consultation first approach to regulation and seeks to involve all our stakeholders in our decision making, retaining these exemptions provides the AER flexibility to make minor or administrative amendments without additional cost or complexity, making it easier to regularly update instruments in a timely manner. Where the AER has previously made minor or administrative changes without consultation, such as correcting a drafting error in [version 5 of the Service target performance incentive scheme](#), these have been so minor that consultation would have added additional cost and complexity with no tangible benefit.

### **When a consulting party can use the expedited process**

The AER supports the inclusion of an expedited process in the Rules consultation procedure. Currently, the draft rule states a consulting party can use the expedited process for a 'non-material proposal', meaning a proposal that:

- 1) if implemented, will be unlikely to have a significant effect on the NEM; and
- 2) relates to a determination, recommendation or document on which the consulting party has previously consulted under this rule 8.9.

The inclusion of the second criterion means the expedited process can only be used for changes to existing instruments.

The AER does not support the inclusion of this second criterion, and instead considers that the expedited process should be available for new instruments if the initial test of 'unlikely to have a significant impact on the NEM' is satisfied.

Many new instruments are unlikely to have a significant impact on the NEM, and therefore are not required to undergo the additional examination provided for by the standard consultation process. This is a fact also recognised by the AEMC as evidenced by its [AER reporting on market outcomes](#) rule change, which states the 'AER is not required to comply with the Rules consultation procedure when developing and publishing the initial significant price reporting guidelines' but 'must publish a draft of the initial significant price reporting guidelines on its website and provide at least 20 business days for written submissions from any person on this draft.' In effect, the rules provide for the AER to undertake an expedited consultation process for this new guideline.

The *AER reporting on market outcomes* rule change relates to changes to the AER's \$5000 report. We support using an expedited process to consult on the changes to the \$5000 report. The report and the reporting requirements are well understood by the market, and the proposed changes are unlikely to have a significant effect on the NEM. However, without the AEMC including an explicit exemption in the draft rule change, the AER would be required to undertake a standard consultation process as it is a new draft instrument in the rules.

As an alternative, if it is considered that a second limb to this rule is required, the AER considers expedited processes would be appropriate in these circumstances:

- where a rule change has gone through an expedited consultation process as this strongly implies that any associated instrument arising from the rule is unlikely to be controversial or require a higher level of engagement than the original rule change consultation process
- where a rule requires the consulting party to make new instruments to implement the rule change, and that, by themselves, are uncontroversial and administrative in nature.

Overall, the AER considers removing the second criterion in the 'non-material proposal' test will result in better fit-for-purpose consultation and reduce unnecessary cost and complexity for parties consulting on new instruments that are unlikely to have a significant effect on the NEM.

### **The grounds on which a consulting party can reject a stakeholder request**

The AEMC propose that 'if any person considers the Proposal is not a Non-material Proposal, the person may request the consulting party to use the standard rules consultation procedure instead of the expedited rules consultation procedure' within two weeks of the draft instrument being published.

The AEMC also propose that a consulting party can reject such a request 'if the consulting party considers the reasons given in a procedure change request are misconceived or lacking in substance'. The AEMC asks if alternative grounds such as 'if the consulting party still considers it appropriate to use the expedited process, and publishes reasons', are more appropriate.

The AER does not support using 'misconceived or lacking in substance' as the grounds on which a consulting party can reject a stakeholder request, and instead supports using the alternative grounds proposed by the AEMC. This provides the consulting party with an opportunity to consider the additional information included in the stakeholder request and, if the additional information does not change its assessment, continue to use the expedited process.

Using 'misconceived or lacking in substance' as grounds for rejecting a request significantly reduces the scope of the grounds on which a consulting party can reject a request, particularly as the consulting party would be required to find that it is misconceived or lacking in substance that 'a person *considers* [emphasis added] the Proposal is not a Non-material Proposal'. As noted by the Australian Financial Complaints Authority in its [guidance on excluding complaints](#), judging a claim as misconceived or lacking in substance means a claim is so obviously untenable that it cannot possibly succeed, manifestly groundless, or it is a claim which presents no more than a remote possibility of merit and which does no more than hint at a just claim. A consulting party will not be able to reject any stakeholder request that is not completely unfounded or unreasonable, regardless of whether the reason for the request changes its assessment that the proposal is unlikely to have a significant impact on the NEM.

Using misconceived or lacking in substance as the grounds to reject a request provides an implicit veto power to any stakeholder over a consulting party's decision to use the expedited process, is entirely inconsistent with the initial test the consulting party relies on in determining to use the expedited process and does not facilitate flexible or fit-for-purpose consultation. Instead, it will likely result in unnecessary delays and result in additional consultation that is not commensurate to a project's complexity. Additional consultation may also have the impact of creating unnecessary burdens on other stakeholders.

## **Requirement to hold a meeting at the request of an interested party**

The AEMC's proposed draft rule states that if an interested party requests a meeting, 'the consulting party must hold the meeting within a reasonable period of time after the request or respond to the interested party giving reasons why it is not reasonably practicable to hold the meeting.'

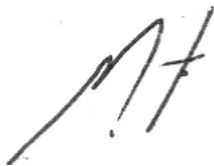
The AER considers the proposed clause 8.9.1(k) should be combined with proposed clause 8.9.1(l) such that where an interested party requests a meeting, the consulting party is given discretion to either (i) hold a private meeting, (ii) schedule a form of consultation to address the issues raised (eg: create a working group, host a conference for a cohort of affected stakeholders, establish an advisory panel or hold a public forum), or determine that it is not necessary or desirable to schedule consultation to address the issue. This approach would facilitate better quality subordinate instruments by promoting flexible engagement that can be adapted to the nature of the specific instrument being introduced or amended, and more directly and efficiently address material issues raised by interested parties.

## **Summary**

The AER supports changes to the Rules consultation procedure that result in a more efficient, flexible and fit-for-purpose consultation process than what is currently allowed for under rule 8.9 of the NER. To help achieve this objective, we consider the draft rules should be amended as outlined above.

If you have any questions or wish to discuss any aspect further, please contact Brendan Staun, Assistant Director, Sandboxing Team at [Brendan.staun@aer.gov.au](mailto:Brendan.staun@ aer.gov.au) or on 02 9230 9149.

Yours sincerely



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Sent electronically via AEMC portal