



Australian Energy Market Commission

## **DRAFT RULE DETERMINATION**

National Electricity Amendment (Market Participant Suspension Framework) Rule 2016

**Rule Proponent**  
COAG Energy Council

8 September 2016

**RULE  
CHANGE**

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**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.

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## Summary

The Australian Energy Market Commission (AEMC or Commission) has made a draft rule that clarifies the Australian Energy Market Operator's (AEMO) discretion to suspend market participants from trading in the National Electricity Market (NEM).

The draft rule, which is a more preferable rule, was made in relation to the COAG Energy Council's rule change request regarding the suspension of a market participant from the NEM when it is under external administration. The rule change request also addresses the suspension of some, but not all, of a market participant's trading activities in the NEM. The Commission invites submissions on this draft determination including the more preferable draft rule by **20 October 2016**.

The draft rule amends the National Electricity Rules (NER) to:

- remove the prohibition on a market participant trading in the NEM while under external administration;
- establish a decision-making framework that AEMO must apply when considering whether to permit a market participant under external administration to continue trading in the market;
- clarify that, if a default event occurs in respect of a market participant, AEMO may suspend the market participant from trading in respect of one or more registration categories or activities, whilst allowing it to continue trading in respect of some registration categories or activities; and
- require AEMO to publish a 'non-suspension notice' if it decides not to suspend a market participant under external administration.

### Background and rationale

There is currently a lack of clarity in the NER as to whether AEMO must suspend a market participant under external administration from trading, or whether it has the discretion to allow that market participant to continue trading. It is also unclear under the NER whether the reference to a suspension notice specifying the 'extent' of a suspension permits AEMO to suspend a market participant from continuing to trade in some, but not all, of its registration categories.

Both of these issues were previously examined in the AEMC's NEM Financial Market Resilience Review, which recommended changes to the NER to address these issues. COAG Energy Council's rule change request was informed by these recommendations. The AEMC published a consultation paper on the rule change request, and this draft determination is informed by stakeholder submissions on that consultation paper.

### Features of the draft rule

The draft rule addresses the same issues as the COAG Energy Council's proposed rule, but provides a clearer decision-making framework that AEMO must apply when exercising its discretion on whether to suspend a market participant. The draft rule requires AEMO to suspend a market participant under external administration, unless:

- the external administrator has requested or consented to the non-suspension decision and has undertaken that the defaulting market participant will meet its relevant liabilities under the NER; and
- AEMO has taken into account the following matters:
  - whether the market participant is likely to comply with the NER;
  - for a market generator, market small generator aggregator or market network service provider, the potential impact of the suspension on reliability in the NEM; and
  - any other matters AEMO considers relevant.

Should AEMO decide not to suspend a market participant under external administration, the draft rule permits AEMO to impose conditions on the market participant in connection with the non-suspension decision, and requires the affected market participant to comply with any conditions imposed. In addition, the draft rule requires AEMO to publish a 'non-suspension notice' if it decides not to suspend a market participant under external administration.

#### **Benefits of the draft rule**

Having regard to the issues raised in the rule change request, the Commission is satisfied that the draft rule will, or is likely to, contribute to the achievement of the National Electricity Objective (NEO) by:

- mitigating the risk of financial instability in the NEM;
- reducing the risk of the reliability standard not being met; and
- providing greater consistency and predictability of decisions.

If a market participant enters external administration, its automatic suspension from trading the NEM may cause financial contagion and a spike in spot prices. Not suspending market participants with generation registration(s) could bring about additional reliability benefits to the NEM, because the level of available generation capacity would not suddenly decrease. In all cases, the draft rule provides a clear framework for how AEMO should exercise its discretion and removes an existing inconsistency in the NER.

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# 1 COAG Energy Council's rule change request

This chapter summarises the rule change request and how it aims to address a perceived issue with current arrangements. It provides relevant background on the topic of market participant suspension from the National Electricity Market (NEM). It also outlines the Australian Energy Market Commission's (AEMC or Commission) process in assessing the request, including consultation on this draft determination.

## 1.1 The rule change request

On 9 December 2015 the COAG Energy Council (Council) submitted a rule change request to the AEMC in relation to suspending a market participant from the NEM when it is under external administration.<sup>1</sup> The request also proposed an amendment to the National Electricity Rules (NER) that would allow the Australian Energy Market Operator (AEMO) to suspend some, but not all, of the registrations of a market participant.<sup>2</sup>

## 1.2 Current arrangements

The NEM is a gross pool market operated by AEMO. The aggregate amount of money paid into the NEM has to match the aggregate amount paid out of it. In order for there to be a high likelihood that all participants owed settlement money will be paid, AEMO may, if certain events occur, suspend market participants from trading in the NEM. These events are called 'default events'.<sup>3</sup> Generally, these events indicate that a market participant may pose a risk to the financial integrity of the NEM. The majority of these events can be grouped into three types:

- failure to make market payments to AEMO as and when requested;
- a problem with the credit support provided to AEMO by a market participant; or
- an insolvency process is initiated against the market participant.<sup>4</sup>

In any of these cases AEMO may issue a 'default notice', specifying the default and requiring the market participant to remedy it within a certain timeframe. If the market participant does not comply with this request, AEMO may suspend it from trading in the NEM by issuing a 'suspension notice'. Suspension in this regard means that after the date and time specified in the suspension notice, the market participant will not be able

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<sup>1</sup> Market participants include: Market Generators, Market Small Generation Aggregators, Market Customers (retailers and large customers), and Market Network Service Providers. Traders, Reallocators and Transmission Network Service Providers are also market participants for some purposes, and are subject to the prohibition on participating in the market while under external administration. See Cl. 2.5A (b) (2), 2.5B (b) (2), and 3.6.5 (b) of the NER.

<sup>2</sup> COAG Energy Council, Amendments to National Electricity Rules to implement market participant suspension recommendations, 9 December 2015. The rule change request is available on the AEMC's web site at: <http://www.aemc.gov.au/Rule-Changes/Market-suspension-framework>

<sup>3</sup> See Cl. 3.15.21 (a) of the NER.

<sup>4</sup> This includes external administration events where the market participant becomes externally administered. That is, the board of directors no longer administers the market participant. Instead, an insolvency practitioner such as an administrator, liquidator, receiver or manager is appointed to manage the affairs of the company.

to receive payments or purchase electricity from the spot market.<sup>5</sup> It also means that AEMO may not accept bids or offers from the market participant with regard to energy dispatched through the wholesale market.

### **1.3 The AEMC's NEM Financial Market Resilience Review**

Many of the issues raised by the COAG Energy Council's rule change request, and discussed in this draft determination, were previously examined in AEMC's NEM Financial Market Resilience Review (the review).<sup>6</sup>

#### **Objectives of the review**

COAG Energy Council asked the AEMC to advise on risks to the financial stability of the NEM, and whether any additional measures may be required to manage those risks. Financial stability relates to the smooth flow of funds between market participants in the NEM so that the buying and selling of electricity continues to operate as intended.

While the NEM has operated effectively to date, its operating environment has evolved significantly since the market began. This includes changes to industry structure and regulatory obligations, which may introduce new risks or require different mitigations.

#### **Recommendations of the review**

The AEMC recommended a number of measures to improve the financial resilience of the NEM. In doing so, these recommendations sought to:

- minimise the disruptions of electricity supply to consumers;
- mitigate the risk of financial instability of the market if a market participant fails; and
- maintain public confidence in the market if a market participant fails.

One of the recommendations was to address regulatory measures related to the suspension of a market participant from the NEM.<sup>7</sup> The AEMC noted that the existing framework for suspending a market participant under external administration is unclear. In particular, where a market participant is registered in more than one category of participants, it was unclear whether one or more of its registrations could be suspended while not suspending its other registration(s).

The review set out recommended changes to the NER that would clarify the above. COAG Energy Council's rule change request was informed by these recommendations.

### **1.4 Rationale for rule change request**

COAG Energy Council's rule change request identifies an inconsistency in the NER as to whether AEMO must suspend a market participant under external administration, or

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<sup>5</sup> See Cl. 3.15.21 (i) of the NER.

<sup>6</sup> AEMC 2015, NEM Financial Market Resilience, Final Report, 6 March 2015, Sydney, p. 142-148

<sup>7</sup> AEMC 2015, NEM Financial Market Resilience, Final Report, 6 March 2015, Sydney, p. 148

whether it has the discretion to not suspend the market participant.<sup>8</sup> This lack of clarity arises because:

- on the one hand, clause 3.15.21 of the NER grants AEMO discretion over suspending a market participant if a default even occurs, and identifies entry into various forms of external administration as default events; but
- on the other hand, clause 2.4.1(c) of the NER, jointly with 3.3.1(b), states that a market participant must not be under external administration while participating in the market.

The Council's rule change request also states that the NER is unclear as to whether a market participant that is registered in multiple registration categories (eg a market generator and a market customer) could continue to trade in the market if one of its registrations was suspended.<sup>9</sup>

## 1.5 Solution proposed in the rule change request

The COAG Energy Council proposes to amend the NER in the following ways:<sup>10</sup>

- Clarify what discretion AEMO has regarding suspending a market participant under external administration by deleting clause 3.3.1(b).<sup>11</sup>
- Allow AEMO not to suspend one or more of a market participant's registrations by amending the clause that defines the procedure for issuing a suspension notice and the extent of that notice.<sup>12</sup>
- Require AEMO to consider whether the market participant has a sufficient guaranteed funding to meet its trading amounts, as well as any other factors AEMO considers relevant when deciding whether to suspend a market participant under external administration.
- Allow AEMO to impose conditions on a market participant under external administration if it decides not to suspend the market participant.
- Require AEMO to notify the relevant market participant, the Australian Energy Regulator (AER) and the COAG Energy Council if it decides not to suspend a market participant under external administration.

The Council identifies the following benefits of not suspending a market participant under external administration:<sup>13</sup>

- mitigating the risk of financial instability in the NEM by allowing the market participant, or some of its registration categories, to continue trading in the wholesale market;

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<sup>8</sup> COAG Energy Council's rule change request, 9 December, 2015, p. 4-5

<sup>9</sup> COAG Energy Council's rule change request, 9 December, 2015, p. 4-5

<sup>10</sup> COAG Energy Council's rule change request, 9 December, 2015, p. 3

<sup>11</sup> This clause prohibits a market participant from participating in the market while under external administration.

<sup>12</sup> This change would apply to all default events, not just external administration.

<sup>13</sup> COAG Energy Council's rule change request, 9 December, 2015, p. 5

- maintaining security of supply by allowing a market generator under external administration to continue selling electricity to the wholesale market; and
- increasing the likelihood that corporate rescuing initiatives may extract value from the failed company.<sup>14</sup>

## 1.6 The rule making process to date

On 9 June 2016 the AEMC published a notice that it commenced the rule making process and a consultation paper on the issues raised by the rule change request.<sup>15,16</sup> The Commission received eight submissions in response to the consultation paper.<sup>17</sup> Where appropriate, issues raised by stakeholders in their submissions are addressed throughout this draft determination. A summary of issues that have not been explicitly addressed in this draft determination, and the Commission's response to them, is provided in Appendix A.

## 1.7 Consultation on draft rule determination

The Commission invites submissions on this draft rule determination, including the draft rule by **20 October 2016**.

Any person or body may request that the Commission hold a hearing in relation to the draft rule determination. Any request for a hearing must be made in writing and must be received by the Commission no later than 15 September 2016.

Submissions and requests for a hearing should quote project number “ERC0202” and may be lodged online at [www.aemc.gov.au](http://www.aemc.gov.au) or by mail to:

Australian Energy Market Commission  
 PO Box A2449  
 SYDNEY SOUTH NSW 1235

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<sup>14</sup> This can support reliability in the longer term by retaining a generator’s capacity in the market.

<sup>15</sup> This notice was published under section 95 of the National Electricity Law (NEL).

<sup>16</sup> The consultation paper is available on the AEMC's website at:  
<http://www.aemc.gov.au/Rule-Changes/Market-suspension-framework>

<sup>17</sup> The submission are available on the AEMC's website at:  
<http://www.aemc.gov.au/Rule-Changes/Market-suspension-framework>

## 2 Draft rule determination

The Commission's draft determination is to make a more preferable draft rule. The draft rule addresses the same issues as COAG Energy Council's proposed rule, but provides a clearer decision-making framework that AEMO must apply when exercising its discretion on whether to suspend a market participant that is under external administration.

The draft rule also addresses the intent of COAG Energy Council's proposed rule with regard to whether the market participant has a sufficient guaranteed funding to meet its trading amounts, but does so by focusing on the external administrator providing an undertaking that the defaulting market participant will meet its relevant liabilities under the NER (such as provision of credit support to AEMO).

This chapter outlines the Commission's:

- rule making test for changes to the NER;
- assessment framework for considering the rule change request; and
- draft rule and the reasons for making it.

From 1 July 2016, the National Electricity Rules (NER),<sup>18</sup> as amended from time to time, apply in the Northern Territory (NT), subject to derogations set out in Regulations made under the NT legislation adopting the NEL.<sup>19</sup> Under those Regulations, only certain parts of the NER have been adopted in the NT. As the proposed rule relates to parts of the NER that currently do not apply in the NT, the Commission is not required to assess the proposed rule against additional elements required by NT legislation.<sup>20</sup>

Further information on the legal requirements for making this draft rule determination is set out in Appendix B.

### 2.1 Rule making test

Under the National Electricity Law, the Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the national electricity objective (NEO). This is the decision-making framework that the Commission must apply.

The NEO is:<sup>21</sup>

“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:

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<sup>18</sup> Details about parts of the NER adopted by the Northern Territory can be found on the AEMC's website at: [http://www.aemc.gov.au/Energy-Rules/National-electricity-rules/Rules-\(NT\)/National-Electricity-Rules-\(NT\)-Version-1](http://www.aemc.gov.au/Energy-Rules/National-electricity-rules/Rules-(NT)/National-Electricity-Rules-(NT)-Version-1).

<sup>19</sup> National Electricity (Northern Territory) (National Uniform Legislation) (Modifications) Regulations.

<sup>20</sup> *National Electricity (Northern Territory) (National Uniform Legislation) Act 2015*.

<sup>21</sup> NEL s.7

- (a) price, quality, safety, reliability and security of supply of electricity;  
and
- (b) the reliability, safety and security of the national electricity system.”

For this rule change request, the relevant aspects of the NEO are the efficient operation and use of electricity services for the long-term interests of consumers with respect to the price and reliability of electricity.

## **2.2 Assessment framework**

In assessing the rule change request against the NEO, the Commission has considered the following matters:

- Whether the rule change request is likely to result in decisions to suspend or not suspend market participants that assist to maintain the **financial stability** of the NEM.
- Whether the rule change request is likely to result in decisions to suspend or not suspend market participants that assist to maintain the **reliability** in the NEM.
- Whether the rule change request is likely to result in **consistent and predictable** decisions of whether to suspend or not suspend market participants.

Each of these considerations are discussed in turn below.

### **2.2.1 Financial stability**

Financial stability in the NEM contributes to achievement of the NEO by reducing the resources that are required for financial risk mitigation. Financial instability can deter investment, which can cause higher prices and less reliable supply (discussed further below). The Commission has considered whether the rule change request contributes to maintaining efficient investment in, and operation of, electricity services by mitigating the risk of financial instability in the NEM. In the context of the of this rule change, an efficient outcome is one where the potential increased risks associated with allowing a market participant under external administration to continue to trade in the NEM are outweighed by the benefits. In particular, this relates to the risk of financial contagion and/or elevated spot prices.

### **2.2.2 Reliability**

Reliable electricity supply is fundamental to consumers' long-term interest. It also underpins national economic activity, efficient operation and investment decisions. The Commission has considered this to be relevant to this rule change request, because the decision about suspending or not suspending a generator may affect the level of supply available, and the reliability of electricity supply.

Different types of market participants contribute to reliability in different manners. As such, the Commission has also considered whether reliability needs to be assessed differently in the decision of whether to suspend different types of market participants.

### 2.2.3 Regulatory consistency

Regulatory decisions should be sufficiently consistent and predictable, with clear and objective processes for change. This is important, because participants plan their operations and activities in light of the regulatory framework. At the same time, regulatory frameworks need to be flexible enough to accommodate change and/or specific circumstances. An appropriate balance of consistency and flexibility would enhance efficiency of the market by allowing participants to make long-term investments with confidence. This is particularly important regarding whether AEMO should have discretion not to suspend a market participant (or certain of its activities) if the participant is under external administration.

### 2.3 The Commission's draft rule

The Commission's more preferable draft rule is published alongside this draft determination.<sup>22</sup> This section describes the draft rule.

The draft rule removes clause 3.3.1(b) of the NER, which states that a market participant cannot participate in the market while under external administration. The draft rule clearly provides AEMO with discretion as to whether or not to suspend a market participant (or some of its activities).

The draft rule amends clause 3.15.21 of the NER to define a sub-category of default events termed 'external administration default events'. These are events in which one of the following occurs in respect of the market participant or a provider of credit support for that market participant:

- a receiver or receiver and manager is appointed;
- an administrator, provisional liquidator, liquidator, trustee in bankruptcy or person having a similar or analogous function is appointed;
- a winding-up order is made, or resolution is passed; or
- a notice under section 601AB(3) of the *Corporations Act* is given (unless the registration of that market participant or credit support provider is reinstated under section 601AH of the *Corporations Act*).

The draft rule also amends clause 3.15.21 of the NER to require AEMO to suspend a market participant under external administration, unless:

- the external administrator has requested or consented to the non-suspension decision and has undertaken that the defaulting market participant will meet its relevant liabilities under the rules; and
- AEMO has taken into account the following matters:
  - whether the market participant is likely to comply with the NER;
  - for a market generator, market small generator aggregator or market network service provider, the potential impact of the suspension on reliability in the NEM; and

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<sup>22</sup> The draft rule is available on the AEMC's website at:  
<http://www.aemc.gov.au/Rule-Changes/Market-suspension-framework>

- any other matters AEMO considers relevant.

Should AEMO decide not to suspend a market participant under external administration, the draft rule permits AEMO to impose conditions on the market participant in connection with the non-suspension decision and requires the affected market participant to comply with any conditions imposed.

In addition, the draft rule requires AEMO to publish a 'non-suspension notice' if it decides not to suspend a market participant under external administration.

## 2.4 Summary of reasons

Having regard to the issues raised in the rule change request, the Commission is satisfied that the draft rule will, or is likely to, contribute to the achievement of the NEO by:

- **Mitigating financial instability** in the NEM in the event that a market participant enters external administration. The draft rule would allow AEMO, subject to the factors described in section 2.3, not to suspend a market participant if suspending the participant may have an adverse effect on spot market volatility (price spikes) and bring about the risk of financial contagion.
- **Reducing reliability impacts** in the NEM in the event that a market participant enters external administration. The draft rule would allow AEMO, subject to the factors described in section 2.3, not to suspend a market participant if suspending the participant may impact the reliability of electricity supply. AEMO's decision would enable the orderly phase out of sources of supply or demand from the market.
- **Providing greater consistency and predictability of decisions** regarding the suspension (or lack thereof) of market participants following a default event. The draft rule provides clear requirements on how AEMO should exercise its discretion, particularly with regard to any decision not to suspend a participant under external administration.

Having regard to the issues raised by the rule change request, the Commission is also satisfied that the draft rule will, or is likely to, better contribute to the achievement of the NEO than the rule proposed by COAG Energy Council. This is because the draft rule provides a clear decision-making framework for AEMO in dealing with market participants that are under external administration. This is likely to improve the consistency and predictability of AEMO's decisions on whether to suspend a market participant under external administration.

Further detail on the Commission's considerations is provided in Chapter 3.

## 2.5 Consistency with the AEMC's strategic priorities

This draft rule relates to the AEMC's strategic priority of facilitating market (and network) arrangements that encourage efficient investment and flexibility.<sup>23</sup> The draft

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<sup>23</sup> AEMC 2015, Strategic Priorities for Energy Market Development, Final Priorities, 26 November 2015, Sydney.

rule is expected to mitigate the risks to the financial stability and reliability of supply in the NEM in the event that a market participant goes under external administration. These, in turn, would allow market participants to make efficient investment decisions and to take informed positions in response to changes in the market.

## 3 Assessment of the rule change request

This chapter provides a detailed assessment of the rule change request. It also summarises stakeholders' views expressed in submissions on the consultation paper. In particular, it considers the following aspects of the rule change request:

- allowing AEMO to exercise discretion in deciding whether to suspend a market participant under external administration;
- how that discretion may be exercised in relation to different types of market participants; and
- how that discretion may be exercised in relation to the different registration categories of the same market participant.

### 3.1 AEMO discretion

Under clause 3.15.21 of the NER, if a default event occurs, AEMO has discretion over suspension from the market. External administration is a default event according to the NER.<sup>24</sup> On the other hand, clause 2.4.1(c) of the NER, jointly with clause 3.3.1(b), states that a market participant must not be under external administration while participating in the market. The apparent inconsistency between these two parts of the NER is noted in COAG Energy Council's rule change request. The Council considers that it is currently unclear whether AEMO must suspend a market participant under external administration, or whether it has the discretion to not suspend the market participant.

#### 3.1.1 Stakeholder views

Submissions to the consultation paper supported AEMO having discretion when it comes to deciding whether to suspend a market participant under external administration. But stakeholders expressed different views on how the discretion should be exercised in practice.

AEMO and the AER favoured general discretion for AEMO in making its decision of whether to suspend a market participant under external administration. They considered that this would provide an appropriate balance between prescription and discretion.<sup>25</sup> In contrast, AGL and EnergyAustralia submitted a range of factors that AEMO should consider when making the decision.<sup>26</sup> These are:

- whether the market participant has sufficient staff and resources;
- likelihood of the market participant failing to comply with the NER;
- overall significance or materiality of the generator to the NEM;
- whether the participant has sufficient funds and resources to continue operating in the NEM;

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<sup>24</sup> See Cl. 3.15.21 (a) (10) and (11) of the NER

<sup>25</sup> AER submission, 6 July 2016, p. 1.; AEMO submission, 7 July 2016, p. 2

<sup>26</sup> AGL submission, 18 July 2016, p. 2; EnergyAustralia submission, 7 July 2016, p. 2

- whether there would be a market benefit attained from deciding not to suspend the relevant participant;
- whether the possibility of a supply shock or risk of financial contagion would be reduced;
- whether the impact of the decision on related markets such as the gas market would be acceptable; and
- whether there would be any conditions or time limits that are able to be placed on the troubled entity, if it was allowed to continue to operate.

The Public Interest Advocacy Centre (PIAC) also supported having a set of factors that AEMO would need to consider in exercising its discretion. Additionally, PIAC considered that AEMO should be able to impose conditions on any market participant under external administration that it decides not to suspend, with the possibility of AEMO reviewing its initial decision should the market participant fail to meet the specified conditions.<sup>27</sup>

### **AER involvement and compliance**

The AER and AEMO submitted that AEMO should not be required to consult with the AER (or any other body) prior to making a suspension decision. However, they considered that compliance with the AER's requests should be a condition for the continued non-suspension of a market participant under external administration.<sup>28</sup>

In contrast, EnergyAustralia and PIAC both favoured a formal role for the AER in the decision of whether to suspend a market participant. EnergyAustralia proposed that AEMO should be required to consult with the AER to better understand the likely impact on customers of suspending a retailer.<sup>29</sup> PIAC expressed concern over the AER's ability to enforce infringement notices (especially ones related to the National Energy Customer Framework) on market participants operating under external administration. As such, PIAC considered that AEMO should be able to apply its discretion independently in the short term, but be required to consult with the AER in the longer term if it were not to suspend a market participant.<sup>30</sup>

### **3.1.2 Assessment**

Providing AEMO with discretion over suspending market participants under external administration has the potential benefit of allowing other market participants to organise their positions. In turn, this would mitigate the risk of financial shocks to the NEM. It may also mitigate any short-term reliability impacts that could result from market participants suddenly exiting the market. The draft rule clarifies the extent of AEMO's discretion in this regard, which will improve the consistency and predictability of suspension decisions.

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<sup>27</sup> PIAC submission, 7 July 2016, p. 5-6

<sup>28</sup> AER submission, 6 July 2016, pp. 1-2; AEMO submission, 7 July 2016, p. 1-2

<sup>29</sup> EnergyAustralia submission, 7 July 2016, p. 3

<sup>30</sup> PIAC submission, 7 July 2016, p. 6-7

Were AEMO to allow a market participant under external administration to continue to participate in the market, and if third parties were aware of that, they may decide to adjust their dealings with that and other market participants over time. This may reduce the shock to the market if the market participant is ultimately suspended from the market and, as a result, mitigate the risk of financial contagion.

In addition, if a generator is allowed to remain in the NEM despite being under external administration, it can continue supplying electricity to the market. Depending on the conditions, less supply could lead to immediate spot price surges and lack of cover under hedge contracts, – increasing the risk of financial instability in the NEM. More available generation capacity in the NEM also reduces the risks of negative impacts on reliability a sudden removal of a generator could cause in the short term.

In exercising its discretion, AEMO must have regard to the following:

- **Whether the external administrator has requested or consented to the non-suspension decision and has undertaken that the defaulting market participant will meet its relevant liabilities under the NER.** The aggregate amount of money paid into the NEM has to match the aggregate amount paid out of it. The risk of financial contagion is reduced if market participants trading in the NEM are able to meet their liabilities under the NER.
- **Whether the market participant is likely to continue to comply with the NER.** There are restrictions on enforcement action against companies that are under external administration. When AEMO makes a decision on whether to suspend the market participant, it is important that it considers the risk that an external administrator would not comply with the AER's requests.
- **Whether the reliability benefit to the NEM of allowing the market participant to continue trading outweigh the risk of removing it from the market. This is only applicable to market generators, market small generators aggregators and market network service providers.** These types of market participants can have a direct impact on reliability, but not all of them increase the reliability of the power system. This is discussed further in section 3.2.

AEMO may also consider any other matters it considers relevant.

### **3.2 Applying discretion to different types of market participants**

This section considers whether AEMO's discretion should apply differently to different types of registration categories (ie generators, retailers and others). It does so in the context of the two core objectives of the rule change request: to minimise the risks of financial contagion and to reliability of supply in the NEM. The AEMC's NEM Financial Market Resilience Issues Paper identified two possible sets of circumstances for a financial contagion: either a sudden surge in spot prices, or a long unplanned outage of generation units or transmission network capacities.<sup>31</sup>

The risk associated with not suspending a market participant under external administration is not the same for all types of registrations. Generators, in general, are net receivers from the NEM, whereas retailers are net payers in almost all cases. COAG

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<sup>31</sup> AEMC 2015, NEM Financial Market Resilience, Issues Paper, 8 June 2012, Sydney, p. 30-35

Energy Council's rule change request suggests that suspending a generator (or the market generator registration of a gen-tailer) could have a negative impact on the reliability of supply. Suspending a retailer (or other type of market participant) is unlikely to have the same direct impact on reliability of supply.

### 3.2.1 Stakeholder views

Several stakeholders highlighted a difference between not suspending a generator under external administration and AEMO applying the same kind of discretion to a retailer under external administration. The Energy Networks Association (ENA) and Ausgrid were particularly concerned about a retailer continuing to accumulate debt in network charges, which the network businesses may not be able to recover if the retailer is under external administration. The ENA and Ausgrid were also concerned that while the Retailer of Last Resort (ROLR) procedure is underway, creditors may still have claims against generators if there are cross guarantees in place with the retailers.<sup>32</sup> This issue is discussed further in Chapter 4.

The only other stakeholder comment on this topic was from PIAC, who recommended that AEMO should consider reliability when deciding whether to suspend a market participant. PIAC considered that these factors are of different levels of importance when applied to generators and when applied to retailers.<sup>33</sup>

### 3.2.2 Assessment

This section considers the benefits and risks of allowing different types of market participants to continue trading in the wholesale market when they are under external administration. In general, the benefits can be expected to outweigh the risks more often for market generators, market small generator aggregators or market network service providers than they would for retailers. Other types of market participants (such as traders, reallocators or transmission network service providers) are unlikely to have a material impact on the NEM in terms of financial stability and reliability of supply.

#### Generators<sup>34</sup>

Generators, in general, are net receivers from the NEM. They may be required to make payments to AEMO under the following circumstances:

- under the “causer pays” procedure for frequency control ancillary services (FCAS);
- if there are reallocations in place with other market participants; and
- when spot prices are negative.

However, these circumstances are likely to be rare or have a relatively small impact on a generator's financial position.<sup>35</sup> As such, there is little risk that a generator's financial

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<sup>32</sup> If a market customer is suspended from the market, the AER will assign one or more ROLRs to take responsibility for the market customer's retail customers under the ROLR framework in the National Energy Retail Law. The transfer of customers to ROLRs must happen as soon as possible.

<sup>33</sup> PIAC submission, 7 July 2016, p. 5

<sup>34</sup> For the sake of simplicity, market generators, market small generator aggregators and market network service providers are referred to as generators in this section.

position toward the NEM would worsen if it were to continue participating in the market while under external administration.

The main benefit of allowing a generator to continue trading in the wholesale market while under external administration is that it can continue supplying electricity. This could mitigate the risk of a sudden increase in spot prices that may result from the generator being suspended and its supply no longer being available to meet demand in the NEM. It is important to note, however, that not suspending a generator does not guarantee that it would continue to sell to the market. The administrator would still need to make a decision on whether to continue operating.

Of particular significance in this regard is whether the generator is able to retain its bilateral hedge contracts. If these are annulled, the generator will be fully exposed to the spot price, which is a risk that an external administrator may not be willing to take because the administrator is personally liable for debts incurred by the company during their appointment.

An external administrator may also find it easier to sell a generator as a going concern if its ability to trade in the market is preserved. This should increase the likelihood of the generator's capacity being available in the future, which could mitigate the impacts on the reliability of supply.

There may be an additional financial benefit of not suspending a generator that is part of a corporate group that also has market customers. If the concerned entities enter external administration and there are cross-guarantees in place between these entities, creditors may be able to transfer their financial claims from the market customer to the generator. If the generator registration of a gen-tailer is allowed to continue to participate in the market, it may earn further revenue that could go towards meeting the creditors' claims.

In light of the above, when AEMO decides whether to suspend a generator, the factors listed in section 3.1.2 would come into consideration in the following ways:

- AEMO must take into account whether the external administrator appointed to the generator has requested or consented to the non-suspension decision and has undertaken that the defaulting market participant will meet its relevant liabilities under the NER (this is likely to be the case unless the generator is or is likely to be a net payer to the NEM).
- AEMO would need to consider the likelihood that the generator will continue to meet its obligations under the NER, and any implications for reliability of suspending that generator.
- Any other matters that AEMO considers relevant to the decision.

## **Retailers**

Market customers (of which retailers are the main group of interest for this rule change), in general, are net payers to the NEM. As such, they may accumulate debt if allowed to

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<sup>35</sup> FCAS payments are typically lower than spot market payments. Bilateral contracts behind reallocations are usually voided if a party to the contract enters external administration, resulting in reallocations themselves becoming invalid. Negative spot prices seldom occur in the NEM and, even at those times, they are typically outweighed by positive prices over the course of a week.

continue trading in the wholesale market. They may also accumulate debt toward network service providers by not paying their network charges when they fall due, if there are insufficient credit support arrangements in place (or none at all).<sup>36</sup> The risk of debt accumulation toward the market could be mitigated as long as the participant continues to meet its credit support requirements. These provide cover against shortfall in payments to the NEM.<sup>37</sup>

The suspension of a market customer may lead to contagion through triggering a sequence of ROLR events. If an insolvent market customer is suspended from the market, the AER appoints one or several ROLRs that will take over the customers of that retailer. This will increase the payment obligations and credit support requirements of the ROLR(s), which may have to be met in a potentially short period of time. If the appointed ROLR(s) cannot comply, they could themselves become insolvent, which may trigger additional suspensions and ROLR events, leading to further financial instability in the NEM. Chapter 4 provides more detail on how this rule change interacts with the ROLR procedure.

In light of the potential adverse consequences of suspending a retailer and triggering a sequence of ROLR events, there may be situations in which the benefits of not suspending the retailer would outweigh the risks. When AEMO decides whether to suspend a market customer, the factors listed in section 3.1.2 would come into play in the following ways:

- AEMO must take into account whether external administrator appointed to the generator has requested or consented to the non-suspension decision and has undertaken that the defaulting market participant will meet its relevant liabilities under the NER.
- AEMO must also be satisfied that the market customer is likely to comply with the NER. This would provide confidence that the AER would be able to take action against a market customer for breach of its obligations, since there are restrictions on enforcement action against companies that are under external administration.<sup>38</sup>
- Any other matters that AEMO considers relevant to the decision.

The draft rule does not require AEMO to assess whether the market participant is likely to meet its financial obligations towards network service providers. This is because AEMO is unlikely to be able to assess this matter in the short time required to make a suspension decision. In contrast, AEMO would be able to make such an assessment

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<sup>36</sup> The AEMC is reviewing these arrangements under the Retailer-Distributor Credit Support Requirements rule change, which is available on the AEMC's website.

<sup>37</sup> Credit support amounts are designed to cover the financial exposure of market participants to AEMO in respect of accrued amounts over a period of approximately five weeks. See Cl.3.1.1A and 3.15.16 of the NER.

<sup>38</sup> External administration creates a protected environment for the relevant company. The Corporations Act – which governs the rights and obligations of appointed third parties for companies under external administration – provides that legal proceedings and enforcement processes cannot be commenced against the company unless the external administrator or the court agrees.

with regard to relevant liabilities (including, but not limited to trading amounts), since those are sums owed to AEMO.

The draft rule also does not require AEMO to assess the reliability implications of suspending a market customer. This is because the impact would be indirect – via the termination of hedge contracts with generators who would then be exposed to the spot price – and, as such, be difficult to assess in the short time required to make a suspension decision.

### **Other market participants**

This rule change has limited implications for other types of market participant registrations. Market participants registered as traders or transmission network service providers cannot purchase electricity from or sell electricity to the NEM, so this rule change has limited relevance to them. Reallocators cannot purchase electricity from or sell electricity to the NEM, but may be parties to hedge contracts that help market customers and market generators manage their risks against spot prices. If a reallocator went under external administration, its hedge contracts would likely be voided, which means that it would neither owe any amounts to the market, nor have any claims against the market.

## **3.3 Applying discretion to different registrations of the same market participant**

COAG Energy Council's rule change request states that the NER is unclear as to whether a market participant that has multiple registrations (eg a market participant that is registered as both a market generator and a market customer) could continue to trade in the market if one of its registrations was suspended. The same idea could be applied to a market participant with separate registrations in different regions. In essence, this is a question of whether AEMO can exercise its discretion to one (or more) but not all registrations of a market participant (henceforth 'partial suspension').

### **3.3.1 Stakeholder views**

Submissions on the consultation paper offered mixed views on whether AEMO should be able to make partial suspension decisions. But there was consensus that such a decision would be difficult in practice, owing to:

- complex corporate structures;<sup>39</sup>
- cross-guarantees between the market generator and market customer registrations of a business;<sup>40</sup> and
- shared assets and resources across different market registrations.<sup>41</sup>

EnergyAustralia supported partial suspension as it may allow generation assets to continue operating.<sup>42</sup> PIAC also supported partial suspension as long as adequate

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<sup>39</sup> Seed Advisory submission, 7 July 2016, p. 2

<sup>40</sup> Ausgrid submission, 7 July 2016, p.1.; ENA submission, 7 July 2016, p. 2

<sup>41</sup> EnergyAustralia submission, 7 July 2016, p. 3

<sup>42</sup> EnergyAustralia submission, 7 July 2016, p. 3

ring-fencing is in place, and as long as the added complexity of the process does not outweigh the benefits.<sup>43</sup>

AGL was of the view that partial suspension might only delay the inevitable exit from the market, because the remaining registration would find itself without hedge cover and completely exposed to spot prices. AGL also warned that counterparties who decide to enter into hedge contracts with an entity of a partially suspended market participant would face greater credit risk.<sup>44</sup>

### **3.3.2 Assessment**

The costs and benefits of not suspending the market generator or market customer registration of a participant with more than one registration are largely the same as those discussed in section 3.2.2. However, partial suspension presents the added complexity of being able to meaningfully draw the line ('ring-fence') between different market registrations, especially with regard to financial obligations. It may be easier to draw that line between registrations that operate in regions (for example, a parent group that owns generators in different states).

The draft rule has the effect of requiring AEMO to assess whether each registration of a market participant meets the factors set out in section 3.1.2. This allows for the possibility of partial suspension but, in practice, AEMO would need to satisfy itself that:

- the external administrator appointed to the market participant has requested or consented to the non-suspension decision and has undertaken that the defaulting market participant will meet its relevant liabilities under the NER, including any amounts it becomes liable for as a result of the suspension of other registrations in the same corporate group;
- the market registration is likely to comply with the NER; and
- for a market generator, market small generator aggregator or market network service provider, any implications for reliability of the suspension.

AEMO would also need to consider any other relevant matters.

### **3.4 Practical implementation of a non-suspension decision**

It is important that decisions of whether to suspend a market participant are made in a consistent and predictable way. Transparency around decision-making would allow other market participants to make informed decisions about their own entities, which should reduce the risk of widespread negative impacts (either on the financial stability of the NEM or on reliability of supply).

Since information about a market participant entering external administration is publicly available, other market participants would benefit from AEMO notifying that it has decided not to suspend a market participant who is under external administration. The draft rule requires AEMO to publish a 'non-suspension notice' in such an event. The notice would stress that the decision is reviewable at any time. The

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<sup>43</sup> PIAC submission, 7 July 2016, p. 4-5

<sup>44</sup> AGL submission, 18 July 2016, p. 1-2

above is also applicable to any market registration that is not suspended following a partial suspension decision.

In the event that a non-suspended market participant fails to meet the conditions set out by AEMO, AEMO would be able to make a decision about the suspension of that participant without having to issue another default notice. Doing so would allow AEMO to make speedy decisions without compromising the objective of this rule change request.

## 4 Retailers of last resort and market customer suspension

This chapter discusses interactions between the suspension of market customers and the ROLR regime. This was not an aspect of the rule change request, but was raised in a number of submissions.

### 4.1 Stakeholder views

The AER submitted that any non-suspension of a retailer would conflict with the current ROLR process.<sup>45</sup> As a result, the AER considered that the ROLR framework may have to be modified. PIAC also suggested that the ROLR framework may need to be amended if the Commission made the rule as proposed by COAG Energy Council.<sup>46</sup> PIAC also considered that particular consideration should be given to any decision to suspend a market customer who is a registered ROLR, due to the potential implications for customer transfers.<sup>47</sup>

### 4.2 Assessment

A ROLR procedure may be triggered by various events (ROLR events), including (but not limited to):

- the market customer being suspended from the market;<sup>48</sup>
- an external administrator being appointed to the corporate entity that holds the market customer registration or to any property of that corporate entity;<sup>49</sup>
- the corporate entity that holds the market customer registration fails to provide the required credit support to a distributor;<sup>50</sup> and
- the corporate entity that holds the market customer registration fails to pay network charges when they fall due.<sup>51</sup>

The AER is responsible for managing the ROLR process and it has discretion over initiating it. This draft rule leaves the AER's discretion unchanged in that regard.

As noted above, a decision by AEMO to suspend a market customer is one of the triggers for issuing a ROLR notice. However, the AER may still issue a ROLR notice even if a market customer was not suspended by AEMO, if any of the other conditions are triggered. After a ROLR is initiated, AEMO may suspend the market participant.<sup>52</sup> This means that AEMO may decide not to suspend a retailer under external

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<sup>45</sup> AER submission, 6 July 2016, p. 2

<sup>46</sup> PIAC submission, 7 July 2016, p. 7

<sup>47</sup> PIAC submission, 7 July 2016, p. 4

<sup>48</sup> See Part 6, Division 1, Section 122 (b) of the National Energy Retail Law

<sup>49</sup> See Part 6, Division 1, Section 122 (d) of the National Energy Retail Law

<sup>50</sup> See Part 6, Division 3, Section 130 (2) (b) of the National Energy Retail Law

<sup>51</sup> See Part 6, Division 3, Section 130 (2) (c) of the National Energy Retail Law

<sup>52</sup> Clause 3.15.21 (a) (7) of the NER allows AEMO to suspend a market participant if the market participant ceases or threatens to cease to carry on its business or a substantial part of its business. This default event is likely to be satisfied where there has been a ROLR event.

administration but the AER could issue a ROLR notice based on the occurrence of any of the ROLR events.

The Commission considers that the current ROLR framework, combined with the draft rule, leaves sufficient discretion for the AER to prevent the accumulation of debt by market customers. This means that the draft rule does not expose network service providers to a greater risk of unpaid, unrecoverable network charges.

## Abbreviations

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
COAG Energy Council Commission	Council of Australian Governments' Energy Council See AEMC
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NERL	National Energy Retail Law
NEM	National Electricity Market
NEO	National Electricity Objective
ROLR	Retailer of Last Resort

## A Summary of issues raised in submissions

This section summarises comments made in submissions that were not addressed in chapters 3 and 4, and provides the AEMC's response.

Stakeholder	Issue	AEMC response
<b>AEMO discretion</b>		
AEMO, p. 1-2	AEMO requested further clarification by removing any doubt that non-compliance with any conditions imposed on a non-suspension can result in AEMO reviewing that decision. AEMO believed it would be best done by adding an addition default event to 3.15.21 (a).	The draft rule clarifies the consequences of non-compliance with non-suspension related conditions. Addressing the consequences of such non-compliance in a required timely manner is better achieved if AEMO is able to issue a suspension notice immediately without having to issue a previous default notice.
AER, p. 2	The AER noted that the consequence of non-compliance with the conditions set on non-suspension should be clarified.	See previous response.
PIAC, p. 6	PIAC submitted that expanding the list of default events by creating new sub-categories would be useful. Default events in the new sub-category would automatically trigger review of registrations.	The draft rule will provide sufficient discretion to AEMO for reviewing and monitoring changes in material conditions that may affect the NEM.
Seed Advisory, p. 2	Seed considered that AEMO's discretion should not be influenced by the existence of swap and option reallocations that are in place at the time of the default event. However, if these reallocation agreements lapse at the time the market participant enters external administration, their prudential requirement may not be met as a result.	The draft rule requires AEMO to take into account whether the external administrator has requested or consented to the non-suspension decision, and has undertaken that the defaulting market participant will meet its relevant liabilities under the NER, in order for it not to suspend a market participant under external administration. The bilateral agreements behind the market participant's reallocations may lapse if one of the counterparties enters external administration and AEMO might only be notified after a non-suspension decision is made. If the result of this is the market participant not meeting its prudential requirements, AEMO will be able to revise its previous non-suspension decision and suspend the market participant.

Stakeholder	Issue	AEMC response
AGL, p. 2	AGL considered that AEMO discretion should be limited by a range of factors that might include sufficient funds and resources to continue operating in the NEM, positive benefit to the market, impact on other related markets such as gas, conditions and time limits to be imposed on the participant.	The draft rule sets out the decision-making framework for AEMO's decisions on whether to suspend a market participant under external administration. There may be several markets that are related to the NEM. But it would be difficult to specify which markets AEMO should consider and not others. It would also be difficult for AEMO to make informed and timely decisions about markets on which it has limited information.
EnergyAustralia, p. 2-3	EnergyAustralia submitted that AEMO should consider sufficient staff and resources, likelihood of compliance and overall significance/materiality to the NEM in deciding whether to suspend a market participant. Additional factors might include generation capacity or number of customers.	The draft rule sets out the decision-making framework for AEMO's decisions on whether to suspend a market participant under external administration. The draft rule requires AEMO to be satisfied that the market participant is likely to comply with the NER in order for it not to suspend a market participant under external administration. A market participant cannot comply with the NER without sufficient staff and resources.
<b>Other issues</b>		
Seed Advisory, p. 1	Seed raised concern over the timing and manner by which AEMO may find out about an external administrator being appointed to a market participant, and the implications of that to its ability to consult with other parties	The draft rule does not change AEMO's ability to gain and gather information about the appointment of external administrators. Nor does it affect the time AEMO takes to decide its course of action. However, a decision on whether to suspend a market participant must be made as soon as practicable.
Seed Advisory, p. 1	Seed raised the question of what happens if the external administrator withdraws the market participant from the market before AEMO has taken a decision, or if it is unprepared to meet AEMO's conditions for non-suspension.	An administrator may withdraw its company from the market at any time. Doing so constitutes a default event (see clause 2.10.2 of the NER with regard to ceasing participation).  A decision by AEMO not to suspend a market participant is no guarantee that the market participant will continue to trade in the market.

## **B Legal requirements under the NEL**

This appendix sets out the relevant legal requirements under the NEL for the AEMC to make this draft rule determination.

### **B.1 Draft rule determination**

In accordance with section 99 of the NEL the Commission has made this draft rule determination in relation to the rule proposed by COAG Energy Council.

The Commission's reasons for making this draft rule determination are set out in section 2.3

A copy of the draft rule, which is a more preferable rule, is attached to and published with this draft rule determination. Its key features are described in section 2.3.

### **B.2 Power to make the rule**

The Commission is satisfied that the draft rule falls within the subject matter about which the Commission may make rules. The draft rule falls within the matters set out in section 34 of the NEL as it relates to "the operation of the national electricity market" (section 34(1)(a)(i)), "the operation of the national electricity system for the purposes of the safety, security and reliability of that system" (section 34(1)(a)(ii)) and "the activities of persons (including Registered Participants) participating in the national electricity market or involved in the operation of the national electricity system" (section 34(1)(a)(iii)).

### **B.3 Power to make a more preferable draft rule**

Under s. 91A of the NEL, the Commission may make a rule that is different (including materially different) from a proposed rule if the Commission is satisfied that, having regard to the issue or issues that were raised by the proposed rule (to which the more preferable rule relates), the more preferable rule will, or is likely to, better contribute to the achievement of the NEO.

As discussed in Chapter 2, the Commission has determined to make a more preferable draft rule. The reasons for the Commission's decision are set out in section 2.3.

### **B.4 Commission's considerations**

In assessing the rule change request the Commission considered:

- the Commission's powers under the NEL to make the rule;
- the rule change request;
- submissions received during first round consultation; and
- the Commission's analysis as to the ways in which the proposed rule will or is likely to, contribute to the NEO.

There is no relevant Ministerial Council on Energy (MCE) Statement of Policy Principles.<sup>53</sup>

The Commission may only make a rule that has effect with respect to an adoptive jurisdiction if satisfied that the proposed rule is compatible with the proper performance of Australian Energy Market Operator (AEMO)'s declared network functions.<sup>54</sup> The draft rule is compatible with AEMO's declared network functions because it does not impact AEMO's performance of its declared network functions.

## **B.5 Civil penalties**

The Commission's draft more preferable rule removes rule 3.3.1(b) of the NER. This rule is currently classified as civil penalty provision under Schedule 1 of the National Electricity (South Australia) Regulations. The Commission considers that rule 3.3.1(b) should no longer continue to be classified as a civil penalty provision because it proposes to remove this rule from the NER. The Commission will propose to the COAG Energy Council that its classification is changed accordingly.

The Commission does not consider any other provisions of the draft rule should be classified as civil penalty provisions.

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<sup>53</sup> Under section 33 of the NEL the AEMC must have regard to any relevant MCE statement of policy principles in making a rule. The MCE is referenced in the AEMC's governing legislation and is a legally enduring body comprising the Federal, State and Territory Ministers responsible for Energy. On 1 July 2011 the MCE was amalgamated with the Ministerial Council on Mineral and Petroleum Resources. The amalgamated Council is now called the COAG Energy Council.

<sup>54</sup> See section 91(8) of the NEL