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Dear John

Re: EUAA Response to AEMC Notice of proposed Rule under sec. 95 National Electricity Law: National Electricity Amendment (Advocacy Panel) Rule 2006-02-01

The Energy Users Association of Australia (EUAA) would like to thank the Australian Energy Market Commission (AEMC) for the opportunity to respond to the AEMC's proposed National Electricity Rules (NERs) changes to the governance, accountability and funding arrangements for the National Electricity Consumers' Advocacy Panel.

The EUAA was formed in 1996 and is a non-profit organisation focused entirely on energy policy and regulation advocacy. Members determine EUAA policy and direction. The EUAA represents a wide spectrum of end-users in all Australian States and has over 80 Members, predominantly business end-users with activities across all states and many sectors of the economy. EUAA activities cover both national and sub-national issues. [See <http://www.euaa.com.au/> for more information on the EUAA.]

The comments that follow in the attached submission are based on the EUAA's substantial experience in dealing with the National Electricity Consumers' Advocacy Panel on a regular basis since it began operations in April 2003. We believe that getting the governance, accountability and funding arrangements for the National Electricity Consumers' Advocacy Panel is an important first step in securing the long-term funding arrangements of end user advocacy and therefore promoting the long-term interests of consumers of energy.

If you have any queries regarding our comments please do not hesitate to contact me on telephone number (03) 9898 3900 or e-mail roman.domanski@euaa.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read "Roman Domanski".

Roman Domanski
Executive Director



**EUAA Response to Australian Energy Market
Commission Rules Change on National
Consumer Advocacy Panel Governance,
Accountability and Funding Arrangements
Review**

FEBRUARY 2006

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1. Introduction

The Energy Users Association of Australia (EUAA) would like to thank the Australian Energy Market Commission (AEMC) for the opportunity to respond to the AEMC's proposed National Electricity Rules (NERs) changes to the governance, accountability and funding arrangements for the National Electricity Consumers' Advocacy Panel (the Panel).

The EUAA was formed in 1996 and is a non-profit organisation focused entirely on energy policy and regulation advocacy. Members determine EUAA policy and direction. The EUAA represents a wide spectrum of end-users in all Australian States and has over 80 Members, predominantly business end-users with activities across all states and many sectors of the economy. EUAA activities cover both national and sub-national issues. [See <http://www.euaa.com.au/> for more information on the EUAA.]

Since, the Panel begun operations in April 2003, the EUAA has received funding for 30 projects (or 29% of the total funded projects). The EUAA believes that this significant level of contact with the Panel provides a sound basis for responding to the MCE proposed Rules changes on improving the governance and accountability arrangements.

The EUAA would welcome an opportunity to meet with AEMC officials conducting the Rules Change Review to discuss our experiences with dealing with the Advocacy Panel.

We also note and support that any Rules change proposal must enhance the National Electricity Law (NEL) Single Market Objective (SMO):

*The national electricity market objective is to promote efficient investment in, and efficient use of, electricity services **for the long-term interests of consumers of electricity** with respect to price, quality, reliability and security of supply of electricity and the reliability, safety and security of the national electricity system. (Sec. 7, NEL)*

The EUAA believes the Rules changes proposed by the MCE, as contained in the AEMC sec. 95 notice, generally do not satisfy the SMO. In fact, we believe that some of the proposed MCE Rules changes are a retrograde step to the current arrangements and would detract from the SMO. Our main concern with the proposed Rules changes is that they fail to acknowledge or take into account end user groups, the primary target for the advocacy funds. For instance, many of the proposed Rules changes do not require and/or seek input from end user advocates in the decision-making process. We strongly believe this is contrary to the SMO.

The remainder of the submission provides specific comments on the MCE proposed Rules changes and provides recommendations to enhance the proposed MCE Rules changes.

2. Composition of Panel Members

The EUAA supports the proposed Rules change to de-link panel member representation from a particular constituency. The current structure of membership based on constituents creates a real and/or perceived conflict of interest for the supply side representatives as proposals before the Advocacy Panel are often based on end users undertaking advocacy that challenges the supply side position.

Further, the EUAA supports the proposal that end user Panel members should not be directly involved with any particular end user advocacy group. While it is vital to have Panel members with sound knowledge of energy end user issues, it creates a perceived conflict of interest if the Panelists are members of any particular advocacy group or “class”.

It has been quite common for these problems to emerge with the Panel that has existed up to now and this has detracted from the existing Advocacy scheme.

We support the need to have an “independent” Chair and Panel members and believe that they should be appointed on the basis of criteria such as:

1. A demonstrated ability to understand the subject matter of eligible applications made to the Panel.
2. A demonstrated ability to understand energy end users and their issues.
3. A demonstrated ability to maintain contact with energy end users, their representatives and develop a constructive relationship with them.
4. An ability to contribute to the objectives of the Panel and the Single Market Objective of the National Electricity Rules.
5. An ability to contribute to good decision-making and governance by the Panel, including the avoidance of conflicts of interest and bringing the Panel into disrepute.
6. An ability to show leadership and effectively chair Panel meetings (in the case of the Chair).

However, we do not support the proposed Rules change on the process of appointing Panel members. The MCE proposes “the existing provisions for the Chair to issues guidelines on appointment should be replaced by the ability for the AEMC to issue guidelines in consultation with the MCE and for the AEMC to have regard to these”.

We believe that this change does not satisfy the SMO. In particular, this proposed change fails to acknowledge end user groups and the knowledge they possess when it comes to identifying appropriate Panel members.

The proposed MCE Rules change assumes that the AEMC and MCE are in the best position to make decisions on the appropriate skills required to appoint Panel members. The EUAA believes that this is a false presumption and it is not obvious that this change would be in the long-term interests of consumers of electricity. This

would be a far more likely outcome if it were to be made clear that there would be consultation on this with end user representatives.

End user advocates deal directly with the Panel and its members on a regular basis with respect to preparing applications, managing project funding and dealing with Panel administrative requirements. End user bodies, such as the EUAA, also have a membership base made up of actual end users and hence have an excellent understanding of the needs of actual users (which should be the primary target of advocacy funds). With due respect, neither the AEMC nor the MCE can claim to have this.

Hence, the EUAA believes that end user groups are in an excellent position to understand the skills required by Panel members to carry out their functions effectively and to contribute constructively to this. They should be able to bring this experience and knowledge – and their networks – directly to bear on the appointment process and both the AEMC and MCE would benefit from this (as would the delivery of advocacy to actual end users). This would be far more in line with the SMO).

We also note that Chairmen of the Advocacy Panel have hitherto undertaken such consultation and that it has resulted in the betterment of the appointment procedures. To remove the requirement, as proposed in the MCE's Rule changes, would be a step backwards from the existing arrangements and would be likely to detract from any future end user advocacy scheme.

The EUAA therefore recommends that the MCE proposed Rules change should be amended to include end user group input in the development of guidelines on appointment of Panel members. In particular, the EUAA recommends that the Rules should require the AEMC to consult with and require direct input from key end user advocacy groups and involve them formally and meaningfully in the development of guidelines for the appointment of Panel members. Further, the AEMC should review the guidelines every three years to ensure their continued relevance and efficacy.

The EUAA, Energy Action Group and Energy Markets Reform Forum have recently written to the Chairman of the AEMC suggesting that he form a Customer Consultative Committee to help secure the SMO and this would also prove a useful and convenient device for consultation on procedures for the appointment of Advocacy Panel members.

3. Selection of Panel members

The proposed Rules change states that, “the Panel should be appointed by the AEMC having regard to any nominations from the MCE and any guidelines developed by the AEMC”.

In its current form, the proposed Rules change disregards input from end user groups. It suffers from the same deficiencies as the proposed Rule changes for developing appointment guidelines (see Section 1) and presupposes that the MCE and AEMC are in a better position and have greater knowledge than end user groups in identifying potential candidates. Again, and for similar reasons, we believe this is a false supposition. End users groups deal with their members (ie actual end users) and other relevant individuals on energy policy, regulatory and a range of other matters on a

regular basis and therefore are likely to more readily identify potential candidates. For example, the EUAA (and other end user advocates) have regular contact with senior energy purchasing personnel within large organisations through its membership base and contact with the energy user community. Hence, they would be well positioned to identify individuals with excellent knowledge of energy issues, as well as business acumen and other relevant skills, that could make excellent Panel member.

The EUAA recommends that clause 8.10.2 (b) (1) be broadened to require the AEMC to “*consult with key end user groups on appointments and have close regard to any nominee recommended by the MCE and/or an end user advocacy group...*”.

4. Chair Appointment

The EUAA supports the proposed MCE Rules change that the Chair be appointed for a period of three years.

The EUAA recommends that the proposed Rules change should also specify the length of appointment for all Panel members. In particular, all Panel members should have tenure for three years. However, not all members should cease at the same time. Rather, their appointment and end of tenure should be staggered, whereby two Panel members are replaced at any given time, with the staggering occurring evenly one and half years. This will ensure that existing members can pass on Panel experience to new members. It will also ensure that there is continuity in decision-making.

5. Removal of Panel Members

The MCE proposed Rules change seeks to “extend the current criteria for dismissing the Chair to other members of the Panel but also make it clear that any power of removal can only be exercised by the AEMC after consultation with the MCE”.

While the EUAA supports this proposed Rules change, we recommend that the proposed Rules change be broadened to allow end user groups to have the authority to seek the removal of Panel members. In particular, end user groups should be entitled to request a review of the performance of Panel member(s) if they believe that the decision-making by member(s) is ‘biased’, ‘prejudiced’, ‘unfair’ or involves ‘conflicts of interest’. The AEMC would be given the authority to investigate any request. The end user advocate request should be made to the Chair of the AEMC and would be required to be in writing outlining the rationale for the request (confidentially if necessary). The AEMC would be required to conduct the investigation and make a recommendation to support or decline the end user request.

We would like to emphasise that this comment is made based on past experience with the Panel and failures to act on such serious shortcomings in the past. We would be willing to discuss this matter on a confidential basis with the AEMC (or SCO) to outline our concerns in detail in the interests of avoiding such situations in future.

6. Funding requirements

The EUAA generally supports the Rules change that “Panel should continue to determine what funding is required but submit this to the AEMC for approval. As long as those requirements are reasonable, the AEMC must approve them”.

In particular, the EUAA supports the proposal that the Panel must determine the funding requirements for end user advocacy in accordance with the Rules consultation procedures. This will ensure that end users have an opportunity to submit to the Panel an outline of prospective policy and regulatory work and required resources to effectively participate on these matters. Subsequently, the Panel will have a better opportunity to make a fully informed decision on the amount of funds required for the year to discharge its activities effectively.

However, the proposed Rules change should provide for more flexibility for the Panel to seek top up funding outside of the formal review process during March each year. This is to allow end user groups to seek funding for projects that arise during the year but were not foreseeable at the formal review process. This flexibility will enhance the SMO as it will ensure that end user groups are not excluded from participating on important energy policy and regulatory matters purely because of financial resource constraints. Again, this recommendation is based on our experience with the existing Advocacy arrangements and problems that have arisen with them in the past.

The EUAA has concerns with the proposal that the “AEMC must approve the funding requirements by 31 March each year, unless satisfied that there are no reasonable grounds for approving the funding requirements”. In particular, the EUAA is concerned that the AEMC seems to have unilateral power to deny the Panel’s funding requirements. The AEMC’s grounds to deny the funding requirements are not made clear in the Rules proposal. For example, it is unclear what the phrase “...unless satisfied that there are no reasonable grounds for approving the funding requirements” means.

The EUAA recommends that the AEMC must accept the Panel provisional funding requirements unless it can show why it is “unreasonable” and makes its reasons public.

The EUAA recommends that the AEMC also provide guidance on what the term “there are no reasonable grounds for approving the funding requirements” means.

If the AEMC decides to deny the Panel’s provisional funding requirements as it considers “there are no reasonable grounds”, then the Rules must state that the AEMC be required to conduct a public consultation process (such as a fast tracked Rules Change Consultation process) to determine the new level of funding requirements and consultation process should be finalised within 30 business days.

Further, if the AEMC decide to decline the Panel’s provisional funding requirements and therefore conduct its own formal consultation, the Rules must allow for interim funds to be made available to the Panel to allow it to process end user applications that may arise during the AEMC consultation period.

7. Panel Annual Report

The EUAA supports the proposed Rules change that “the Panel should submit a draft of its annual report to the AEMC by 15 March each year so that the AEMC can provide feedback to the Panel and ensure the report is appropriately accountable prior to the report being published on 31 March”.

8. Panel Funding Criteria

The EUAA generally supports the proposed Rules change that “the Panel should continue to develop the funding criteria, the criteria should be submitted to the AEMC for approval in line with the existing criteria in the Rules”.

In particular, the EUAA supports the proposal that the Panel must determine the funding criteria in accordance with the Rules consultation procedures. As stated above, this will allow the Panel to access valuable information from end user groups and therefore make a more informed decision.

However, the EUAA has concerns with the unilateral authority given to the AEMC under clause 8.10.3 (d) to decline funding criteria if they consider the criteria are not consistent with the principles outlined in clause 8.10.3 (2). The EUAA recommends that the statement “the AEMC *may* approve the funding criteria if they are, to the extent practicable, consistent with the following principles” should be change to state that “the AEMC *must* approve the funding criteria if they:

- Have been through the Rules consultation procedures;
- Are consistent with the Rules and National Electricity Market Objective;
- Specify the procedure for making funding criteria.”

Such a requirement would be consistent with the Rules Change proposed for Application Guidelines (see below for further comments).

If the AEMC decides to maintain the word “may” then the EUAA recommends that the Clause 8.10.3 (d) add that, “and the AEMC must develop new funding criteria in accordance with the Rules consultation procedure”. Allowing the AEMC unilateral authority to deny and change the Panel’s funding criteria is not consistent with the SMO (especially given that end users will be consulted in their development).

The EUAA is opposed to any Rules change proposal that allows a Regulatory body, such as the AEMC, to make an important decision without the scrutiny of stakeholders directly affected by the decision. To do so would be contrary to the consultation procedures outlined in the Rules, the Rule change process and the SMO.

9. Application Guidelines

The EUAA supports the proposed Rules change that application guidelines “should be submitted to the AEMC for approval. The AEMC must approve them if they:

- Have been through the Rules consultation procedures;

- Are consistent with the Rules and National Electricity Market Objective;
- Specify the procedure for making application.”

10. Expiry of Funding Arrangements

The EUAA supports the proposed Rules change to “remove the sunset clause bearing in mind that the arrangements will be replaced on 1 Jan 2007 by the long term model”.

11. Other Issues

Apart from the MCE proposed Rules changes, the EUAA believes that the AEMC should use this opportunity to also consider transitioning matters that the MCE agreed to as part of the long-term funding model. In particular, the EUAA urges that the AEMC consider whether it is possible, through the current Rules change review, to:

- Provide greater clarity and guidance on the Principles of Funding Criteria under clause 8.10.3(2).
- Provide for end user groups accessing funds to assist them better participate in gas policy and regulatory matters.
- Provide for end user groups accessing funds to assist them better participate in appeals against AER regulatory decision-making.
- Outline principles in the Rules on the Conduct of Panel Members and their Decision-Making.
- Consider the appropriate level of Remuneration of Panel Members.

The remainder of this section provides comments in support of each of these issues.

11.1 Principles for Funding Criteria

Clause 8.10.3(d) outlines seven principles that the Advocacy Panel must take into consideration when considering the validity of funding applications. The EUAA supports the notion of providing guidance in the Rules to the Panel to assist with their decision-making based on a set of appropriate criteria. We also believe that the Panel’s decisions need to be – and be seen to be – rational, logical and objective.

However, our experience with dealing with the Advocacy Panel to date has shown that the Panel’s interpretation of the existing funding criteria resulted has resulted in it rejecting a number of funding applications on useful end user advocacy projects that would have benefited all end users. We emphasise that it is not just our own applications that we are referring to.

In particular, the Panel has given far too much weight to the first principle listed in the Rules, being diversity in the allocation of funding. It is the strong opinion of the EUAA that a greater focus on diversity, at the expense of the other principles, is inappropriate and unlikely to result in the most effective allocation of Advocacy funds.

Furthermore, the EUAA considers too great an emphasis on diversity in funding can contradict the more important Panel objective of distributing funding on advocacy projects in a cost-efficient manner so as to maximize the impact of limited funds. In our view and based on our experience to date, there should be more emphasis given to allocating funds efficiently and effectively so as to maximize the impact of the 'advocacy dollar'.

Hence, the EUAA recommends that the AEMC use the current Rules change process to better clarify the relative importance of the seven criteria as outlined in clause 8.10.3(d). In particular, the EUAA recommends that the AEMC should stipulate in the Rules that all criteria are relevant and that the Panel should give significant weight to criteria (2) and (3) in deciding on funding applications.

11.2 Gas Advocacy

The MCE has clearly stated that gas advocacy will be included under the new long-term funding arrangements:

The MCE has determined that consumer advocacy arrangements for both electricity and gas should be dealt with the same funding body to build on the developing synergies in electricity and gas regulation (Attachment A, AEMC sec. 95 notice).

We strongly support this view and believe it should be treated with some urgency.

The EUAA believes this is an important matter given the MCE's extensive gas reform agenda and the rapid developments that are taking place in the gas market at present. The gas reform agenda will also have a significant role in shaping the development of gas fired generation in the NEM and commercial and personal decisions made by end users as to the cost-effective fuel mix (gas and/or electricity).

Based on our knowledge and involvement in this gas agenda, we are concerned that a number of very critical decisions will be made on gas during 2006 and that these will shape the future of gas (and gas fired generation) for the foreseeable future. End users will be seriously disadvantaged if they are unable to access funds for advocacy.

Hence, it is imperative that users have access to funding to effectively participate in the current MCE gas reform agenda to ensure that end users views are appropriately considered in the policy formation stage.

The EUAA recommends that the AEMC implement appropriate Rules changes that allows end user groups to access Panel funding for gas policy and regulatory issues as part of the current Rules change process. If there are any policy or legal difficulties with this, then the EUAA urges the AEMC to make this known urgently to end user groups and take the matter up with the MCE.

11.3 Merits and Judicial Reviews

This issue is dealt in detail within the EUAA final submission to the SCO's Consultation on MCE Review of Decision-Making in the Gas and Electricity Regulatory Frameworks. In summary, the current review arrangements have the

effect of excluding end users from review/appeal processes, explicitly and/or because of lack of access to adequate resources to support participation. In particular, significant ‘free-rider’ problems exist in terms of an individual end user bearing the costs of pursuing a review of a regulatory decision and the benefits of correction of the regulatory error being disbursed among all users.

Allowing individual end users or an end user representative body to access consumer advocacy funds to finance an appeal overcomes the ‘free rider’ problem as the costs of an appeal are spread across all end users, as are any benefits that flow from the correction of regulatory error. It is also consistent with the principles behind end user advocacy that

Providing end users with access to consumer advocacy funds is also consistent with the SMO and the MCE’s desire to obtain a more even balance between end user and supply side input into the energy market policy and regulatory process.

Hence, the EUAA strongly recommends that the AEMC broaden provision 8.10.3(2)(ii)(B) as part of the current Rules change process to include access to Advocacy Panel funding for end users wishing to run and/or participate in a review of AER’s regulatory decision-making.

11.4 Conduct of Panel Members and Decision-Making

The EUAA believes that the AEMC should use the current Rules change process to embed in the Rules guidelines and procedures for the conduct of panel meetings, decision-making and the conduct of Panel members.

Our recommendation is based on our experience in dealing with the Panel. In particular, our experience highlights significant inconsistencies and a lack of transparency in decision-making. For example, feedback on Panel decisions on funding applications has been extremely variable. On occasions the EUAA has received immediate feedback on the outcomes of funding applications. On other occasions, it has taken up to two weeks to obtain feedback. Currently, the Panel is not required to publish reasons for decisions and in the past this has led to patchy and unclear feedback. Sometimes the Panel has provided a rationale for a decision, on other occasions it has only stated if it has accepted, rejected or altered an application without any rationale. This makes it extremely difficult for end user groups to perform their advocacy activities effectively and in a timely manner.

Hence, the EUAA believes that the AEMC should use the current Rules change process to provide greater clarity for end users by including guidelines and procedures in the Rules for the conduct of panel meetings, decision-making and the conduct of Panel members. The guidelines and procedures should be structured around normal accepted conduct for similar ‘public’ funding organizations, consistent with the SMO and be accountable back to end users.

The EUAA also recommends that the AEMC outline in the Rules that the Panel should aim to minimise its administrative and overheads costs. In particular, the AEMC should consider introducing a Rule that stipulates that the Panel must maintain overhead and administrative costs at or below 10% of total Advocacy Panel funding for any given financial year (we understand this to be an acceptable benchmark for

funding schemes). In its most recent funding year, the administrative and overhead costs of the panel were more like 30%. The Panel should be required to report on its financial performance against this benchmark in its Annual Report.

11.5 Remuneration of Panel Members

Finally, we are concerned that the severe reduction in remuneration for Panel members imposed by the AEMC is poorly thought out and is creating problems in attracting good quality people to the Panel. The AEMC has reduced the remuneration for Panel members from \$750/day to \$150/day. This recently created severe problems in being able to attract a Business Consumer Representative to the interim Panel. A number of potential candidates were approached who were interested in being appointed but either declined to accept or were very reluctant to do so, with the poor level of remuneration being the main factor. The EUAA wrote to the AEMC about this on 31st January (see email from Executive Director of EUAA to Chair of AEMC). To date there has been no reply from the AEMC.