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Orderly Exit Management Framework: Exposure Draft Bill and Exposure Draft Rules

The Australian Energy Council (AEC) welcomes the opportunity to make a submission in response to the NSW Department of Climate Change, Energy, Environment and Water's (NSW DCCEEW) Orderly Exit Management Framework: Exposure Draft Bill and Exposure Draft Rules (OEMF Draft Bill and Draft Rules).

The AEC is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching Net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

The AEC submitted to the Consultation Paper in February 2024. [1] The practical challenges outlined in that submission remain, with reasonably minor changes to the OEMF from Consultation Paper to Draft Exposure Bill and Rules. This submission does not seek to re-prosecute these issues, but rather focus on a discrete set of issues with the drafting.

The AEC notes that since the release of the Consultation Paper, the NSW Government secured a voluntary agreement with Origin Energy to operate the Eraring Power Station until August 2027. [2] What is interesting to observe with this voluntary agreement is both how transparent the terms of the voluntary agreement are, and the targeted nature of the voluntary agreement. If the NSW Government had relied instead on the OEMF, the nature of the agreement would be far less targeted to the needs of both the NSW Government and the requirements of Origin Energy. Where a voluntary agreement is struck, the AEC does not believe the OEMF information provision requirements should apply.

The AEC remains of the view that voluntary agreements negotiated well ahead of reliability issues emerging are a superior way to deliver an orderly transition. Further, there is no barrier to voluntary agreements being struck between generators and jurisdictions which would be resolved through the OEMF. The key risk to an orderly transition is that Government's may have unrealistic expectations about what can be done with older generating assets approaching end of life. The OEMF, which should be used only as a last resort measure [3], does nothing to address that potential mis match in expectations in ahead of time. To avoid this situation, voluntary discussions planned for ahead of time, are superior to relying on a last resort measure triggered when closure becomes imminent.

The OEMF should not be retrospective

The retrospective nature of the OEMF, where the OEMF is triggered if an early closure proposal is submitted after 31 December 2020 should be reassessed. Given consultation on the OEMF commenced with the release of the Consultation Paper on 15 December 2023 and is ongoing, the AEC suggests 30 June 2024 as a more reasonable early notice proposal trigger.

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[1] https://www.energycouncil.com.au/media/zdhdswm1/20240209-aec-submission-to-orderly-exit-management-framework-consultation-paper-final.pdf

[2] https://www.environment.nsw.gov.au/news/nsw-government-secures-2-year-extension-to-eraring-power-station

[3] Noting that there is nothing in the Draft Bill or Rules that ensures the MOD is used as a last resort, and in fact if there are less than 30 months before the expected early closure date of the generating unity, the Minister is able to issue a MOD without being required to obtain advice from AEMO or attempting a good faith negotiation with the generator with the aim of reaching a voluntary agreement – the MOD could in fact be used as a first resort in this scenario.

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MOD generators should be made whole

If a generator is subject to a Mandatory Operation Direction from a Minister, it must be kept whole. However, the Draft Rules contemplate scenarios where costs the MOD generator incurs which are outside of its control, are not able to be recouped if they fall under materiality thresholds.

For example, Clause 4B.F.20 in the draft rules, which governs the application for review of final generator payments determination creates this issue. The clause says that if an adverse event happens (ie. Something outside the control of a MOD generator), the generator can apply to the AER for different generator payments. However, these generator payments are subject to the capex resulting from the adverse event being greater than $50 million. That is, if a MOD generator suffered an adverse event outside its control, and it resulted in capex of $49 million, the MOD generator incurs that capex with no generator payment covering the cost. In addition, in the case of short run marginal costs (SRMC), if the adverse event increases the MOD generator SRMC, the SRMC must increase by 10% for a higher generator payment to be paid. For SRMC of less than 10%, the MOD generator is expected to incur the higher cost without compensation.

Neither of these materiality thresholds are reasonable and should be struck out from the Final Rules so that MOD generators are kept whole.

Prescribed Information and Ministerial discretion remain of concern

The AEC notes that some changes have been made to the timing of the provision of Prescribed Information. While the changes are a move in the right direction, the timing remains onerous, with the bulk of the Prescribed Information required when a notice of closure date is brought forward. We remain of the view we outlined in our submission to the Consultation Paper on the appropriate timing of Prescribed Information. We also remain concerned with the lack of confidentiality protections for the Prescribed Information, and request that be added to the drafting.

The AEC also notes some changes to the level of Ministerial discretion in that the Minister will be required to issue reasons for making decisions. However, better regulatory practice would involve a merits review / appeal process to apply to both Ministerial decisions and AER decisions.

The AEC would also like to see an obligation on the Minister to consider plant information when setting performance obligations in the MOD. The draft rules state the Minister may commission an independent technical audit report which includes whether the generator can run in order to address the system need shortfall. This report should be submitted up front in the Prescribed Information. Clause 118AC(4) only requires the Minister to consider AEMO's system needs assessment when making a MOD. The Minister should also be required to consider the generator technical information as well. 20 business days to respond to the draft MOD is also too short given it will contain performance obligations, operating modes and insurance coverage.

Force majeure provisions require further refinement

The force majeure provisions require further refinement to ensure they are geared towards assets that are already beyond their design life. For example, "normal wear and tear" is not currently covered as a force majeure event. Performance exclusions should also recognise situations where it becomes too late for necessary maintenance or ordering critical parts etc which might have otherwise been done in line with good industry practice.

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