



Government of Western Australia
Energy Policy WA

Improving the Rule Change Panel appointments process

Directions Report

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Abbreviations

The following table provides a list of abbreviations and acronyms used throughout this document. Defined terms are identified in this document by capitals.

Term	Definition
EPWA	Energy Policy WA
the Panel	The Rule Change Panel
WEM	Wholesale Electricity Market
Panel Regulations	Energy Industry (Rule Change Panel) Regulations 2016
Market Rules	Wholesale Electricity Market Rules
GSI Rules	Gas Services Information Rules
GSI Regulations	Gas Services Information Regulations 2012
MAC	Market Advisory Committee
GAB	Gas Advisory Board
AEMO	Australian Energy Market Operator
ERA	Economic Regulation Authority
IMO	Independent Market Operator
AEMC	Australian Energy Market Commission
Takeovers Panel	The Federal Takeovers Panel
Guidance Note	Takeovers Panel Guidance Note 11 – Conflicts of Interest
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Technical Rules	Western Power's Technical Rules
the Minister	Minister for Energy

Executive summary

Strict eligibility criteria in the Energy Industry (Rule Change Panel) Regulations 2016 (Panel Regulations), designed to avoid conflicts of interest, have made it difficult to identify suitably qualified Western Australian-based candidates for Rule Change Panel (Panel) appointments.

Energy Policy WA (EPWA) has developed recommended changes to the Panel Regulations to broaden the potential composition of the Panel and improve the process to appoint Panel members.

Increasing the number of Panel members and expanding the scope of eligible candidates will provide the Panel with a greater range of expertise to consider rule change proposals relating to an increased scope and complexity of matters, including as a result of the implementation of the Energy Transformation Strategy.

These changes will also improve succession planning for the Panel and remove barriers to the appointment of sufficiently qualified Panel members located within Western Australia, while avoiding the cost and complexity of a more fundamental reform to the design and operation of the Panel and associated rule change processes.

This report recommends the following arrangements.

- An increase to the number of Panel members from three to five, thereby creating a pool of suitably qualified persons able to manage the anticipated increase in volume and complexity of the Panel's workload.
- Modified eligibility criteria for Panel member appointments to allow the potential appointment of suitably skilled public servants (outside of EPWA and the Economic Regulation Authority) and persons employed in the energy industry, including market participants and consultants with market participants as customers (excluding persons employed by the Australian Energy Market Operator).
- New disclosure requirements and procedures for both professional and personal conflicts of interest.
- Removal of the restriction on Panel members being reappointed only once.
- The quorum of three members remaining unchanged, such that Panel meetings may occur with voting of three to five members.

These changes have been based on a similar model in the form of the Federal Takeovers Panel and the Australian Energy Market Commission, specifically in relation to the size of the Panel and arrangements to manage conflicts of interest.

If implemented, EPWA considers the changes will:

- provide the Panel with a greater range of expertise to assist in progressing an increasing volume and complexity of rule change proposals;
- improve succession planning for Panel members; and
- remove barriers to the appointment of Panel members with significant experience in the nature and operations of the Western Australian energy sector.

1. Introduction

This report examines challenges associated with the structure of the Rule Change Panel (the Panel), which performs the rule-making function for the Wholesale Electricity Market (WEM) and Gas Services Information (GSI) arrangements in Western Australia. These challenges are materially affecting the ability to identify suitably qualified Western Australian-based candidates for Panel appointments. Proposed changes to market governance arrangements associated with implementation of the Energy Transformation Strategy are expected to further increase the scope and complexity of rule-making activities of the Panel.

Energy Policy WA (EPWA) has reviewed similar bodies to the Panel to develop proposals for change, including addressing challenges associated with the size of the Panel and arrangements to manage conflicts of interest. These proposals have been informed by consideration of the design of the Federal Takeovers Panel (Takeovers Panel)¹, established pursuant to Part 10 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act); and operational arrangements of the Australian Energy Market Commission (AEMC), established pursuant to the *Australian Energy Market Commission Establishment Act 2004* (South Australia), with the functions of the AEMC being set out in section 6 of that Act.

The Takeovers Panel is the primary forum in Australia for resolving disputes about a takeover bid until a bid period has ended, holding functions and powers conferred on it by the *Corporations Act 2001* and a full-time executive that assists members in performing these functions. This panel comprises five members and is a peer review body with appointments drawn from active participants of Australia's takeovers and business communities, such as lawyers, investment bankers and corporate advisers.

The AEMC is an independent statutory body with two key roles: making and amending rules for the National Electricity Market, elements of the natural gas market and related retail markets; and providing strategic and operational advice to the Council of Australian Governments Energy Council.²

The paper is structured as follows:

- Section 2 summarises the role and functions of the Panel as outlined in the Energy Industry (Rule Change Panel) Regulations 2016 (Panel Regulations) and associated regulations, the Wholesale Electricity Market Rules (Market Rules) and Gas Services Information Rules (GSI Rules).
- Section 3 outlines the policy intent of the original design and structure of the Panel and Section 4 discusses the challenges inherent in this design and structure.
- Section 5 details EPWA's proposed regulatory changes and Section 6 outlines proposed next steps and timing.

¹ The Takeovers Panel consists of not less than five members, as may hold office from time to time, appointed by the Governor-General on the nomination of the responsible Minister. The Takeovers Panel has published Procedural Rules made under section 195 of the ASIC Act, which govern its proceedings

² The AEMC consists of at least three and not more than five Commissioners. AEMC Commissioners are appointed in accordance with section 12 of the *Australian Energy Market Commission Establishment Act 2004* (South Australia).

2. The Rule Change Panel

The Panel is an independent statutory body responsible for rule-making functions for the WEM and GSI arrangements. The Panel was established on 24 November 2016 and commenced operations on 3 April 2017.

The Panel has been established under the Panel Regulations and consists of a Chairperson and two Panel members, all appointed by the Minister for Energy (the Minister).

The Panel's functions are conferred on it by the:

- Electricity Industry (Wholesale Electricity Market) Regulations 2004;
- Gas Services Information Regulations 2012 (GSI Regulations);
- Market Rules; and
- GSI Rules.

The Panel's functions are to:

- administer the rule change process and make decisions on rule change proposals for the Market Rules and GSI Rules;
- maintain the Market Procedures assigned to it under the Market Rules; and
- publish documents relating to Panel functions under the Market Rules and GSI Rules.

The Panel also has obligations detailed in the Market Rules and GSI Rules to convene and administer the Market Advisory Committee (MAC) and Gas Advisory Board (GAB), being committees of industry representatives established under the Market Rules and GSI Rules respectively. The committees advise the Panel, the Australian Energy Market Operator (AEMO) and the Economic Regulation Authority (ERA) on rule change proposals, procedure change proposals and matters concerning the evolution of the Market Rules and GSI Rules.

The Minister retains the power to repeal and entirely replace the Market Rules and the GSI Rules. In addition, as part of the Energy Transformation Strategy and the transition to the new market arrangements, the Minister is temporarily empowered to make rule changes on a time-limited basis for these purposes. This power will expire on 1 July 2021.

The Panel is not constituted, resourced or structured to provide expert advice on electricity network technical rules, energy policy matters or to influence the broad direction of changes to markets and associated frameworks. Electricity and gas market policy guidance is provided by EPWA to the MAC, GAB and the Panel, or with respect to the development of the WEM, through a policy statement issued to the Panel by the Minister under Market Rules 2.5.2 and 2.5.3, and Rule 126 of the GSI Rules.³

³ Further information on Panel functions and operations is available at: <https://www.erawa.com.au/rule-change-panel>.

3. Design of the Rule Change Panel

The design of the Panel was intended to preserve, as far as was possible, rule-making arrangements previously overseen by the former Independent Market Operator (IMO), with a key feature being the independence of former IMO Board members from market participants or government.

The IMO was dissolved on 21 September 2018 via gazetted Ministerial Notice. The Panel design was also intended to address some of the resulting concerns about the IMO arrangements regarding market governance structure, including the potential for conflicts of interest arising from combining market operation, rule-making and rule enforcement functions within the same entity. Structural separation of specific functions and a clear delineation of functional roles and responsibilities was determined as being the best means of addressing these concerns.

A further design consideration was the need for the Panel and associated governance arrangements to be simple and cost-effective in both implementation and operation. As a result, the final design did not introduce any material changes to existing rule-making arrangements, including the powers of the Minister, the role of the MAC and the GAB, or to the operation of the WEM and GSI rule change processes.

As outlined in Panel Regulation 9(3), the skills, experience and qualifications relevant to the function of the Panel are broad and generally consistent with the range of skills, experience and qualifications considered relevant for appointment to other energy sector decision-making bodies and public sector boards. This regulation requires that Panel members hold experience, skills or qualifications relevant to functions of the Panel including:

- knowledge of the electricity or gas industry including the electricity or gas markets;
- knowledge of the legislation relevant to the electricity or gas industry;
- tertiary qualifications including in engineering, economics, finance or law;
- experience in the electricity or gas industry in engineering, economics, finance, law or senior management; and
- experience or qualifications in public policy or public administration.

The Panel Regulations also specify strict eligibility criteria for Panel members (Regulation 9(4)), to ensure independence, free from any conflict of interest that might interfere with the proper performance of the Panel's functions. The regulation excludes the following persons from consideration for appointments:

- the Executive Officer of the Panel;
- a member of the ERA (as defined in section 3 of the *Economic Regulation Authority Act 2003*);
- a person employed in the Public Service;
- a market participant; or
- a person who is employed or engaged by a market participant.

In the relatively small pool of suitably qualified and experienced persons in Western Australia, the restrictions have limited the scope of persons who may potentially be available for appointment to the Panel and the nature of their energy industry experience.

4. Challenges inherent in design of the Rule Change Panel

The role, functions and composition of the Panel were always intended to evolve with the development of the energy market. Initial design criteria applied by the former Electricity Market Review in 2015 included that the rule change body should:

- be of sufficient size to conduct the required functions in an efficient and sustainable manner; and
- have, or have access to, adequate rule-making, technical and operational expertise to support sound decision making to achieve improvement in market outcomes arising from market rule changes.

Key limitations of the Panel design have been identified which, taken together, restrict the pool of potential panel members, making it difficult to attract and appoint suitably skilled, experienced and qualified people, particularly individuals based in Western Australia.

Further, with the continued implementation of the Energy Transformation Strategy, it is expected that the work of the Panel will increase and become more technically complex. For example, it is intended that parts of the (presently separate) Technical Rules⁴ (such as the generator connection standards and frequency operating standards) will be incorporated into the Market Rules.

The key limitations are discussed below. Amendments to the Panel Regulations are required to address these deficiencies and ensure the Panel remains able to perform its functions effectively.

Number of Panel members

As the Panel's rule change workload may increase, in both volume and complexity, over time, with only three members and restrictive eligibility criteria it will likely become increasingly challenging for the Panel to address issues in a timely manner.

The restriction to the appointment of three Panel members also means any opportunities for mentoring of incoming members is limited and succession planning is compromised.

Eligibility of members and term

The pool of potential panel members in Western Australia is already small and replacing retiring members is proving increasingly difficult because of the restrictive nature of the eligibility criteria discussed at Section 4 above, and the ability to renew a panel member's term only once. Currently, there are very few potential members in Western Australia, that have both the requisite experience and independence.

The former Public Utilities Office conducted an informal recruitment process to attempt to identify suitable persons for future Panel appointments. This process was unable to identify any potential available candidates based in Western Australia.

⁴ Technical Rules provide the standards, procedures and planning criteria governing the design, construction and operation of a covered electricity network (under the Electricity Networks Access Code 2004) and the requirements for the facilities, loads and generators that connect to the network to meet reliability, power quality and safety standards. Currently the only covered network in Western Australia is the Western Power owned transmission and distribution network.

Conflicts of interest

Panel members must not be engaged in the business of the energy market in Western Australia, under the current eligibility requirements. As a result, professional conflicts of interest are not presently encountered. Members may still have personal conflicts of interests. Panel Regulations 20 and 21 set out how these interests should be disclosed and consequential voting arrangements. However, these provisions have rarely been required.

EPWA considers that conflicts of interest can be effectively managed by the Panel and its Executive Officer with appropriate procedures, if eligibility to the Panel is expanded.

5. Rule Change Panel operation – proposals for change

To overcome the challenges described in Section 4, it is proposed that a new model, drawing in part on the arrangements of the Takeovers Panel and AEMC, be adopted. The proposed changes are:

- an increase in the number of Panel members from three to five members, thereby creating a pool of qualified persons able to manage the anticipated increase in workload volume and complexity, and manage potential conflicts of interest;
- modified eligibility criteria for Panel member appointments to include suitably skilled public servants (excluding EPWA and ERA employees) and persons employed in the energy industry (excluding AEMO employees), including market participants and consultants engaged by market participants;
- new disclosure requirements and procedures for both professional and personal conflicts of interest; and
- the removal of the restriction on Panel members being reappointed only once.

The quorum of three members is proposed to remain unchanged.

Regulatory changes required to give effect to the proposed solution are detailed below.

5.1 Number of Panel members and quorum

Under Panel Regulation 4(2), the Panel consists of three members appointed by the Minister. Panel Regulation 14 requires meetings to have a quorum of three members and decisions are made by a majority vote in accordance with Panel Regulation 16.

A larger number of Panel members (five members) would allow for a greater range of expertise and assist in the timely assessment of rule change proposals. Additional membership would also assist in the management of an expected larger volume of conflicts of interest (see Section 5.3 below).

This arrangement would also support succession management, enabling a new Panel member to be supported and mentored by experienced and retiring members.

No change is proposed for the quorum under Panel Regulation 14. It would remain at three Panel members, such that Panel meetings could occur with three, four or five members present. The Panel Chairperson would have a casting vote in the event of a deadlock on a particular matter.

Recommendations

Amend Panel Regulation 4(2) to increase the number of Panel members from three to five.

Amend Panel Regulation 16 to provide for the Chairperson to have a casting vote in the event of a deadlock in deciding a particular matter.

5.2 Independence and eligibility for appointment as a Panel member

Panel Regulation 9(4) specifies those persons who are not eligible for appointment as Panel members. Currently, these include members of the ERA, all Western Australian public servants, market participants, and those employed or engaged by market participants.

EPWA recommends that suitably-skilled public servants (outside of EPWA) be eligible for appointment as Panel members. Public servants working within EPWA would be expected to experience conflicts of interest, or at least perceived conflicts, on all matters considered by the Panel and should therefore remain excluded.

EPWA also recommends that persons working for, or engaged by, energy market participants should be eligible for appointment to the Panel, including consultants, however excluding AEMO employees. No change to the restriction on members of the ERA is recommended.

Giving effect to this arrangement through the removal of Panel Regulation 9(4)(d-e) would significantly increase the number of potential Panel members, especially those residing in Western Australia. Section 5.3 below outlines a more detailed regime to manage the potential conflicts of interest that may arise from this approach, noting that the intent would be to recruit persons with limited conflicts of interest.

Recommendations

Amend Panel Regulation 9(4)(c) to exclude only the Coordinator of Energy and those public servants working directly under the Coordinator of Energy from potential appointment to the Panel and remove Panel Regulations 9(4)(d) and 9(4)(e). The exclusion applied to persons employed by the ERA should be retained.

Amend Panel Regulation 9(4) to provide that AEMO employees are excluded from appointment to the Panel.

5.3 Conflicts of interest

Panel Regulations 20 and 21 currently apply if Panel members have a material personal interest in a matter being considered by the Panel. Panel Regulation 20 requires a member of the Panel who has a material personal interest to disclose the nature of that interest to the other members of the Panel.

Pursuant to Panel Regulation 21, if a Panel member has a material personal interest in a matter being considered, that member is not permitted to vote on the matter and must not be present while the matter is being considered. However, the Panel is empowered to resolve that an interest should not disqualify a member from considering or voting on a matter. The Minister is also similarly empowered.

There is currently no need for the Panel Regulations to address any other types of conflicts of interest, such as commercial and professional interests. The restrictive eligibility criteria significantly limits the potential for these types of conflicts to arise.

If the pool of eligible persons under Panel Regulation 9(4) is expanded, as recommended at Section 5.2 above, it will be necessary to broaden the disclosure requirements and process to also include commercial and professional conflicts of interests, which will inevitably arise.

It is therefore recommended that the current conflicts resolution process contained in Panel Regulations 20 and 21 be expanded to include both personal and professional conflicts. If the Chairperson has a conflict of interest and should not consider a matter, he or she should appoint an acting Chairperson (free from conflict and taken from the general Panel members) who should fulfil the role for the relevant matter.

It is also recommended that the disclosure requirements and process be expanded upon in a separate procedure, with similar arrangements to those contained in the Takeovers Panel Guidance Note on Conflicts of Interest⁵, where more detail can be set out without extensive modification to the Panel Regulations.

Panel Regulation 22 allows the Panel to determine its own procedures (except to the extent that procedures are already provided for in the Panel Regulations, the GSI Rules or the Market Rules), and so could be utilised for providing greater guidance on conflicts of interest. It is envisaged that potential Panel members would disclose conflicts of interest to the Chairperson both prior to their appointment and on a continuous basis. Parties should also be permitted to raise perceived conflicts of Panel members for review.

With no change proposed for the quorum under Panel Regulation 14, if a Panel member is conflicted from time to time, Panel meetings could still occur with three or four members present. The Panel Chairperson would have the casting vote in the event of a deadlock on a particular matter as per the recommendation at Section 5.1.

Recommendations

Expand Panel Regulations 20 and 21 to apply to both professional and personal conflicts of interest.

Separate procedures should also be determined for handling conflicts of interest, using the power contained in Panel Regulation 22 and using content similar to the Takeovers Panel Guidance Note.

The Panel Regulations should also be amended to allow parties to be permitted to raise perceived conflicts of Panel members with the Chairperson.

5.4 Term of office

Panel Regulation 11 provides that Panel members are appointed for a fixed period of no more than four years and are eligible for reappointment only once after their initial term. If a Panel member is initially appointed for a period of only one year, the total number of years that member may serve the Panel is greatly reduced (one year, plus a further term of up to four years). This is not in keeping with the desire for greater flexibility for the Panel to meet the current challenges outlined in Section 4 above, nor does it support succession planning.

⁵ Guidance Note 11 – Conflicts of Interest is available at: www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN11_2009.pdf

Recommendation

The restriction on Panel members being reappointed only once, under Panel Regulation 11(3), be removed.

6. Next steps

EPWA will seek to progress the proposed regulatory improvements outlined in this report as soon as practicable, subject to the Minister's endorsement. A proposed implementation timeline is detailed below.

Table 1.1 Implementation schedule for changes to the Panel Regulations

Milestone	Indicative Timing
Ministerial endorsement of recommendations outlined in Directions Report and drafting instructions for required amendments to the Panel Regulations	December 2019
Publication of Directions Report Draft Amendment Regulations released for consultation	February 2020
Finalised Amendment Regulations submitted for Executive Council approval and publication in Government Gazette	April 2020