

Transpower's comments on proposed draft rules giving effect to Commerce Commission conditions

Suggested drafting changes are marked up in the text of the rule change.

<p>CONDITION 1</p>	<p><i>Prior to the Rulebook coming into effect, the Rulebook must be amended to include rules that provide that where the Electricity Governance Board established under the Rulebook ("the EGB"), in its discretion, considers that a proposal for a pro-competitive and public benefit enhancing rule change is being blocked or unduly delayed, the EGB may require that the proposal for such a rule change be put to a vote, notwithstanding that a working group has not completed its consideration of the proposed rule change.</i></p>
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Proposed Rule	Transpower Comment
<p>Part A, Section IV as a new rule 1.5</p>	
<p>1.5 Board has discretion to put proposal to vote where delay</p> <p>If at any time the Board considers that a proposal for a rule change is being or has been blocked or unduly delayed, and the Board considers that the rule change may be pro-competitive and likely to be of benefit to the public, the Board may, subject to rule 1.6, put the proposal to a vote in accordance with rule 2, notwithstanding that the working group has not completed its consideration of the proposed rule change.</p>	<p>Transpower is concerned at the potential timeframes required for the proposed rules to be effective in achieving the requirements of condition 1.</p>
<p>1.6 Process for putting proposal to vote where delay</p> <p>Where the Board wishes to put a proposal for a rule change to a vote under rule 1.5, the Board must:</p>	
<p>1.6.1 Notice to working group</p> <p>Notify the working group responsible for the proposal accordingly. The Board may require the working group to provide a report on the rule change within 30 days of such notice (or such shorter period as the Board may specify), such report to satisfy the requirements of Schedule A3 for working group reports as far as is possible in the circumstances.</p>	

<p>1.6.2 Board to consider working group's proposal</p> <p>Consider the working group's report <u>(if required by the Board)</u> and publish the report on the Board's website.</p>	<p>The Board has a discretion to require the working group to provide a report. Drafting of this rule needs to reflect that discretion.</p>
<p>1.6.3 Consider issues</p> <p>Carry out any steps required of the working group under rule 11 of Schedule A3 which were not completed by the working group and the Board may repeat any of those steps which were completed by the working group. <u>For the purposes of rules 12 and 13 of Schedule A3, a submission, response or report requested by the Board under this rule will be deemed to be a request by a working group</u></p>	<p>The additional wording gives the Board all of the powers of the working group under Schedule A3 in relation to the steps to be taken under rule 11. Without this the Board is unable to effectively stand in the shoes of the working group as contemplated by this rule.</p> <p>Transpower notes that it has raised concerns in previous submissions regarding rule 11 which it believes have still not been adequately addressed.</p>
<p>1.6.4 Board report and recommendation</p> <p>Prepare its own report on the proposal, such report to include:</p>	
<p>1.6.4.1 Same matters required of the working group</p> <p>All matters which were to be included in the final report of the working group appointed to consider the proposal;</p>	
<p>1.6.4.2 Decision</p> <p>A decision on whether the rule change is <u>likely to be</u> pro-competitive and likely to be of benefit to the public;</p>	<p>The condition does not distinguish different thresholds for the two criteria of pro-competitive and benefit enhancing. Rule 1.5 acknowledges this by referring to the Board considering that a rule change may be pro-competitive. Rule 1.6 needs to be consistent with this. In each case, it is a matter of judgement to be made by the Board and so it is appropriate that both thresholds be framed as "likely" rather than absolutes. This is also consistent with the tests in the Commerce Act which all encompass a "likely" effect.</p>

<p>1.6.4.3 Recommendation</p> <p>Where the Board has decided that the rule change is <u>likely to be</u> pro-competitive and likely to be of benefit to the public, a recommendation on whether the rule change should be made <u>and, where the recommendation is that the rule change should not be made, its reasons for that recommendation;</u></p>	<p>The Board should articulate its reasons for any recommendation against the rule change.</p>
<p>1.6.4.4 Minority view</p> <p>Where the Board is not of a unanimous view as to the matters referred to in rules 1.6.4.1 to 1.6.4.3, the views of dissenting directors; and</p>	
<p>1.6.4.5 Other matters</p> <p>Such other matters as the Board thinks fit.</p>	
<p>1.6.5 Board to publish report</p> <p>The report prepared in accordance with rule 1.6.4 must be published on the Board's website.</p>	
<p>1.6.6 Board to notify</p> <p>The Board must notify the person who made the proposal of its decision and recommendation under rules 1.6.4.2 and 1.6.4.3.</p>	
<p>1.6.7 Board may remit proposal to working group</p> <p>If, after consideration of a proposal under 1.6.4, the Board does not recommend that the rule change should be made, the Board may remit the proposal back to the original working group or to a different working group.</p>	<p>Refer to comments above (at rule 1.6.4.3) suggesting that there is no benefit for the rule change to go back to the working group if the Board has performed all of the tasks that the working group was required to perform.</p>

<p>1.6.8 Board may to put proposal to vote</p> <p>If the Board decides that the rule change is likely to be pro-competitive and likely to be of benefit to the public under rule 1.6.4.2 and recommends that a rule change should be made under rule 1.6.4.3, the rule change shall be put to a vote conducted in accordance with rule Schedule A5.</p>	<p>Heading is inconsistent with the text of the rule which is mandatory.</p> <p>The reference to rule 2 is incorrect. Rule 2 does not deal with rules being put to vote, only the consequences of a rule having being put to a vote. The changes suggested make this rule consistent with the wording in rule 1.8.4.</p>
<p>1.6.9 Only minor drafting changes permitted</p> <p>The Board may only make minor drafting changes to any proposed rule change before it is put to a vote in accordance with rule 1.6.8.</p>	

<p>CONDITION 2</p>	<p><i>Prior to the Rulebook coming into effect, the Rulebook must be amended to include rules that provide that the EGB has the discretion to implement a pro-competitive and public benefit enhancing rule change when such a rule change has been rejected by a vote and an independent body chosen by the EGB considers that such a proposed rule change is pro-competitive and public benefit enhancing.</i></p>
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<p>Proposed Rule</p>	<p>Transpower Comment</p>
<p>Part A, section IV as new rule 2.4.</p>	
<p>2.4 Board may implement a rule change not approved by resolution</p> <p>Where a rule change proposal is put to a resolution and is not passed, but the Board considers that the proposal may be pro-competitive and likely to be of benefit to the public, the Board may, subject to rule 2.5, implement the rule change despite the vote.</p>	

<p>2.5 Process for implementing a rule change not approved by resolution</p>	
<p>2.5.1 Initiate a hearing</p> <p>Where the Board wishes to implement a rule change under rule 2.4, the Board must request a hearing of either:</p> <p>2.5.1.1 Rulings Panel</p> <p>The Rulings Panel under rule 5 of Section V of Part A; or</p> <p>2.5.1.2 Independent Body</p> <p>An independent body appointed in accordance with rule 2.5.2.</p> <p>The Board must request either the Rulings Panel or the independent body to hold a hearing and make a decision on whether a rule change not approved by resolution is <u>likely to be pro-competitive and likely to be of benefit to the public</u>. Such request must be made within 45 business days of the resolution rejecting the rule change.</p>	<p>Transpower does not consider the Rulings Panel to be the appropriate body for this role. One of the central premises on which the governance structures of the rulebook are based is separation of the executive function from the judicial function. Putting the Rulings Panel into the role required by this condition merges those discrete functions.</p> <p>The Rulings Panel is a judicial body and its skill set is determined by this function. The decision required by the condition is more of an expert determination than a judicial one. It is unlikely that the Rulings Panel will have sufficient/appropriate expertise to assess the merits of differing economic opinions put before it.</p> <p>All of the drafting comments below are made subject to this overriding concern at the appropriateness of the Rulings Panel performing this role.</p>
<p>2.5.2 Rulings Panel not to hear certain applications</p> <p>Where the rule change proposal for which the hearing is requested was a proposal recommended by the Rulings Panel, a conflict of interest, the hearing must be before an independent body appointed in accordance with rule 2.5.3.]</p>	<p>The very fact that the Rulings Panel might be conflicted suggests that this is an inappropriate role for the Rulings Panel. If there is a disagreement on whether the Rulings Panel is conflicted, there is no process to resolve that conflict – because the judicial body is a party to it.</p> <p>If Transpower's suggestion to remove the Rulings Panel as a potential hearing body under rule 2.5.1 is adopted, this rule 2.5.2 can be deleted. However, if the option of using the Rulings Panel is retained (which Transpower does not support), Transpower does not agree with the proposal to delete this rule. There should be no option to use the Rulings Panel where there is a conflict of interest.</p>

<p>2.5.3 Appointment of independent body</p> <p>Where the Board chooses to appoint an independent body under rule 2.5.1, it must select either 3 or 5 persons to constitute the independent body, such independent body to be independent, multidisciplinary, and have appropriate expertise in economics, law and the electricity industry. The Board may remove any member of the independent body if that member ceases to be independent or where the member is guilty of serious misconduct. Members of the independent body shall be appointed in writing. The appointment shall last for so long as is necessary to make a decision on the proposed rule change as required by this rule 2.5. The Board will pay the costs of the independent body and will recover those costs from members.</p>	<p>As noted above, Transpower's position is that the Board may only appoint an independent body and not the Rulings Panel.</p>
<p><u>2.5.3A For the avoidance of doubt, the Rulings Panel shall not be appointed as an independent body under rules 2.5.1 and 2.5.2.</u></p> <p>[numbering to be fixed if adopted.]</p>	<p>Deleting express references to the Rulings Panel still leaves open the possibility that the Board might appoint the Rulings Panel as an independent body. Given the inappropriateness of the Rulings Panel having this role, it is desirable to exclude this possibility.</p>
<p>2.5.4 Procedures of the independent body</p> <p>The independent body will adopt the same processes and procedures as the Rulings Panel as set out in rule 5 of Section V of Part A.</p>	
<p>2.5.5 Request for decision and submissions</p> <p>In making a request to the Rulings Panel or independent body for a decision on whether a proposed rule change is <u>likely to be</u> pro-competitive and likely to be of benefit to the public, the Board may provide such background information as it thinks fit as part of the request.</p>	

<p>2.5.6 Request to be made public</p> <p>Where the Board makes a request under rule 2.5.1, the request must be posted on the Board's website, at least 30 business days in advance of any hearing before the Rulings Panel or the independent body. The date on which the hearing is to take place (as informed by the Rulings Panel or the independent body) must be posted on the Board's website alongside the request..</p>	
<p>2.5.7 Any participant may make submissions</p> <p>Any participant person may make submissions at the hearing, by notifying the Rulings Panel or the independent body of its intention to do so at least 10 business days prior to the hearing. All synopsis of the submissions must be provided to the Board and the independent body at least 5 business days prior to the hearing. The Board will post any such submissions on its website within 1 business day of receipt..</p>	<p>All persons should be entitled to make submissions, not just participants. It is vital to the effectiveness of this condition that consumers (including non-major users) be able to participate in the debate on whether a rule change could be pro-competitive and of benefit to the public.</p> <p>There is no justification for a synopsis of the submissions, as opposed to the submissions in their entirety, being published. If the concern is that commercially sensitive information may be contained in submissions, a separate process for assessment and agreement by the independent body that such information is commercially sensitive is more appropriate than adopting a synopsis approach.</p> <p>The approach used should mirror, as closely as possible, that adopted by the Commerce Commission in its public conference process, unless there is a very good reason to deviate from it.</p>
<p>2.5.8 Rulings Panel or independent body to make decision</p> <p>Following the hearing and consideration of the submissions, the Rulings Panel or the independent body must decide whether:</p> <p>2.5.8.1 Rule change pro-competitive</p> <p>The rule change is <u>likely to be</u> pro-competitive; and</p> <p>2.5.8.2 Rule change is like to benefit to the public</p> <p>The rule change is likely to <u>be of</u> benefit to the public.</p>	

<p>2.5.9 Rulings Panel or the independent body must provide reasons</p> <p>The Rulings Panel or the independent body must provide reasons for its decision and will use reasonable endeavours to make its decision within 40 business days of the hearing. As soon as practicable after the Rulings Panel or the independent body has made its decision it will notify the Board and any participant person who made submissions of the decision and the reasons for that decision.</p>	
<p>2.5.10 Decision to be made public</p> <p>The decision of the Rulings Panel or the independent body and the reasons for that decision shall be published on the Board's website as soon as practicable. The Rulings Panel or the independent body may direct that parts of the reasons for the decision not be published where <u>it considers that to do so would disclose commercially sensitive information appropriate</u></p>	<p>The reference to "appropriate" is meaningless and gives a completely open discretion to the independent body. Some parameters need to be expressed and we have suggested commercially sensitive information. Consideration should be given to whether grounds for withholding parts of a decision should tie back to the section in the rulebook on information disclosure.</p> <p>Transpower suggests that the basic premise should be that the decision be made public unless there are good reasons otherwise.</p>
<p>2.5.11 If rule change <u>likely to be</u> pro-competitive and likely to be of benefit to the public</p> <p>Where the Rulings Panel or the independent body finds that the proposed rule change is <u>likely to be</u> pro-competitive and likely to be of benefit to the public, within 20 business days of the receipt of the decision, the Board must prepare a report on the proposed rule change, such report to include the Board's decision on whether the proposed rule change is pro-competitive, likely to be of benefit to the public and whether, in its discretion, the proposed rule change should be implemented. decide whether or not the proposed rule change should be implemented. <u>implement the rule change it must prepare a report within 20 days of the independent body's decision, setting out its reasons for this decision.</u> Before deciding to implement a rule change, the Board may make minor drafting changes to the proposed rule change.</p>	<p>There is no need for the Board to prepare a report if it is going to adopt the rule change. There will already have been either a working group or Board report on the rule change prior to it going to a vote the failure of which has triggered this process.</p> <p>If the Board does not adopt the rule change then clearly it will need to report with detailed reasons for its reasons not to proceed with the rule change, but no other matters.</p>

<p>2.5.12 Board to publish <u>decision or report</u></p> <p>The <u>Board's decision (if it decides to implement the proposed rule change) or report prepared in accordance with rule 2.5.11 (if it decides not to implement the proposed rule change)</u> must be published on the Board's website as soon as practicable. The Board may decide not to publish parts of the report where <u>it considers that to do so would disclose commercially sensitive information appropriate.</u></p>	<p>Consequential changes as a result of the Board not having to publish a report if it decides to implement the rule change.</p>
<p>2.5.13 Implementation</p> <p>If the Board decides to implement the proposed rule change under rule 2.5.11, then the rule change will become effective 10 business days after publication of the Board's report <u>decision</u> on the Board's website, but otherwise in accordance with rule 2.4 [refers to current Rulebook numbering].</p>	<p>If no report needed (as per our comments on rule 2.5.11) then this needs to be changed accordingly.</p>
<p>2.5.14 Rule change proposal will lapse</p> <p>A rule change proposal will lapse where the decision from the Rulings Panel or independent body under rule 2.5.8 did not find the proposed rule change was <u>likely to be</u> pro-competitive and likely to be of benefit to the public or the Board decides not to make the change under rule 2.5.11.</p>	
<p>2.5.15 Board to notify</p> <p>The Board must notify the person who made the proposal of the outcome.</p>	
<p>2.5.16 Rules 2.8 and 2.9 apply [current rulebook numbering]</p> <p>The Board must notify members of the rule change in accordance with rule 2.8.</p>	
<p>2.6 Appeals</p> <p>A decision to implement a rule in accordance with rules 2.4 and 2.5 will not be subject to the right of appeal in rule 3.</p>	

<p>6.1.7—Decision</p> <p>Make a decision as to whether a proposed rule change referred to it under rule 2.5 of section IV is pro-competitive and likely to be of benefit to the public.</p>	<p>Deleted as Transpower does not consider that this should be a function of the Rulings Panel.</p>
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<p>Proposed Rule (change shown in italics)</p>	<p>Transpower Comment</p>
<p>2.3 Rule changes not passed by resolution</p> <p><i>Subject to rules 2.4 and 2.5, where a rule change proposal is put to a resolution and is not passed, the proposal will lapse.</i></p>	

<p>CONDITION 3</p>	<p><i>That within 12 months from the date of authorisation the Rulebook must be amended to include in Part B of the Rulebook rules drafted in consultation with consumer groups to address consumer issues..</i></p>
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<p>Proposed Rule</p> <p>A new section X of Part A called "Rules in Part B"</p>	
<p>X Rules in Part B</p> <p>1. Board to prepare Part B rules</p> <p>The Board shall prepare Part B of the Rulebook, in consultation with interested parties, including <u>all classes of consumers and consumer representatives</u>.</p>	<p>It is not clear how the rules in Part B will be implemented and given effect to. Simply requiring the Board to prepare Part B is not the same as causing it to become an effective part of the rulebook.</p> <p>Who is to vote on part B? Changes will be required to voting arrangements in Part A in order for Part B to be complete. Is it intended that the whole of the membership of the rulebook have the ability to vote on these changes?</p> <p>Interested parties must include all classes of consumers e.g. small domestic consumers as well as major consumers.</p>
<p>2. Part B rules</p> <p>The rules for Part B shall:</p> <p>2.1 Issues raised by Government Policy Statement</p> <p>Without limitation address the consumer issues raised by the Government Policy Statement dated February 2002; and</p>	
<p>2.2 Be consistent with Guiding Principles and the Rulebook</p> <p>Be consistent with Guiding Principles and the Rulebook; <u>and</u></p>	
<p>2.3 Be completed before 30 September 2003</p> <p>Be completed (including amendments to the rulebook) before 30 September 2003.</p>	

<p>CONDITION 4</p>	<p><i>Prior to the Rulebook coming into effect, the Rulebook must be amended to include rules that require the EGB to commission an independent review on the efficacy of Part F, and to publish that review publicly within 2 years from the Rulebook commencement date.</i></p>
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Proposed Rule	Transpower Comment
A new section XI of Part A "Review of Part F".	
<p>XI Review of Part F</p> <p>1. Independent Review</p> <p>The Board must commission an independent review of the efficacy of part F. The independent review must be published on the Board's website within 2 years of the Rulebook commencement date. The Board will pay the costs associated with this process and recover these costs from members.</p>	It is ambiguous as to whether the cost of the review is borne by all members or just the part F members.

OTHER MATTERS	Board's Annual report	
LOCATION	Part A, section 11, rule 2.2	

Proposed Rule	Transpower Comment
<p>2.2.3 Compliance with authorisation conditions</p> <p>An outline of any issues which have arisen and the occurrence of any events related to the rules adopted to meet the conditions of the authorisation granted by the Commerce Commission on 30 September 2002 (including any replacement, amendment or supplement).</p>	