

LEGISLATIVE FRAMEWORK: RESPONSE TO SUBMISSIONS ON THE AMENDMENTS TO THE NEL AND NGL AND NER AND NGR FOR THE ESTABLISHMENT OF THE AUSTRALIAN ENERGY MARKET OPERATOR (AEMO)

During December 2008 and January 2009 the Ministerial Council on Energy (MCE) Australian Energy Market Operator (AEMO) Implementation Steering Committee (ISC) sought comments from interested parties on proposed amendments to the National Electricity Law (NEL), National Gas Law (NGL) and associated rules [National Electricity Rules (NER) and National Gas Rules (NGR)] for the establishment of AEMO. The following tables set out the response to the issues raised during this consultation process. The ISC response to comments on AEMO's market information powers is set out in a separate paper.

Comments to the Common Provisions

No.	Provision	Issue	Comments & Proposed Response
Information etc to be provided to Ministers			
1.	S51 of the NEL S 91C of the NGL	Commercially sensitive information should only be supplied to MCE or Ministers where relevant participant has granted permission.	<p>Noted and partially accepted</p> <p>When providing information under s 51 of the NEL and s 91C of the NGL AEMO will be subject to the confidentiality requirements imposed by Part 5 Div 6 of the NEL and Division 7 of Part 6 of Chapter 2 of the NGL.</p> <p>The confidentiality obligations of Part 5 Div 6 of the NEL and Division 7 of Part 6 of Chapter 2 of the NGL will not apply to the 'adoptive functions' (see s91BB of the NGL and s50A of the NEL) because to do so would restrict the existing right for Ministers in SA and Vic to information from Electricity Supply Industry Planning Council (ESIPC) and Victorian Energy Networks Corporation (VENCorp) (respectively).</p>
2.	S51 of the NEL and s 91C of the NGL	AEMO should be given a power to recover costs from the requesting Minister or MCE where appropriate.	<p>Noted</p> <p>The current framework does not preclude AEMO recovering costs from Ministers or the MCE.</p>
3.	Sections 51 & 51A of the NEL and	In reference to the limited disclosure of "protected information" arising out of a ministerial request - it does not seem appropriate that a company formed by the agreement of a	<p>Not Accepted</p> <p>Save for the adoptive functions, it is inappropriate for Ministers to be in a privileged position relative to the rest of the market.</p>

No.	Provision	Issue	Comments & Proposed Response
	91C and 91CA of the NGL	jurisdiction's government would be able to withhold information from the Government of that jurisdiction.	AEMO will be operated by a Board that is independent of government and industry stakeholders.
Fees and charges			
4.		Considers that it is appropriate for AEMO to charge for services. However, it is inappropriate for AEMO as a monopoly service provider to recover revenues for a service that are greater than the efficient costs of providing such services.	Noted AEMO's governance structure is intended to impose discipline on its costs. The NEL and NGL require AEMO, in carrying out its statutory functions, to have regard to the National Electricity Objective and the National Gas Objective which require efficiency.
5.		Considers that AEMO should not only consult participants in its fee structure, it should also have formal consultation in relation to the setting of its budget to ensure costs are minimised.	Accepted AEMO's constitution will require it to consult members when setting its budget and the rules require consultation when determining AEMO's fee structure.
6.		Would like to seek an effective cost recovery regime and appropriate cost allocation methodologies to ensure that fees do not escalate over time.	Noted The ISC considers that AEMO's governance and membership arrangements will ensure that the cost recovery regime is appropriate.
7.		The Law should require AEMO to publish a statement of how costs are allocated to the various functions of AEMO – considers that clause 2.11.1(e) of Schedule 3 of the proposed Rules is not adequate.	Noted The ISC considers that the requirement to publish the fee structure along with the method used to develop it (r 2.11.1(e)), combined with the public consultation process required by r 2.11.1(a), the skills/industry based Board requirements of AEMO's constitution and scrutiny of members is a relevant level of accountability for AEMO's budget and fee structure.
8.	ss52(3) of the NEL and 91E(3) of the NGL	This is not a provision that a regulated Distribution Network Service Provider (DNSP) or Transmission Network Service Provider (TNSP) is permitted to operate under and it is inequitable that another monopoly service provider in the same industry be allowed such latitude.	Not Accepted This provision will not have any impact on the total costs recovered by AEMO. It is designed to assist both participants and AEMO by allowing AEMO to smooth its cost recovery.
9.	ss52(4) and 91E(4) of the NGL	As TNSPs and DNSPs are required under the NER to submit a Cost Allocation Methodology to the Australian Energy Regulator (AER), it seems appropriate that AEMO also be required to follow similar practices in respect of the services	Not Accepted The ISC does not consider that it is appropriate for the AER to have oversight of AEMO's fees. The proposed process for settling AEMO's budget and participant fee structure is intended to

No.	Provision	Issue	Comments & Proposed Response
		provided under the NEL and NER.	replicate the process currently engaged in by National Electricity Market Management Company (NEMMCO) and also incorporates greater scope for consultation with industry.
10.		The schedule for payment for services in the Network Agreement is not consistent with the approach to revenue recovery established by the AEMC.	Noted AEMO and SP AusNet to ensure network agreement reflects current practice.
11.		AEMO Rules should amend clause 8.2.1(h) to expressly exempt AEMO's budgeting decisions from the dispute resolution procedure.	Accepted AEMO's budgeting decisions will be exempt from the dispute resolution process.
12.		The costs associated with functions should be clearly defined and recovered from the adopting jurisdiction in a manner consistent with current arrangements.	Noted AEMO will be required to allocate costs to the users of the services. As an example, this will mean that the costs of providing the functions previously performed by ESIPC and VENCORP's wholesale market functions will be recovered from SA and Vic users respectively.
13.	S91E	Supports AEMO providing consultancy services in a non-statutory capacity provided that all of the costs of the consultancy, including overheads, are fully recovered. AEMO should not provide consultancy services where there is a conflict of interest. Any profits gained from these consultancies should be used to offset against costs for the purpose of setting fees in the future years.	Noted The cost of consultancy work will be fully recovered from the person seeking the work. The AEMO constitution will provide AEMO may only carry out consultancy work related to its statutory functions and provided it is not inconsistent with the National Gas Law or the National Electricity Law and does not compromise AEMO's functions under these laws. Further, AEMO will operate as a not for profit company with any distribution of profits to members prohibited. Any profit must put back into the company.
14.		Regulated businesses need the opportunity to recover costs incurred by market operator services immediately and based on actual costs incurred, not estimated on forecasts.	Not Accepted The ISC does not consider that it is practical to calculate potentially variable costs except by forecast or estimate.
15.		Fees for operation of AEMO should be focused on those that are able to pass on these costs and benefit most from the creation of a secondary mechanism for the sale of natural gas. Producers tend to have long term contracts that will not allow the pass through of costs and do not benefit directly from the development of the	Noted AEMO will seek to ensure that costs are borne by the parties who benefit from them and are best able to bear them.

No.	Provision	Issue	Comments & Proposed Response
		market.	
16.		Fees for the functioning of the market should be charged only to those participants that actively participate in the Wholesale market (and on the basis of the level of participation).	Noted AEMO will be required to allocate costs to the users of the services.
Information Gathering			
17.		Concerned with AEMO's power to issue Market Information Orders (MIO) and Market Information Notices (MIN) given AEMO is not a regulator. There should be a clear distinction in the functions of the market operator and the regulator.	Not Accepted See attached discussion.
18.		AEMO is a company incorporated under the Corporations Act and not a statutory authority [eg. Australian Energy Market Commission (AEMC) and AER]. Therefore, it seems incongruous that such wide ranging information gathering powers are provided to it.	Not Accepted Although a company limited by guarantee, AEMO is legislatively charged with carrying out particular functions for which it will require information, for example the national transmission planner function. It requires information to support the successful execution of the relevant functions.
19.		The process of issuing and consulting on MINs and MIOs is time consuming, inefficient, costly and combative. Suggests alternatives as follows: - the Law/Rules can provide a broad outline of the information required from participants relating to its planning functions. - Electricity Statement of Opportunities (SOO) process be applied for both electricity and gas SOOs.	Not Accepted See attached discussion.
20.		Appreciates the inclusion of information gathering powers are required for AEMO's obligations as the National Transmission Planner (NTP) and planning functions in general, however, considers that current regime contained in the NER is sufficient for these purposes and there is no need for MIOs/MINs. A case has not been made on why this is required.	Not Accepted See attached discussion.
21.		MINs and MIOs are unnecessary as participants have a history of working with market operators to ensure accurate reports are produced. To introduce MIOs/MINs could undermine the cooperative relations between market participants and AEMO.	Not Accepted See attached discussion.

No.	Provision	Issue	Comments & Proposed Response
22.	S53(2) of the NEL	Considers that these functions are too broad and it is not clear that these provisions are intended to provide the basis for transfer of the ESIPC functions.	<p>Not Accepted See attached discussion.</p> <p>The additional advisory function at s50B of the NEL is intended to replace ESIPC's current functions.</p>
23.	S53(2)(d) of the NEL	Strongly opposes the extension on the use of MIOs/MINs to cover statutory functions administered by AEMO other than those relating to the NTP – suggests that s 53(2)(d) of the NEL be deleted. Also suggests that s 91F(2)(c) of the NGL also be deleted.	<p>Not Accepted See attached discussion.</p> <p>It is important to note that, any extension of the use of MIO/MINs beyond the currently named planning functions would require an amendment to the Law, and as such would ultimately be subject to the scrutiny of the MCE and the South Australian (SA) Parliament.</p>
24.	s53(4) of the NEL	This provision should be amended to require a market information instrument to specify the manner in which the information requested will be used.	<p>Not Accepted See attached discussion.</p>
25.	S53D of the NEL	It is not appropriate that information be shared between AEMO in its capacity as a market operator and transmission planner and AEMO in its capacity as a TNSP.	<p>Not Accepted See the attached discussion.</p>
26.		Concerned that the use of these information gathering powers could become a generic way to gather information and a primary tool for information collection ie. "regulatory creep". Suggests that the type of information AEMO needs to collect for each purpose be limited through being explicitly specified.	<p>Not Accepted See attached discussion.</p>
27.		If MINs/MIOs are used, they should be used as a last resort and consideration should be given to the use of appropriate timeframes for information to be provided to AEMO to avoid unnecessary penalties. The first resort should be the use of voluntary means.	<p>Not Accepted See attached discussion.</p>
28.		If MIOs/MINs were to be used, they should only be authorised through the agency head and the number of instruments used should be publicly reported on an annual basis. This would increase accountability and reflect the seriousness of the information request.	<p>Accepted See attached discussion.</p>
29.		Generators should be explicitly excluded from these	<p>Not Accepted</p>

No.	Provision	Issue	Comments & Proposed Response
		arrangements.	The National Transmission Network Development Plan (NTNDP) will seek to anticipate the future development of the industry as a whole. An essential element of this document will be future generation scenarios. The accuracy or likelihood of these scenarios will be dependent on both existing generator data such as operating costs, and performance parameters and new entrant generator data such as capital and operating costs.
30.	53E of the NEL and 91FE of the NGL	Considers that the penalties for providing false or misleading information is grossly inadequate given the national and commercial implications of such a breach. Suggests that a higher level of fines is warranted.	<p>Not Accepted These provisions are appropriate for providing false or misleading information (see also for a similar offence - s60 of the NEL).</p> <p>It should also be noted that providing false or misleading information is a criminal offence.</p>
31.		Considers that information gathering powers are best placed in the NER rather than the NEL in a section that is related to the NTP function.	<p>Not Accepted Given their import, information gathering powers are more appropriately located in the Law.</p>
32.		VENCorp's information powers are contained in the System Code where the information which must be provided is generally explicit. Suggests that these System Code provisions could be merged into the Rules rather than the Law.	<p>Not Accepted See attached discussion.</p>
33.		Considers that the "reasonable costs" test is insufficient and that additional factors must also be taken into account to determine whether it is reasonably necessary to issue a MIO or MIN.	<p>Not Accepted See attached discussion.</p>
34.		AEMO should be prevented from issuing a MIO/MIN if the recipient is not reasonably able to produce the information and the instrument would impose disproportionate costs or be unduly onerous to the recipient.	<p>Noted See attached discussion and s 53(3) of the NEL and 91F(3) of the NGL.</p>
35.		There should be a requirement to consult with the public when AEMO proposes to issue a MIO/MIN as this is currently in place for the AER. All market participants should be provided with a copy of the proposed instrument and have an opportunity to comment. AEMO should consider these	<p>Accepted in Part See the attached discussion and ss 53A and 53B of the NEL and ss 91FA and 91FB of the NGL which require AEMO to have regard to likely compliance costs before deciding to issue an instrument.</p>

No.	Provision	Issue	Comments & Proposed Response
		comments before making a final decision to issue a MIN/MIO.	
36.		AEMO should not attempt to acquire information from TNSPs under a MIO/MIN.	Not Accepted See attached discussion.
37.		MIO/MINs only apply for collecting information relevant to the Gas Statement of Opportunities (GSOO). There is no clear reason why something that doesn't apply to the electricity SOO should apply to the GSOO. Does not consider MIO/MINs necessary for the GSOO.	Not Accepted See attached discussion.
38.		The information that can be requested for GSOO purposes is already submitted to the Bulletin Board (BB) or is publicly available information. Therefore, it is not necessary to institute the MIOs/MINs as these are very broad ranging powers.	Not Accepted The ISC accepts that there is substantial similarity between the information required for the GSOO and the BB but considers that it is necessary to allow AEMO to gather additional information if required.
39.		MINs/MIOs should be specifically crafted for AEMO's declared system functions and should not remain open to being used for any other purposes.	Not Accepted See attached discussion.
40.		MINs/MIOs should be limited in use for GSOO purposes to those classes of market participant required to provide information to the BB under NGL s 223. Suggests that participants be exempt from providing information to the BB should also be exempt from providing information to the GSOO (NGR Rules 149-151).	Noted See attached discussion. It is anticipated that the persons that are exempt under the National Gas Rules from providing information to AEMO in its capacity as operator of the Natural Gas Services Bulletin Board will not be subject to a market information instrument for the purposes of the GSOO.
41.		Suggests that an alternative to the use of MINs/MIOs would be through the creation of an additional rule requiring market participants identified as having to provide information to AEMO for the purpose of the GSOO should provide the information by a set date. If this information does not comply with this request, AEMO could issue a MIN to the non-compliant participant.	Not Accepted See attached discussion.
42.		Alternatives to the use of MIOs and MINs include the Law and/or Rules providing a broad outline of the information required from participants for the drafting of the GSOO. The	Not Accepted See attached discussion.

No.	Provision	Issue	Comments & Proposed Response
		regulations or procedures can provide more specific information required from participants.	
43.		As AEMO will be responsible for drafting, consulting and making the final decision on MIOs/MINs, some level of separation between the drafting and implementation of the notice is desirable.	Not Accepted It is inappropriate to specify how AEMO should carry out its functions in the Law or Rules.
44.		Suggests that provisions be included which provides a mechanism by which the issuing of a MIN/MIO can be questioned by the recipient. Should also specify on what grounds recipients will be able to challenge the MIN/MIO.	Noted Participants may respond to an initial notice or consultation on an order and may seek judicial review of the service of an instrument.
45.	S91F(1)	Considers that the term "reasonably necessary" is too broad and that there should be clearly defined rules and criteria controlling the use of AEMO's discretion in issuing MIOs/MINs. The use of MIOs/MINs should be defined and limited to the information which it must publish as set out in s135KB.	Not Accepted See attached discussion.
46.	S91FD	Information obtained under this section for GSOO purposes should be published in aggregate form and not any other form.	Noted AEMO will prepare the GSOO with regard to participants' confidential information but it is impractical to aggregate certain types of information such as the capacity of transmission pipelines.
47.		Information obtained through a MIO/MIN should be limited for uses relating to the declared system as there is a risk that participant's confidential information could be misused or mishandled.	Noted See attached discussion.
48.		If participants are exposed to the MIN/MIO framework, careful consideration must be given to the use of appropriate timeframes for information provision to AEMO.	Noted The ISC considers that the timeframes provided for in the NEL and NGL are adequate.
49.		MIO/MINs only apply for collecting information relevant to the GSOO. There is no clear reason why something that doesn't apply to the electricity SOO should apply to the GSOO. Does not consider MIO/MINs necessary for the GSOO.	Not Accepted See attached discussion.
Protected Information			

No.	Provision	Issue	Comments & Proposed Response
50.		Concerned that commercially sensitive information could be passed onto a third party (eg. AER) without the participant's consent and there is no requirement on third party to keep information confidential. Suggests that commercially sensitive information can only be shared by AEMO where the relevant participant has granted permission.	Not Accepted See attached discussion.
51.		Concerned that information supplied to AEMO for a particular purpose could be used against the participant for another purpose. Suggest that information only be used for the purpose that it was collected.	Not Accepted See attached discussion.
52.	S54C of the NEL and 91GC of the NGL	Subsections (1) and (2) of s 54C of the NEL should explicitly state who is authorised to disclose protected information under given circumstances. As s 54C(5) of the NEL explicitly authorises any individual working for AEMO or any body listed in s 54C(2) to disclose protected information, the remainder of the section concerning protected information is rendered immaterial.	Not Accepted The ISC considers that it is inappropriate to attempt to limit disclosure of information in accordance with other Laws and therefore proposes to retain s 54C(1). As discussed above the ISC does not intend to limit disclosure to other energy market bodies and therefore will retain s54C(2) Subsection 54C(5) is intended to allow AEMO staff and their advisers to disclose protected information in accordance with s 54C(2).
53.	S54C(2) of the NEL	This provision allows named organisations ability to obtain information without complying with the terms of their individual enabling legislation. Eg. Australian Competition and Consumer Commission (ACCC) can obtain information from AEMO in the performance or exercise of its functions or powers without complying with s155 of the <i>Trade Practices Act 1974 (TPA)</i> .	Noted See attached discussion.
54.	S54C(5) of the NEL	The intended purpose of this provision is not apparent and undermines the process contained in s 54H and should be deleted. If this clause were to be retained, then it should be made subject to s 54H.	Not Accepted See response at 52.
55.	S54H of the NEL	Powers granted to AEMO under this section appear to extend beyond that necessary for a market operator, a NTP and a TNSP. Notes that NEMMCO does not currently have such	Not Accepted This power is to allow AEMO to disclose protected information where there is public benefit in doing so and it outweighs any

No.	Provision	Issue	Comments & Proposed Response
		powers and is not adversely affected.	public detriment. An area where this may be relevant is in AEMO's role to manage electricity supply shortages.
56.		In the interest of transparency, AEMO should be subject to the same mechanism of information inquiry as the market participants being monitored or investigated.	Not Accepted AEMO requires information gathering powers to successfully perform its functions. The case for subjecting AEMO to information inquiry does not seem to have been made.
57.		Concerned that confidential information could be passed to another regulatory agency and eventually into the public arena to the detriment of the market participant. Suggest that the regulatory agency directly seek the market participant to obtain the information it requires to meet its monitoring and compliance obligations.	Not Accepted See attached discussion.
58.		The powers to obtain confidential material should be implemented through the Rules.	Not Accepted The ISC considers that it is appropriate to put information gathering powers in the Law because of their substantial impact on the rights of participants.
59.		The proposed regime does not provide for merits review. Hence the legislative framework should be more defined including setting out the criteria around which AEMO can exercise its various functions.	Not Accepted The amendments to s244 of the NGL and 71A of the NEL provide for merits review of information disclosure decisions.
60.		Documents provided in response to a MIO/MIN can be confidential to more than one party, such as a third party and third parties should be allowed to seek protection. The Law should specify how the duty to protect the information will work.	Not Accepted It is impractical for AEMO to be required to seek out all people who the information may be confidential to when releasing information under s91GB. It is more appropriate for the onus to be on the party who provided the information to ensure that they have any other parties consent before agreeing to the release of protected information.
61.		As drafted, the NGL does not provide a requirement on the party to which AEMO has provided information to keep that information confidential, thereby undermining the existence of confidentiality.	Not Accepted See the attached discussion.
62.	S91GC(2)(a) of the NGL	Suggests removing the reference to the ACCC in this section as it no longer has a role in energy market regulation and should not be able to acquire information from AEMO without	Not Accepted See the attached discussion.

No.	Provision	Issue	Comments & Proposed Response
		permission from the relevant market participant.	
63.	S91GH(1) of the NGL	Suggests that AEMO does not form a view on the public benefit prior to consultation.	Not Accepted It is appropriate for AEMO to form an initial view that it intends to release the information prior to issuing an initial disclosure notice.
64.	S91GH of the NGL	Considers that the definition of "restricted period" of 5 business days is insufficient for the disclosure of information that was provided to AEMO on a confidential basis as this information is most likely to remain confidential for more than 5 days.	Not Accepted The purpose of the restricted period is to allow a participant to seek merits or judicial review of the decision to release the information prior to its release. It mirrors s239 of the current NGL.
65.	S91GH of the NGL	Allowing AEMO the power to release information where it is considered to be in the public benefit undermines the notion of any confidentiality.	Not Accepted This provision requires AEMO to perform a balancing test that the benefit outweighs the detriment.

Comments on the National Electricity Law

No.	Provision	Issue	Response
Division 7 NTP Function			
1.		Concerned that AEMO's NTP responsibilities are limited to the NEL objective and does not include social or environmental considerations.	Not Accepted The national electricity objective is considered appropriate to govern the discretion given the focus on efficiency and the long term interests of consumers.
2.		Dual function assets are not relevant to the functions of the NTP and information relating to these assets should not be required to be provided to AEMO.	Noted Particular assets are not 'exempted' from the NTNDP. The NTNDP will focus on the national flow paths which may reduce the need to obtain information about dual function assets. Delivery of the NTP function is an operational issue for AEMO and one for negotiation and consultation between AEMO and those network service providers controlling dual asset functions.
3.		NEL should also include an NTP objective or guidance on factors to which AEMO must have regard to in performing its NTP functions such as: <ul style="list-style-type: none"> - Focus of the NTP on strategic, long term, high level planning; and - Avoiding duplication of the planning which NSPs have to do to meet their obligations with respect to reliability. 	Not Accepted Consistent with the MCE Response to the AEMC's Final Report on National Transmission Planning Arrangements, the ISC considers that the National Electricity Objective is adequate to cover the NTP function and does not wish to compromise the single objective by introducing supplementary objectives.
4.	S50F	Considers that this section needs to state clearly that any augmentation recommended should be economically justified and have considered alternative initiatives including DM and Distributed Generation (DG) measures. Should also allow for consideration of the long-term interests of consumers as well as the social and environmental implications. This section should also provide for the NER to stipulate how information relevant to augmentation decisions is to be	Noted S50F(2)(a) specifies that a cost benefit analysis must be undertaken of any proposed augmentation. The probabilistic approach required under paragraph (2)(b) involves a balanced consideration of network and non-network alternatives with the primary aim being to ensure investments result in customers receiving a service at an economically efficient cost. Clause 5.6A.3 of the NER specifies that the NTP must

No.	Provision	Issue	Response
		collected and reported by the TNSPs to facilitate decision making by AEMO as the NTP.	ensure that its development strategies for national transmission flow paths are consistent with the co-optimisation of network and non-network alternatives.
5.		Information gathering powers of AEMO should be strengthened to include non-network options such as DM and DG measures.	Noted The proposed scope of the information powers and applying these powers to DM and DG is not precluded.
6.		Information gathering powers of AEMO in its role as NTP should clearly define the format and required content of the information to be gathered from TNSPs to ensure that the TNSPs collect data that is useful for AEMO's assessment and development of the NTNDP.	Noted See attached discussion.
Other Comments			
7.	S110(3)	Allowing AEMO to be appointed as a jurisdictional system security co-ordinator in multiple jurisdictions removes the checks and balances inherent in having two separate bodies responsible for load-shedding.	Noted This provision is designed to allow AEMO to continue to perform VENCORP's role in Victoria. It is not anticipated that AEMO will perform this role in other jurisdictions but as part of incorporating the function in the national framework it was necessary to express the power broadly.
8.	S115A	It is unnecessary for AEMO to refer a load shedding arrangement to the jurisdictional Minister for determination. Rather, this is more appropriately classified as an access dispute.	Not Accepted The ISC considers that load shedding arrangements are principally the responsibility of governments because of their significant impact on the general public. It should also be noted that emergency management remains primarily the responsibility of jurisdictions and that the current arrangements where jurisdictions approve load shedding tables and asset owners perform the load shedding will remain in place.
Preliminary and definitions			
9.		Suggests that the definition of "Activity" is unnecessary and should be deleted as it has broad consequences including creating confusion in the scope of those requiring to be registered.	Accept The definition of "Activity" will be deleted
10.	S71A	Definition of "small/medium user or consumer intervener"	Noted

No.	Provision	Issue	Response
		is not used in the draft legislation and should be deleted.	The definition is included here as it was accidentally omitted from the 2007 amendments to the NEL.
Division 1: General			
11.	S49(1)(a)	Draft legislation alters the role of the market operator in the following ways: <ul style="list-style-type: none"> - "Wholesale Exchange" is not defined, thereby creating confusion; - References to the Law and Rules (as in the current Law) have been removed and should be retained. 	Accept in Part The term "Wholesale Exchange" is currently used in the NEL without definition (s 49(1)(a)). The ISC believes that its meaning is well understood and considers that attempts to define it could create greater uncertainty.
Division 2: AEMO's adoptive jurisdiction functions			
12.		Law should specifically exclude an expansion of the role of AEMO under these provisions by specifying which jurisdictions can adopt the functions.	Not Accepted The adoptive jurisdiction mechanism was used on the recommendation of the Parliamentary Counsel's Committee as an appropriate mechanism to allow jurisdictional functions to be incorporated into national legislation. Jurisdictions must individually legislate to adopt the declared functions.
13.		Concerned that AEMO is a monopoly provider of transmission network services, but is not required to operate under a similar degree of regulation borne by other monopoly service providers in the NEM.	Not Accepted Although AEMO's revenue will not be subject to regulatory oversight by the AER, there will be a reasonable degree of accountability: a requirement to have a revenue methodology that includes a description of the method (consistent with the Cost Allocation Principles) for allocating costs, a requirement that the revenue methodology is publicly consulted and reported upon; and the application of the negotiating framework and pricing methodology. Unlike network service providers, AEMO will be subject to ownership and governance arrangements that will encourage decisions consistent with the NEO. It will not have an incentive to misuse any market power that it may have. This difference in ownership and governance justifies a different regulatory approach.

No.	Provision	Issue	Response
14.		Concerned that AEMO is given the right to veto over certain decisions made by the AEMC and AER.	<p>Not Accepted</p> <p>The relevant decisions are related to AEMO’s declared network functions. The functions are vested in AEMO by the relevant jurisdiction (to date, by Victoria only).</p> <p>AEMO will have specific expertise in the relevant functions, and will be required to agree with certain decisions relevant to the performance of those functions, and that agreement will be governed by the general objective of the NEL.</p> <p>AEMO’s powers in this regard will be further constrained by the availability of judicial review.</p> <p>The relevant Minister in a jurisdiction where the functions are adopted will be able to propose a Rule in relation to the functions independent of AEMO.</p>
15.		Concerned that appropriating revenue will reduce the opportunity for transmission network service providers to turn a profit and result in reduced returns to shareholders.	<p>Not Accepted</p> <p>AEMO will pass through to a transmission network service provider all of that provider’s regulated annual revenue that is associated with shared network services. The remainder of the provider’s regulated annual revenue will be recovered directly from connection customers. Regulated transmission network service providers will not suffer a shortfall.</p>
16.	50D(1)	<p>It is not clear how the transmission network services provided by SP AusNet could be recognised within Ch 6A of the Rules as prescribed transmission services. There is a risk that the AER may be unable to determine a revenue cap for these services and AEMO's obligation to make payment for them can also become tenuous.</p> <p>There is a need to preserve the definitions for services provided by the Victorian service providers and to make it</p>	<p>Noted</p> <p>The Rules will specify that services AEMO procures to provide prescribed shared transmission services (i.e., an output) are themselves prescribed transmission services (i.e., an input) . This will allow the TNSP to recover the costs associated with those services through its revenue cap in the normal manner.</p> <p>The Rules will also address cost-recovery for augmentations</p>

No.	Provision	Issue	Response
		clear that the AER is to determine a revenue cap for the services provided by SP AusNet that are currently subject to revenue capping.	an NSP is directed to undertake that were not factored already into the revenue cap. A choice between two paths will exist – either the Network Agreement could provide for cost recovery between reviews (and set out the principles) and included in the revenue cap thereafter, or the revenue cap could be reopened immediately to allow recovery of these amounts.
17.	S50E	This provision is not contemplated under the NECF with regard to customers connected through the distribution network.	Not Accepted This provision deals with connection to the declared transmission system which is not dealt with in the NECF.
18.	S50G	AEMO should be registered as a market participant to ensure that the status quo is maintained for services currently provided by VENCORP.	Not Accepted The ISC considers that it is inappropriate to require AEMO to register itself. The appropriate obligations are imposed on AEMO directly by the Law and the Rules.
19.	S50J	Subsection (1) directs the AER to make a determination that is "compatible with the proper performance of AEMO's declared network functions" – this may, conceivably, be to the detriment of other parties to the determination. Subsection (3) – consider that it is inconceivable that any party participating in the NEM, especially a monopoly provider of network services, should be given a right of veto rather than a right of appeal.	Not accepted. See response at issue 14.
20.		Any necessary veto power should exist through the ability of the MCE to vary the 'declared network functions' through Rule developments. (ref. s50C, 50D, 50E and 50F)	Not accepted. See response at issue 14.
21.		The removal of the Victorian System Code with the commencement of AEMO will reduce the clarity of the regime and remove independent oversight. Such clarifications need to be contained in regulatory instruments to avoid ambiguity.	Noted. Relevant requirements in the Victorian System Code will be transferred to the National Electricity Rules.
22.		AEMO's corporate governance model (ownership by jurisdictions and industry participants) is insufficient to provide assurance in regard to potential conflicts of interest between AEMO's functions and the interests of market	Not Accepted. AEMO's functions are governed by the Objectives of the National Electricity and Gas Laws, which provide for efficient performance of AEMO's functions in the long term

No.	Provision	Issue	Response
		participants.	<p>interests of consumers.</p> <p>AEMO's governance arrangements include membership for market participants, which provides accountability to AEMO's members (jurisdictions and market participants) for performance of its statutory functions, in addition to the general governance supervision provided by the Law, the Rules and the related administrative and enforcement functions of the AEMC and AER.</p>
23.		Considers that judicial review is insufficient and merits review should also be introduced.	<p>Not Accepted</p> <p>The allocation of rights of judicial and merits review for AEMO functions, including the declared network functions, is consistent with the MCE's general policy on review, and with the treatment of the functions when legislated solely under Victorian Law and administered by VENCORP.</p>
24.		AEMO's status as a Corporations Law company introduces additional commercial risk for SP AusNet relative to that under VENCORP, which was a statutory body. An explicit government guarantee would mitigate this.	<p>Not Accepted</p> <p>The administration under AEMO of the collection and transfer of transmission service revenue for the transmission asset owner in Victoria, as part of the declared network service function, in accordance with the National Electricity Law and Rules, is comparable with that under VENCORP. AEMO (like VENCORP before it) will be performing statutory services, and the nature of any implied guarantee for revenue transferred to a transmission asset owner in these circumstances has not been altered in any substantive way.</p>
25.	S91	Any participant should be able to request a rule in relation to AEMO's declared network functions and not only a Minister or a declared transmission system operator.	<p>Noted</p> <p>Any participant may propose a Rule or Rule amendment in relation to the AEMO declared network functions to AEMO, consistent with AEMO's responsibilities for the performance of the jurisdictional-specific functions as noted in the response to 3 above.</p>
26.	S91(7)(c)	Seems inappropriate for AEMO as a legislated monopoly provider of transmission services, to have a right of veto over rules affecting its operations. This also implies that the	<p>Not accepted.</p> <p>See response at issue 14.</p>

No.	Provision	Issue	Response
		AEMC has not fulfilled its responsibilities under section 88(1) of the NEL – a role which seems inappropriate for AEMO. Entities involved in the market should not be capable of overturning a decision of the AEMC.	AEMO and the AEMC are subject to the national electricity objective (as applied under section 88(1) of the NEL to AEMC’s rule making function.

Comments to the National Electricity Rules

No.	Rule	Issue	Response
1.		The current Rule proposals allocate obligations which are currently the responsibility of both SP AusNet and VENCORP to AEMO. Considers that this is an unintended consequence and should be examined further as it results in a significant shift in responsibility and potentially alters the operating arrangements. Suggests that certain responsibilities be designated to SP AusNet by exception.	Accepted Rules have been redrafted to avoid this outcome.
2.		Under the proposed amendments, all TNSP references will be to SP AusNet and AEMO is not designated as a TNSP. Further clarification on this point is necessary.	Accepted Rules have been redrafted to avoid this outcome.
3.		Proposed amendments also assign the responsibilities of TNSPs rather than of NSPs where that NSP is a TNSP. Considers that the amendment should ensure that TNSP obligations referenced in both ways are assigned.	Accepted Rules have been redrafted to avoid this outcome.
4.		There is an ability for AEMO to vary the threshold for contestability without any guidance to suit the circumstances facing AEMO. This threshold must be either fixed, and subject to variation via Rule changes, or maintained through regulatory oversight. To not do so would result in a lack of clarity which is inconsistent with the national framework to provide certainty to participants.	Accepted Ability to vary threshold removed.
5.	8.5.11(e)	This provision promotes anti-competitive behaviour by allowing the incumbent TNSP to tender for a contestable augmentation of its own network.	Not accepted AEMO rather than the incumbent TNSP will conduct tenders. In most cases, the 'contestability' will apply in relation to assets that will form part of the shared transmission network. These assets otherwise would be constructed by the incumbent TNSP, and so scope of competition will be extended. Where the augmentation is for a funded augmentation, the customer

No.	Rule	Issue	Response
			will have the choice as to whether AEMO runs a tender, the TNSP undertakes the augmentation or to customer arranges and pays for the augmentation.
6.	8.11.4 & 8.11.5	Taking this approach allows the incumbent TNSP to lose control of the planning and engineering solutions relevant to the provision of transmission network services as well as the choice of parties permitted to construct its assets. This would create problems in the work-force planning and management of assets.	<p>Not accepted</p> <p>AEMO will have the responsibility for planning across the declared shared transmission network, and not be subject to potential commercial factors that may discourage optimal planning. AEMO will have a sufficient critical mass to develop and maintain the required planning expertise. An incumbent NSP (for example, SP AusNet) would have sufficient scale to develop and maintain the required expertise in asset management, and providers of competitively tendered assets could contract for asset management services if necessary.</p>

Comments to the National Gas Law

No.	Provision	Issue	Response
AEMO's declared system functions			
1.		Requests that its South Gippsland arrangements with VENCORP be novated to AEMO's national framework. Argues that ISC has misunderstood the nature of Multinet's request by focusing only on the retail rules and ignoring the commercial arrangements with VENCORP. Seeks assurance that the commercial agreements will be recognised in the national framework.	Accepted Commercial arrangements will continue.
2.		Questions the extent to which the NGL can direct producer maintenance given producers participate in several markets with different existing legislation governing each area. Storage providers and pipelines are specific to the natural gas industry and do not involve the same level of complexity in ensuring all stakeholders can be satisfied during period of reduced capacity.	Accepted Proposed requirements for producers to provide maintenance information removed.
3.		Queries the extent to which AEMO can direct registered participants to "improve" the reliability of gas supply. This power should be limited to ensuring safe operation and not require investment. System maintenance for producers is generally covered by other legislation and improvements should be an economic consideration and now a power of direction.	Noted Any improvements will be made with regard to the national gas objective.
4.		As AEMO will have the power to require entities wishing to connect into the Declared Transmission System to enter into an operation agreement with AEMO – would like to confirm whether "connection" means both as a provider and a user or just a user. Also queries whether existing arrangements with VENCORP will be assigned or new ones developed.	Noted Existing registered capacities will continue.
Part 7: Regulation of retail gas markets			

No.	Provision	Issue	Response
5.	S74(3)(fa)	This section should be tempered by making provision in the NGL for AEMO to have appropriate regard for existing Access Arrangements (AA) and contracts when making procedures.	<p>Not Accepted Rule 135EB(2) of the NGR requires AEMO to have regard to existing access arrangements when making a procedure, the ISC does not consider it necessary to elevate this provision to the Law.</p> <p>The ISC does not consider that it is practical to require AEMO to have regard to existing contracts as it will generally not be aware of their content. The ISC notes that participants may make submissions on the effect of a proposed change on their contracts.</p>
6.		If AEMO proposes a rule change or procedure that is inconsistent with existing AAs or contract or results in a material alteration to an AA in due course, it should be required to justify and demonstrate how the proposed Procedure provides superior outcomes compared to existing practice. Suggests consulting service providers before proposing a new Rule or Procedure.	<p>Not Accepted The ISC considers that this is adequately achieved by requiring AEMO to be satisfied that the procedure is appropriate having regard to the National Gas Objective when making a procedure and by the need for it to convince the AEMC of this when proposing a rule change.</p>
7.		Response to the SoPA sets out that the Rules and Procedures will have the force of law and will therefore generally prevail over provisions in contracts. It is inappropriate to provide AEMO with statutory powers to override contracts.	<p>Not Accepted When making Procedures AEMO will be acting as a delegated legislation maker and it is inappropriate that it should be restricted by the terms of individual contracts.</p>

Comments to the National Gas Rules

No.	Rule	Issue	Response
Part 15B: Procedures			
1.		<p>AEMO should be required to undertake initial consultation with service providers to determine their views on consistency with any contemplated Procedure.</p> <p>Where proposed Procedures and Rule changes impact on safety and reliability of supply, market participants' feedback into the consultation process needs to be weighted according to their relative obligation to maintain safety and reliability of supply.</p>	<p>Noted Rule 135EC of the NGR requires AEMO to establish a process for examining and assessing proposed Procedure changes and for preparing an impact and implementation report. In addition both the ordinary and expedited process for making Procedures requires AEMO (rr 135EE and 135EF) to consult with Registered participants and interested persons. The ISC does not consider that any further specification is required in the Law or Rules.</p>
2.		<p>Allowing "interested persons" to be involved in the process may give rise to those that are not necessarily directly involved with an aspect of the industry influencing development in an area that they do not have expertise in. This could potentially slow down the process. Suggests that "interested persons" should be limited to those that can demonstrate expertise in the area of the industry being considered for change.</p>	<p>Not Accepted See the previous response. AEMO will be responsible for determining how consultation is conducted. The ISC's intention is that AEMO should have greater flexibility to determine who should be involved in consultation than is currently available under the jurisdictional regimes. The process will be settled in conjunction with Registered participants and interested persons (r 135EC).</p>
3.		<p>There needs to be a clear definition and distinction for what constitutes an ordinary change as opposed to an expedited change.</p>	<p>Not Accepted The ISC believes the difference in operation of the ordinary and expedited process by which a Procedure is made is appropriate and clear and that AEMO is in the best position to judge how to treat proposed changes. This is subject to consultation with Registered Participants and interested persons.</p>
4.	Rules 8, 9 and 9A	<p>Notes that the new Rule is not drafted based on the existing gas Rules but on the wording of the electricity Rules Consultation Procedure. Supports the move to converge the two, however, some details prove inappropriate in practice. For instance, the three procedures have two very different wording and a number of inconsistencies in the processes with</p>	<p>Noted The ISC accepts that consistency is preferable but considers that it is inappropriate to alter existing NER provisions as part of this package as the intention is to make minimal changes to existing arrangements.</p>

No.	Rule	Issue	Response
		respect to timing milestones.	
5.		Notes that the use of the existing two procedures is restricted to National Competition Council (NCC) and AER, whilst the procedures in the new Rule can be used by all consulting parties. This means that AEMO (AEMC and others) do not have access to an expedited consultative procedure for minor changes or errors in the Rules. Suggests that a uniform set of change procedures be implemented for accelerated Rule changes that are urgent or to rectify errors.	Not Accepted The ISC does not intend to change the current timeframes for changes to the NGR and considers that the expedited process for Procedure changes is adequate for minor or urgent proposals.
6.		There is little direction as to which of the three change procedures are used in a given change situation. Suggests that clear criteria be used on when each process is to be used.	Not Accepted Rule 135CA requires AEMO to consult on the proposed participant fee structure in accordance with the extended consultative procedure.
7.		Suggests that the Rules Consultation Procedure should also be used for the Gas Retail Market Procedure.	Not Accepted This approach was considered by the ISC but was rejected as the proposed process for amendments of the Procedures was considered more appropriate for amendments to delegated legislation.
8.		Agrees that the use of an "approved process" in the proposed gas Rules regarding Procedure change is a good concept. A detailed time schedule and consultation with respect to the change proposal should be a mandatory component of the approved process.	Noted AEMO is required to consult with Registered Participants and interested persons on the proposed process for making of Procedures including the preparation of an impact and implementation report (r 135EC).
9.		It is inappropriate to have separate processes for amending the Gas Interface Protocol (GIP) and the Procedures as they are generally amended together.	Accepted AEMO will be required to use the Procedure change process when amending the GIP.
10.	Sections 91MB and 228A	The ISC response to the SOPA indicates that a new AEMO Procedure will not override an existing access arrangement. However, there is ambiguity in the draft Bill as to whether this is the case. Whilst s91MB says one thing, section 228A states that all applicable persons must comply with Bulletin Board Procedures. If it is intended that Bulletin	Accepted Issue has been rectified. See ss 91MB and 228A of the NGL.

No.	Rule	Issue	Response
		Board Procedures must be complied with irrespective of access arrangement provision, Jemena submits that this is an inconsistent and undesirable approach. Service providers should be compensated for extra costs due to a new or changed Bulletin Board Procedure, but would prefer the ISC to provide consistency with the Retail market Procedures to ensure that access arrangements are given precedence.	
Part 15C: Dispute Resolution			
11.	Rules 135HB to 135HH	Disappointed that the efforts of industry in rewording the Victorian Market and System Operations Rules (MSOR) are being put aside and do not fully align with the changes recommended by the Dispute Resolution Working Group.	Noted The ISC considers that the current drafting captures the key elements of the working group's recommendations, while bringing increased consistency with the NER process.
Part 15D: Gas Statement of Opportunities			
12.	135K(c)	The use of the word "produce" does not have a sensible meaning as such a facility only has three relevant parameters (storage capacity, injection rate and withdrawal rate).	Accepted "Produce" has been deleted.
13.	135KB(2)	Introduction of the term "annual reserves" is not correct as reserves are measured at a point in time rather than over a period of time.	Accepted "Annual" has been deleted.
Timing Issues			
14.	Rule 9A	Suggests that 20 business days be retained for the consulting party report as the status quo, but allow 30 business days for matters requiring extensive and/or complicated changes. Suggests that once this issue is resolved, similar changes should also be made in relation to the electricity Rules.	Not Accepted This provision is principally designed to allow AEMO to use the same process for consulting on fee structures in electricity and gas. For this reason it mirrors the requirements of rule 8.9 of the NER. The ISC does not intend to amend the NER provisions at this stage.
15.		Suggests that the 10 business day limit for AEMO	Accepted

No.	Rule	Issue	Response
		to produce an Impact and Implementation Report (and to publish notice of consultation 10 days after) is not sufficient. Suggests using the 25 days used in the electricity Rules process for consideration of the B2B Procedure change proposals.	