



The Australian Gas Light Company  
ABN 95 052 167 405

**North Sydney**  
AGL Centre, 111 Pacific Highway  
North Sydney NSW 2060  
Locked Bag 944  
North Sydney NSW 2059

**Telephone** 02 9921 2585

**Facsimile** 02 9957 3871

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Manager - Energy Market Reform Team  
National Energy Market Branch  
Department of Industry, Tourism and Resources  
GPO Box 9839  
Canberra ACT 2601

By e-mail to [MCEMarketReform@industry.gov.au](mailto:MCEMarketReform@industry.gov.au)

Dear Sir or Madam

### **Consultation – National Electricity Law**

AGL is pleased to respond to the Standing Committee of Officials' (SCO) consultation on the Exposure Draft of the National Electricity Law (the Law). We request an opportunity to present at the forum to be held on 7 January 2005 in Melbourne.

#### ***Consultation material and timing***

While we are pleased that the Ministerial Council on Energy (MCE) has decided to consult on the contents of the Law, we are concerned that the process that has been adopted makes it difficult for parties seeking to understand how the new package<sup>1</sup> will work.

While the Rules have been made available for consultation, we understand that the National Electricity Regulations, which are an essential link between the Law and the National Electricity Rules (the Rules), are unlikely to be made available before the entire package comes into effect next March<sup>2</sup>. Additionally, the transitional provisions of the Law are not available for consultation. This prevents full understanding of the new governance regime for the National Electricity Market (NEM).

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<sup>1</sup> The Law, Regulations and Rules form the package of changes that are likely to be put into effect in March 2005. They will also give powers and functions to the Australian Energy Market Commission and the Australian Energy Regulator.

<sup>2</sup> This understanding comes from comments by presenters at the forum on 10 December, who noted numerous aspects of the Law and Rules where clarification and detail was to be provided by the Regulations.



The Rules also contain a number of provisions, particularly in relation to the access regime, that we understand are to be finalised just prior to the Rules coming to effect. We are concerned that participants will either not be consulted on these important issues or will not be consulted in a timely and meaningful way.

To enable effective consultation while meeting the MCE time frame, it is essential that the Regulations, and transitional provisions as much as possible, are available for consultation in very early January. The proposed options for the access regime should be made available for consultation to allow comment and participant involvement as the package is being developed.

We note that the current changes are only those to change the governance regime of the NEM. We urge the MCE to maximise its consultation on the remaining elements of the energy market reform program, particularly changes to the legislative framework required to bring distribution and retail regulation (other than retail pricing) into a national framework.

### ***General comments on the Law***

The new Law is clearer and better packaged than the old Law and National Electricity Code (the Code) combination. AGL supports the compilation of the key governance matters, the Market Objective and the roles of the key bodies (AER, AEMC and NEMMCO) into the Law.

The Information Paper from the SCO that accompanied the release of the Law states: “the substantive rights and obligations on participants in the market under the current NEL and current Code will remain the same in the new NEL and Rules”<sup>3</sup>.

AGL considers that it is appropriate that no substantive increase of participant obligations or any substantive reduction in participant rights occurs. If they were to occur it is likely to increase the costs of compliance for participants, increase the cost of energy by deterring efficient bidding activities and reduce investment in the industry, particularly generation. These outcomes are not in the long term interests of customers.

While, in broad terms, the substantive rights and obligations of participants have been preserved, AGL is concerned that there are some aspects of the package that have inadvertently changed the rights of participants<sup>4</sup>. There are also areas where significant changes have been made. These areas are discussed below and in the attachment.

### ***The Market Objective***

The Market Objective has been significantly changed. Despite assertions in the Information Paper<sup>5</sup> that the MCE had determined to replace the objective, the

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<sup>3</sup> Section 1.3 page 8

<sup>4</sup> A simple example of a change that has reduced participant rights is that transferring the “protected provisions” from the Code into the law, while logical and foreshadowed by the MCE, does remove the right of participants to be consulted on changes to them since they are no longer subject to the Rule change process.

<sup>5</sup> The reference in the paper points to the objectives clause of the AEMC not to a policy decision of the MCE.



releases from the MCE simply stated that a new clause relating to the long term interests of customers was to be included in the current objectives.

That said, AGL supports the simpler structure and thrust of the new objective as it provides a clear statement of the purpose of the Market. However, AGL notes that the objective could be interpreted broadly or with an economic focus. Given the intention that the NEM is to be an economically efficient market and that other policy matters<sup>6</sup> are to be dealt with elsewhere, AGL considers that it is essential that the MCE clarify that the objective be interpreted in an economic sense. The clarification could be included in the Law or by relevant comment in the second reading speech.

AGL notes that considerable work has been undertaken on appropriate objectives clauses by the Productivity Commission in the review of the National Access Regime and the review of the Gas Access Regime. AGL is concerned that the new market objective does not appear to take this work into account fully. The issue of appropriate objectives clauses becomes even more important as other elements of the reform program are considered.

The new objective is a composite objective and our understanding is that case law means that its elements must always be viewed together. AGL is therefore surprised that the AEMC can be required, under section 87(2), to consider only certain aspects of the objective when assessing Rule changes. AGL considers that this is inappropriate and that section 87(2) of the Law should be removed.

We also note that the AER will not be subject to the Market Objective. It is not clear to AGL why this is the case. AGL considers that, as the Rules define key aspects of the AER's operation, then, since those Rules are made under the Market Objective, the AER must operate in a manner consistent with the Market Objective.

We note that, in respect of the AER's economic functions, section 15 of the Law defines a similar, more detailed set of guiding principles that can be used to assist the AER in this specific role but these guiding principles do not replace the Market Objective in the AER's other roles, investigation and enforcement.

AGL therefore considers that the Market Objective should apply to the AER across its entire function in relation to the NEM and that section 15 should be seen as a specific guide for the economic function.

### ***Scope of the Rules***

AGL supports the use of section 35 and Schedule 1 of the Law to define the scope of the rules. We do not consider it appropriate that:

- the scope of the Rules can be extended by regulation, as allowed by clause 36 of Schedule 1. AGL considers that the legislation should remain the sole instrument defining the scope of the Rules and that clause 36 should be removed; nor

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<sup>6</sup> Such as environment and customer protection.



- the AEMC can provide the AER with powers to make or issue guidelines. It is essential that rule making should be separated from rule enforcement. AGL therefore considers that rules should define the guidelines for the AER's economic and enforcement functions and that the AER's guidelines be limited to administrative and procedural matters processes.

### ***Investigation and enforcement Powers of the AER***

The attached advice from Gilbert and Tobin identifies a number of issues with the investigation and enforcement aspects of the new Law. Key aspects are:

- the investigation regime under the Law is stronger than that applied to similar markets overseas and is likely to work against the long term interests of customers. It is important that the investigation powers given to the AER are not considered in isolation from the other legislative powers that govern the operation and behaviour of market participants. In particular, in considering the appropriateness of the investigative powers of the AER under the Law, it is necessary to consider the powers of the ACCC under the Trade Practices Act (TPA) and the powers of ASIC under the Corporations Law. When these powers are considered, it is clear that the powers given to the AER are excessive. AGL is of the strong view that the powers of the AER should be tailored to its specific, and limited, enforcement role.

In addition, clause 8.5.4 of the Code has not been included in the Rules. That clause defined the process for NECA to investigate potential breaches of the Code and provided significant protection to participants. AGL believes it inappropriate that this protection has been removed in the Rules.

The investigative powers of the AER are of particular concern since section 18 of the Law<sup>7</sup> allows information gathered to be used for any purpose and to be shared with the ACCC, AEMC and NEMMCO specifically and, more generally, to others under sections 44AAF(7) and (8) of the TPA.

*AGL believes that the MCE should conduct a full debate on the investigation regime for NEM and that the final regime should be similar to that used by relevant local and overseas regulators (see attachment for a discussion of the enforcement regimes of relevant regulators). As an absolute minimum, the effect of clause 8.5.4 of the Code should be reinstated in the Rules or Regulations to guide the AER.*

*AGL also considers that the broad information sharing powers in the Law and the TPA are not appropriate and should be reviewed and removed;*

- if a corporation is considered guilty of a breach, all officers of that corporation are considered guilty of a breach of the Rules even when they

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<sup>7</sup> By applying section 44AAF of the TPA.



have not been involved. Previously, the position was considered to be that liability would only extend to officers involved in a breach of the Code or Law<sup>8</sup>. Section 66 of the new Law clearly states that relevant officers of the corporation are guilty of a breach that occurs and the inclusion of this section means that section 84<sup>9</sup> of the new Law is therefore unnecessary and excessive.

The new Law also introduces a breach for officers who are considered to have attempted to breach the Law and Rules but were unsuccessful (section 66(2)). It is not clear what practical value this clause will have or why it has been included. AGL notes that section 66 is expressed in a similar manner to relevant provisions in the Corporations Law and it may have been included for that reason.

Under section 66, officers considered in breach of the Rules are subject to the same penalty as the relevant participant. This seems excessive and greater than what is applied under the TPA and Corporations Law. AGL considers that scaling of the individual penalties is required.

*AGL considers that section 84 of the new Law should be removed, that penalties for officers of corporations should be a defined fraction of the penalties applied to corporations and, as a minimum, the intent of, and requirement for, section 66(2) be satisfactorily explained to participants;*

- the enforcement regime under the Law, including the penalties to be applied, gives wider scope to the AER than that given to NECA. Previously NECA was only allowed to initiate a summary process for minor (class A) matters. Under the new Law, as a result of removing the graded penalty approach, the AER has the power to issue infringement notices for all breaches. Payment of the class A breach penalty also was a final end to the matter, whereas the AER has both the power to enforce payment of the Infringement Notice as a debt despite a participant seeking to contest the matter<sup>10</sup> and the ability to still take a participant to court after the penalty in the infringement notice has been paid. There also does not appear to be a limit on the number of infringement notices that the AER can apply to a breach that occurs daily for a defined period, potentially allowing the AER to apply a large fine for a number of instances for a single small breach.

The current class D breach applies to only one clause of the Code. That clause, 3.8.22A, requires offers, bids and rebids to be made in good faith. The new Law defines a penalty of the same quantum (\$1m) but applies it to the loosely defined “rebidding civil penalty provisions”. Firstly, the specific clauses to be subject to the penalty need to be defined, as part of the consultation on the regulations. Secondly, if it is to apply to clause

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<sup>8</sup> Although section 80 of the current Law is not expressed that clearly

<sup>9</sup> This is a transfer of the old section 80 into the new Law.

<sup>10</sup> This appears to be a drafting error since, according to section 74(i), the Infringement Notice must state that a participant can ignore the Notice and the matter will proceed to a court.



3.8.22A of the Rules it is misleading to refer to it as a rebidding penalty<sup>11</sup> since that clause applies more widely.

*AGL supports the new Infringement Notice approach but considers that there should be some gradation in the penalties so that for, at least, technical and administrative breaches, the maximum penalties are defined. This could be done in the regulations, as is currently done for class A breaches. Where the maximum penalty is below \$20,000, an Infringement Notice could immediately apply. AGL also considers that the application of rebidding penalties needs to be clear<sup>12</sup> and that the AER be limited to a single infringement notice for a specific breach.*

- The Law introduces a provision that allows a court to order disconnection of generators and networks. This provision is not in the current Law or Code and needs to be justified. The current Law allows for disconnection of loads, which is necessary for failure to comply with the Code in relation to payments or prudential matters. The Code also allows NEMMCO to disconnect for technical reasons.

AGL therefore sees no justification for a new provision that allows a court to order disconnection of generators and networks in relation to a Rule breach since that would effectively terminate their business.

*AGL considers that section 61 should be amended to remove generator and network disconnection.*

### ***Access Pricing Principles***

AGL supports the inclusion of clear and appropriate pricing principles. AGL also supports the requirement that the AEMC must make clear rules for electricity transmission pricing. However, AGL is of the firm view that the pricing principles in Sections 15 and 91 of the Law should fully reflect the Commonwealth's response to the Productivity Commission's report on the National Access Regime and Productivity Commission's final report on the Gas Access Regime.

Further, in developing the pricing principles for a national electricity access regime for distribution, AGL considers that meaningful consultation is required and that in order to achieve a nationally consistent approach to energy access these principles should reflect the pricing principles developed in the reviews of the National Access Regime and the Gas Access Regime.

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<sup>11</sup> It should be called a "bad faith civil penalty".

<sup>12</sup> Consultation on the Regulations, as requested earlier in this response, would assist.



### ***Rule change process and requirement for authorisation***

AGL supports the proposal to change the Code into mandatory Rules and the Rule Change process consulted on last August. We note that the proposal relies on Senior Counsel advice. To confirm that the implementation of this proposal in the Law is effective, AGL suggests that Senior Counsel opinion be sought on whether the establishment of the Rules and the Rule change process in the Law is adequate.

If you have any questions regarding the above matters, please contact Alex Cruickshank, Manager NEM Development, on (03) 9201 7694 or by e-mail to [acruicks@agl.com.au](mailto:acruicks@agl.com.au).

Yours sincerely,

Dr Robert Wiles  
General Manager Regulation and Policy

