

Attachment 1



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Dear Rolf

AER Reform Process - Proposal to address Part IV risk without ACCC authorisation

I refer to the Consultation Paper published by the Ministerial Council on Energy ('MCE') in August 2004 in respect of the proposed National Electricity Rules ('NER') change process. In that Consultation Paper, the MCE proposes to streamline the National Electricity Code ('NEC') change process by:

- amending the National Electricity Law ('NEL') to make it clear that the NEC is a set of statutory rules made under the NEL (to be the NER); and
- converting key obligations in the NEC that contemplate, and empower NEC participants to enter into, consensual arrangements into mandatory obligations in the NER, without changing the substance of those rules.

The MCE conclude in the Consultation Paper that:

...under the new NE Rules the risk profile for participants in the market will not be materially changed from their existing TPA risk profile under the currently authorised NE Code.

Accordingly, the MCE propose that the NER and changes to the NER will not be authorised by the ACCC under Part VII of the TPA. The MCE adopted this proposal in the Consultation Paper, based on the Memorandum of Advice of Hutley SC and Sarah Pritchard dated 5 August 2004.

The purpose of this advice is to critique that Memorandum of Advice, and identify any implications for Powercor's exposure to Part IV contravention pursuant to the NER, arising under the MCE's proposed NER change process, as against its current exposure under the NEC and NEC change process.

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Summary of Advice

- We are broadly in agreement with the Memorandum of Advice that the proposed NER approach, as a substitute for ACCC authorisation of the NEC, will not materially change the risk profile for participants in the market from their existing TPA risk;
- However this conclusion is subject to amendments to the NEC, at the time of the NEC becoming the NER, to remove 'any language of voluntariness or will' from the NEC. According to the Memorandum of Advice this would include specifying terms of access, 'including price'.
- We note that making such access terms mandatory in legislative form appears inconsistent with the current characterisation of the NEC as, at least nominally, a voluntary industry access undertaking for the purposes of Part IIIA TPA;
- We further note that this approach potentially creates a more prescriptive/ interventionist form of regulation than currently applies under the NEC;
- Further, while the advice is sustainable on the examples put to Counsel by the MCE for the purposes of this advice, other provisions of the Code contemplate or require participants to enter into arrangements that may breach Part IV TPA and these remain a potential trade practices exposure. An example of such a provision is Clause 6.3.4 of the NEC that permits transmission network service providers in a region to agree with transmission network service providers in one or more adjoining regions to undertake the allocation of transmission costs to transmission customers.
- We therefore consider that potentially significant amendments of the NEC, to remove market participant discretion, will be required in order to achieve the 'no greater trade practices risk' position through the conversion of the NEC to NER. A more detailed review of the NEC will be required to identify the implications of such amendments.

Outline of Memorandum of Advice

The Memorandum of Advice advises on whether there will be an increase in the risk of a breach of Part IV of the TPA, or a change in the nature of that risk, as a result of a NEC provision ceasing to be part of a code of conduct authorised by the ACCC, and instead being converted into mandatory rules made under the NEL.

The conclusions reached in the Memorandum of Advice are dependent on, and in some cases expressly limited by reference to, the specific examples considered therein. Reaching more generalised conclusions, based on the conclusions in the Memorandum of Advice, thus depends on the extent to which the examples considered in that Advice are both representative of characteristic NEC provisions and cover the field of NEC provisions giving rise to a risk of contravention of Part IV of the TPA.

In advising on whether there will be an increase in the risk of a breach of Part IV of the TPA, or a change in the nature of that risk, as a result of a NEC provision ceasing to be part of a code

of conduct authorised by the ACCC, Hutley SC and Pritchard did not consider the 'true characterisation' of the current NEC and instead:

...assumed that its underpinning is essentially consensual, in that it rests upon the agreement of market participants, and that authorisation under the TPA would be required as a matter of law. That assumption, as we conceive it, is the most conservative assumption which can be made for the purpose of comparing current arrangements with the proposal for the NEC to become a set of rules made under the NEL. (Para 28)

We agree that this is a conservative assumption for the purposes of assessing the trade practices exposure of NEC participants under the MCE's proposed model relative to that under the current NEC arrangements. While the characterisation of the NEC is beyond the scope of the current advice, we note that in our opinion, on balance, the better view is that the NEC is a statutory instrument and does not constitute a contract, arrangement or understanding between NEC participants, although this is by no means certain. Assuming that the NEC is a statutory instrument, then, as foreshadowed by Hutley SC and Pritchard, the risk of a Part IV contravention by NEC participants in making or giving effect to the provisions of the NEC would be considerably lower than that risk on the conservative assumption adopted in the Memorandum of Advice, as the NEC provisions would not themselves constitute a contract, arrangement or understanding between NEC participants.

Hutley SC and Pritchard summarise their conclusions as follows (at para 5):

The application of the principal prohibitions in Part IV of the TPA depends on there being a contract, arrangement or understanding (in the case of ss 4D, 45, 45A) or some sort of arrangement or transaction (in the case of s 47). If the obligations of Code Participants under the NEC were drafted as mandatory regulations (as would be the case if the NEC became a set of rules under the NEL), then there would be no contract, arrangement, understanding or transaction which attracted the operation of the prohibitions in Pt IV. If the mandatory regulations specified the terms (including price) on which electricity, ancillary services, or other goods or services were to be supplied or acquired, then it would be the mandatory regulations, and not any contract between Code Participants, which had a purpose or effect proscribed by Part IV.

While not immediately obvious from reading the above summary of their conclusions, we note that Hutley SC and Pritchard's conclusion that, under the NER, 'there would be no contract, arrangement, understanding or transaction which attracted the operation of the prohibitions in Part IV', relies on both:

- the NEC becoming a set of rules made under the NEL, i.e. the NER; and
- the amendment of the provisions of the NEC, where necessary, to ensure those provisions impose mandatory obligations.

That is, implicit in the conclusions of Hutley SC and Pritchard is a conclusion that there would be some residual exposure to risk of a contravention of Part IV by participants, were the NEC to become a set of rules made under the NEL, but not be subject to amendments to ensure the NER impose mandatory obligations on NEC participants.

Hutley SC and Pritchard make this clear in their analysis of participants' exposure to the risk of a Part IV contravention under the specific examples of NEC provisions they were asked to consider. So, for example, in discussing the NEC provisions establishing registration

requirements (example 1 in the Memorandum of Advice), Hutley SC and Pritchard state (at para 105):

Irrespective of how advantageous a statutorily imposed regime of registration and prudential requirements might turn out to be for particular Market Participants, that regime would not, in our opinion, be characterised as a provision in a "*contract, arrangement or understanding*" between those parties. Such a result would, of course, depend upon careful examination of the language of each provision in the statutory regime to ensure that any language of voluntariness or will has been removed, and all language rendered in terms of mandatory obligations, created and elaborated by statute.

Similarly, they conclude in relation to the NEC provisions governing the determination of spot prices (example 2 in the Memorandum of Advice) (at para's 125-6):

If the provisions of Chapter 3 are reviewed to ensure that there is no element of voluntariness in compliance with the rules relating to the centralised dispatch process, spot price determination, and the determination of the price cap and price floor, then in our opinion, the conversion of these provisions into rules made under the NEL would result in no increase in the risk that Code Participants would continue to participate in the spot market, and to pay and receive prices determined in accordance with the formulate contained in Chapter 3, being in breach of Part IV of the TPA.

...The scheme proposed will convert the rules into mandatory regulations governing participation in the market.

In other words, an essential pillar underpinning the conclusions in the Memorandum of Advice in relation to participants' exposure to the risk of a Part IV contravention is that, on the NEC becoming statutory rules made under the NEL, the drafting of NEC provisions will be reviewed and amended to ensure that any language indicating voluntariness or will has been removed and any necessary elaboration is made. This re-drafting, in the opinion of Hutley SC and Pritchard, reduces participants' trade practices risk below that that would exist were they to become statutory rules without amendment or, by implication, were the current NEC provisions correctly characterised as provisions of a statutory instrument.

On the basis of the Memorandum of Advice, the MCE proposed a model pursuant to which the NEC would become statutory rules pursuant to the NEL and converting key obligations referable to the NEC's inception as a consensual arrangement into mandatory obligations in the NER (at p9):

Under this model, the obligations on participants would find their source in a legislative instrument. Conduct under the NE Rules would be a matter of compliance with State and Territory laws. Their compliance with the NE Rules would be mandatory and not consensual. Provided the provisions of the NE Rules are formulated as mandatory rules rather than consensual arrangements, then the NE Rules would not constitute a contract, arrangement, understanding or transaction which attracts the operation of the above principal prohibitions contained in Part IV of the TPA.

Agreements between Code participants required or contemplated by the NER

In their conclusions, Hutley SC and Sarah Pritchard noted the potential for entry into an agreement by NEC participants that is required or contemplated by the Code to give rise to the possibility of a breach of Part IV by those participants. They observed (at para 7):

[T]he mere fact that the regulations required, or contemplated, the entry into an agreement between Code Participants would not, of itself, eliminate the possibility of a breach of Part IV, where the agreement contained an exclusionary provision, exclusive dealing provision, or provision substantially lessening competition, contrary to Part IV.

Hutley SC and Pritchard then set out their conclusions with respect to the specific examples of NEC provisions requiring, or contemplating, the entry into agreements by NEC participants they were asked to consider by the MCE. They conclude as follows (at para 7):

The Code presently requires or permits entry into agreements for the provision of non-market ancillary services, connection agreements and system operations agreements. These agreements are not currently protected by ACCC authorisation. Nor would the conversion of the provisions of the Code dealing with such agreements into rules made under the NEL confer any immunity from Pt IV of the TPA.

It is critical to note that Hutley SC and Pritchard's conclusion that '[t]hese agreements are not currently protected by ACCC authorisation' is expressly limited to the examples of NEC provisions requiring or permitting entry into agreements by NEC participants considered in their Memorandum of Advice, i.e. those NEC provisions requiring or permitting 'entry into agreements for the provision of non-market ancillary services, connection agreements and system operations agreements'. It is only where the examples considered by Hutley SC and Pritchard are representative of all NEC provisions that require or permit entry into agreements by NEC participants, such that ACCC authorisation does not currently extend to any agreements between participants required or permitted by the NEC, that their conclusion that the conversion of the NEC into NER made under the NEL would have no consequences for participants' trade practices risk under Part IV has general application beyond the specific examples considered.

In respect of the examples of NEC provisions requiring or permitting agreements between participants considered by Hutley SC and Pritchard, a common element of the provisions is that they do not expressly require or contemplate the inclusion of provisions of a type that are prescribed by Part IV of the TPA. For example, in respect of agreements for the provision of non-market ancillary services (example 3 in the Memorandum of Advice), Hutley SC and Pritchard observe (at para 136):

[T]he NEC does not prescribe the contents of an agreement for the provision of non-market ancillary services.

This characteristic of the NEC provisions permitting NEMMCO to enter into agreements for the provision of non-market ancillary services is critical to Hutley SC and Pritchard's conclusion that the current authorisation of these NEC provisions would not confer immunity from Part IV contravention by specific anti-competitive provisions of non-market ancillary services agreements. Specifically, they reason in respect of example 3 (at para's 137-8):

We are asked to advise first, whether the authorisation by the ACCC of the Code's provisions in relation to agreements for the provision of non-market ancillary services would also constitute authorisation of the making and giving effect to the provisions of such an agreement.

In our opinion, authorisation of these provisions of the Code would not have the consequence of authorising **a particular agreement which itself contained anti-competitive elements in breach of Part IV of the TPA**. All Code Participants, including NEMMCO, are bound by the TPA. The provisions of any agreement for the provision of non-market ancillary services entered into by

NEMMCO, or by any other Code Participant, would need to be reviewed, on a case by case basis, to ensure that it contained no exclusionary provision, exclusive dealing provision (including third line forcing provision) or provision substantially lessening competition. [Emphasis added]

It is, in turn, based on their conclusion that current ACCC authorisation does not extend to authorising 'a particular agreement which itself contained anti-competitive elements in breach of Part IV' that Hutley SC and Pritchard conclude (at para 139):

Accordingly, the conversion of these provisions of the Code into rules made under the NEL, would have no effect upon the risk that Code Participants (including NEMMCO) who are party to such agreements would breach Part IV of the TPA where an agreement contained provisions in breach of Part IV. Either such an individual agreement is the subject of an authorisation under Part VII of the TPA in the first place, or not. If not, then questions of compliance with Part IV cannot be avoided. Whether the NEC has the status of a code of conduct, or a law, has no bearing upon the question of the immunity of an agreement for the provision of non-market ancillary services.

Similar reasoning is adopted by Hutley SC and Pritchard in respect of:

- NEC provisions requiring network service providers to enter into connection agreements with NEC participants (example 4 in the Memorandum of Advice); and
- NEC provisions permitting NEMMCO to enter into system operations agreements with network service providers (example 5 in the Memorandum of Advice).

In our opinion, Hutley SC and Pritchard's conclusions that:

- current ACCC authorisations do not extend to authorising the anti-competitive provisions of an agreement between NEC participants required or permitted by the NEC; and
- therefore, whether the NEC is regarded as a code of conduct requiring authorisation or a law has no bearing on the trade practices exposure of NEC participants entering into such agreements,

would not apply in respect of NEC provisions that not only require or contemplate agreements between NEC participants, but also require or contemplate the inclusion of provisions therein that would contravene Part IV of the TPA.

We have not undertaken a review of the NEC to identify the NEC provisions requiring or contemplating agreements between NEC participants that contain provisions prescribed by Part IV, or the prevalence of such NEC provisions. However, the point can be illustrated by reference to clause 6.3.4 of the NEC.

Clause 6.3.4 of the NEC permits transmission network service providers in a region to agree with transmission network service providers in one or more adjoining regions to undertake the allocation of transmission costs to transmission customers under clause 6.4 as one allocation over all those regions, using the total annual prescribed revenue of all those network service providers. To allocate costs over several regions, the cost reflective network pricing method or the modified cost reflective network pricing must be used for all connection points with transmission customers connected to a transmission network located within those regions.

In contrast to the examples discussed in the Memorandum of Advice commissioned by the MCE, clause 6.3.4 expressly contemplates an agreement between network service providers for the joint allocation of costs, which allocation will form the basis of transmission pricing by those network service providers. Such an agreement between network service providers may contravene the prohibition against price fixing established by ss 45 & 45A of the TPA (although, we note the requirement for those network service providers to be 'in competition with each other' for the purposes of s45A for a contravention to occur).

The reasoning set out above in respect of clause 6.3.4 is analogous to that of Hutley SC and Pritchard in respect of NEC provisions governing the determination of spot prices under the current arrangements assumed by Hutley SC and Pritchard to be 'essentially consensual' in nature. They state (at para's 119-20):

[W]e have assumed, for the purpose of this advice that current arrangements in relation to the Code are essentially consensual, that assumption, as we conceive it, being the most conservative assumption which can be made for the purpose of comparing current arrangements with the proposal for the NEC to become a set of rules made under the NEL. That being said, we agree with our instructors, in general terms, that the provisions in relation to centralised dispatch, and price caps and price floors could potentially infringe Part IV of the TPA.

We note that in its initial authorisation, granted on 10 December 1997, the ACCC indicated (at page 60) that the Code's (then) provisions requiring all electricity to be transacted through the spot market, and at the spot price, could be considered to be *inter alia*, price-fixing arrangements to the extent that Participants are agreeing that a particular pricing mechanism will be used to determine prices.

However, in our view, as clause 6.3.4 contemplates those elements of the permitted agreement between network service providers that may contravene the price fixing prohibition, the ACCC's Network Service and Market Network Service Providers Determination, of September 2001, would authorise the conduct of network service providers in entering into and giving effect to an agreement under clause 6.3.4. Specifically, deletions to clause 6.3.4 proposed by NECA in the relevant NEC change package were required, by condition of authorisation C4.4, not to be made. The ACCC's authorisation extended to giving effect to the NEC provisions authorised in that package. Accordingly, in our view, that authorisation extends to conduct required or contemplated by NEC provisions, including the entry into agreements between NEC participants that contain provisions contravening Part IV, where the relevant NEC provisions contemplate those anti-competitive provisions.

While we consider instances of NEC provisions requiring or permitting agreements between NEC participants containing prescribed provisions would likely be rare, the conversion of the NEC to NER made under the NEL would not, taken alone, entirely eradicate the risk that::

- conduct of NEC participants required or permitted by the NEC may breach the s47 prohibition against exclusive dealing; and / or
- NEC participants may enter into contracts, arrangements or understandings required or permitted by the NEC that breach the s45 prohibitions against exclusionary provisions, provisions that substantially lessen competition and / or price fixing.
- To entirely eliminate the risk of contravention of Part IV of the TPA by NEC participants in giving effect to NER provisions requiring or permitting agreements or

arrangements between NEC participants, the provisions of the NEC would need to be amended to eliminate any requirement or permission for NEC participants to enter into agreements or arrangements, at least in respect of those NEC provisions expressly contemplating the inclusion of provisions prescribed by Part IV.

Amending the NEC provisions to impose a mandatory obligation to enter into such an agreement would not, taken alone, suffice.

A comprehensive review of NEC provisions by the MCE would therefore be required to eliminate any prospect of trade practices exposure not present under the current NEC provisions and change processes. Such a review would ensure that, in converting the NEC into NER made under the NEL, all instances of provisions requiring or contemplating entry by NEC participants into an agreement, including provisions prescribed by Part IV of the TPA, are identified and addressed.

Provided the MCE's current proposal of 'converting key obligations in the NE Code that are referable to a consensual arrangement into mandatory obligations in the NE Rules' extends to removal of provisions that require or contemplate entry into an agreement or arrangement by NEC participants as the mechanism by which their objective is achieved, we are satisfied that there is no change to NEC participants' risk of contravention of Part IV of the TPA by reason of clarifying that the NEC are statutory rules and discarding the process of authorising the NEC and changes thereto.

Exclusive dealing as requiring 'an arrangement or transaction' and essentially of amendments to NEC provisions to remove 'any language of voluntariness or will'

In respect of NEC participants' risk of contravention of the exclusive dealing prohibition established by s47, relative to their current risk of contravention of this prohibition, Hutley SC and Pritchard summarise their conclusions as follows (at para 5):

The application of the principal prohibition in Part IV of the TPA depends on there being ... some sort of arrangement or transaction (in the case of s 47). If the obligations of Code Participants under the NEC were drafted as mandatory regulations (as would be the case if the NEC became a set of rules made under the NEL), there would be no ... arrangement ... or understanding which attracted the operation of [s47].

In truth, as acknowledged by Hutley SC and Pritchard in the body of their Memorandum of Advice, the proposition that exclusive dealing 'depends on there being ... some sort of arrangement or transaction' only holds where exclusive dealing takes the form of a supply or acquisition of goods or services on terms or conditions which are restrictive and / or anti-competitive.

Hutley SC and Pritchard summarise the exclusive dealing prohibition at paragraphs 78 to 82 of their Memorandum of Advice. For present purposes, it suffices to note that:

- s47 details a series of conduct that constitutes the practice of exclusive dealing;
- the following exclusive dealing practices will breach the s47 exclusive dealing prohibition, where the exclusive dealing has the purpose or effect of substantially lessening competition:

- the supply or offer to supply goods or services *on condition that* the acquirer:
 - will not acquire goods or services from a competitor of the supplier; or
 - will not resupply goods or services to particular persons or classes of persons (s47(2));
- the acquisition of goods or services *on condition that* the supplier accepts some restriction on its freedom to supply to third parties (s47(4));
- the refusal to supply goods or services *for the reason that* the acquirer:
 - has dealt or refused to cease dealing in a competitor's products; or
 - failed to accept some restriction on the right to resupply (s47(3));
- the refusal to acquire goods or services *for the reason that* the supplier refuses to accept some restriction on its freedom to supply to third parties (s47(5));
- one form of exclusive dealing, third line forcing, breaches the prohibition against exclusive dealing, regardless of whether that conduct has an anti-competitive purpose or effect. Third line forcing involves:
 - the supply of goods or services on condition that the acquirer acquire goods or services from a particular third party; or
 - the refusal to supply goods or services for the reason that the acquirer will not acquire goods or services from a particular third party (s47(6)&(7)).¹

As can be seen from the above description of the prohibition on exclusive dealing, exclusive dealing may involve a refusal to supply or acquire goods or services for prescribed reasons. That is, exclusive dealing includes unilateral conduct and does not require the existence of a contract, arrangement, understanding or transaction.

Hutley SC and Pritchard acknowledge this, when limiting their conclusion that exclusive dealing requires 'some sort of arrangement or transaction' to s47(2), (4) and (6), which set out exclusive dealing practices that involve the supply or acquisition of goods or services 'on condition that' the supplier or acquirer (as the case may be) accepts some restriction on their right to supply, or acquire or re-supply, respectively. They state (at para 107):

Unlike s45(2) and 4D, the prohibition of exclusive dealing in s 47(2), (4) and (6) does not use the consensual language of "*contract, agreement or understanding*" [sic]. However central to the

¹ This description of s47 is a generalised description that is sufficient to illustrate the issues for present purposes.

definition of exclusive dealing in s 47(2), (4) and (6) is the supply of goods or services "on condition that" the acquirer will not acquire goods or services from a competitor of the supplier, or the acquirer accepts some restriction on the right to resupply goods or services. Integral to the concept of exclusive dealing **in these sub-sections**, therefore, is some sort of arrangement or transaction between the parties which places an impediment upon freedom of action in a market. [Emphasis added]

By contrast, in discussing s47(3) and (5), Hutley SC and Pritchard do not contend that there is any requirement, express or inferred, for an arrangement or transaction between supplier and acquirer, as these provisions use the phrase 'by reason that', rather than the phrase 'on condition that'. They state (at para 113):

In contrast to s 47(2), (4) and (6), which employ the expression "on condition that", s 47(3) and (5) use the expression "for the reason that". In our opinion, the expression "for the reason that" similarly connotes voluntariness, in the sense that the statute contemplates that the supplier and acquirer have sought to, and have failed to reach agreement.

More simply, no arrangement or transaction between supplier and acquirer is involved in a refusal to supply or acquire goods or services.

That is, fundamental to Hutley SC and Pritchard's conclusions in respect of the risk of contravention by NEC participants of the exclusive dealing prohibition under the MCE's proposed approach, is the removal of voluntariness which they contend is a necessary element of that prohibition, not the requirement for 'some sort of arrangement or transaction' which they acknowledge is applicable to some only of the prohibited exclusive dealing practices set out in s47. In this regard, the summary of conclusions, in the Memorandum of Advice, does not accurately represent their reasoning.

Hutley SC and Pritchard conclude in respect of the risk of contravention of s47 under the MCE's proposed model (at para 114):

In our opinion, therefore the effect of a statutorily imposed regime of registration and prudential requirements, would, in principle, be to avoid altogether the provisions of s 47, because instead of Code Participants agreeing (or not being able to agree) to restrictions on the supply of electricity to, and acquisition of electricity from, unregistered persons and persons who do not satisfy the prudential requirements, they would be subject to binding obligations in this regard.

The following (and previously discussed) qualification expressed by Hutley SC and Pritchard in concluding that a statutorily imposed regime of registration and prudential requirements would not be characterised as a provision of a contract, arrangement or understanding, and so would not give rise to a risk of contravention by participants of s45 are equally relevant and arguably called up by the reference in the extract above to 'a statutorily imposed regime of registration and prudential requirements':

Such a result would, of course, depend upon careful examination of the language of each provision in the statutory regime to ensure that any language of voluntariness or will has been removed, and all language rendered in terms of mandatory obligations, created and elaborated by statute. (Para 105)

That is, once again, the amendment of the current NEC provisions to remove 'any language of voluntariness or will' on the NEC becoming statutory rules made under the NEL is essential to Hutley SC and Pritchard's conclusion, in the Memorandum of Advice, that there will not be any risk of contravention of the exclusive dealing prohibition under the MCE's proposed model. It

is implicit that the NEC becoming statutory rules made under the NEL will not suffice to eliminate that risk (and, thus, that the correct characterisation of the current NEC as a statutory instrument would eliminate such a risk).

While we do not consider that it is beyond doubt that voluntariness is an element of the prohibition against exclusive dealing established by s47 from a technical legal perspective (as contended by Hutley SC and Pritchard), we are satisfied that in practice the risk of prosecution for a contravention of s47 where there is no element of voluntariness in the conduct alleged to constitute exclusive dealing is negligible.

Recommendations

While from a technical legal perspective there may be implications for NEC participants' trade practices exposure arising from the proposed conversion of the NEC to NER made under the NEL, in our view the risk of contravention by NEC participants of Part IV of the TPA in giving effect to the NER provisions under the MCE's proposed model would be remote.

Further, while we do not agree with Hutley SC and Pritchard's Memorandum of Advice to the extent it suggests in paragraph 5 that the application of the exclusive dealing prohibition in s47 depends on 'some sort of arrangement or transaction', we are satisfied that amendments to the NEC to remove 'any language of voluntariness or will' at the time of the NEC becoming the NER, made under the NEL, would address any risk of contravention of the exclusive dealing prohibition by participants.

Therefore we broadly agree with the MCE's conclusion in its Consultation Paper that:

...under the new NE Rules the risk profile for participants in the market will not be materially changed from their existing TPA risk profile under the currently authorised NE Code.

However, the Counsel's conclusions are clearly stated to be conditional upon potentially significant amendments to the NEC, in order to remove element of voluntariness and to elaborate as required to meet statutory form. This will therefore not be as simple a process as merely enacting the NEC as NER.

Further, we note that the submission of the NEC as an industry access undertaking under s. 44ZZAA TPA (by NECA as the prescribed industry body) at least nominally reflected that the NEC was a voluntary access undertaking by the service providers concerned. We consider further advice would be required as to whether statutory rules based upon a NEC, as amended by participating jurisdictions to remove elements of discretion from network service providers, is correctly characterised as an industry access undertaking for the purposes of Part IIIA TPA.

Similarly, if the NEC is to be put in more prescriptive terms, analysis may be required as to how this impacts upon network service providers and whether this creates additional regulatory risk.

We therefore recommend that submissions be made to the MCE raising these concerns with the approach proposed and seeking urgent clarification of the form and extent of the proposed amendments to the NEC.

Yours sincerely

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