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ENA COMMENTS ON PROPOSED AMENDMENTS TO NATIONAL ELECTRICITY LAW IN RELATION TO MANDATED ROLL OUT OF SMART METERS

The Energy Networks Association (ENA) takes this opportunity to comment on the Ministerial Council on Energy (MCE) Standing Committee of Officials (SCO) proposed legislative amendments to the National Electricity Law (NEL) and accompanying Explanatory Note. The proposed legislative amendments provide heads of power for jurisdictional Energy Ministers to mandate the roll out of smart meters and related pilots and trials which were released for stakeholder comment on 23 December 2008.

While ENA welcomes the MCE SCO collaborative approach in seeking stakeholder feedback, we have concerns with the exposure draft.

Broadly ENA's main issues are that:

- The NEL amendments would create new wide powers for Ministers to direct electricity businesses and empower the Australian Energy Regulator (AER) beyond their current regulatory role.
- They enable Ministers to make determinations (pilot or rollout) that may not necessarily be consistent with the national smart metering framework, or subjected to jurisdictional review or consultation, or are commercially acceptable.
- The MCE's SCO proposal is silent on distributor exclusivity for the smart meter roll out as endorsed by the MCE Statement of Policy.

The ENA strongly recommend that each roll-out mandate should apply functionality and services within the national specifications, when they are available. The ENA also recommend that there be consideration given to adapting the existing regulatory regime that already has many of the elements necessary for appropriate cost recovery.

Smart metering infrastructure represents a major investment, one that can create substantial technical, commercial and regulatory risks for the industry and customers. Therefore in considering the regulatory requirements to implement smart metering policy, effort should be applied to understanding the risks and to finding the best means to avoid or mitigate them. In doing so it is also important to preserve the integrity of the existing national regulatory framework and to employ the existing transparent processes and institutional accountabilities. Before making changes or additions to the existing framework, the framework should be analysed and a clear need for change should be established.

ENA recognises that MCE SCO is seeking to implement its policy intent to enable distribution businesses (DB) cost recovery by establishing mechanisms::

- to require DBs to conduct trials, assessments and pilots and obtain information necessary for each jurisdiction to review their smart metering policies in 2012
- to require DBs to roll out smart metering in accordance with the policy of each jurisdiction.

The ENA supports the MCE policy intent and wishes to facilitate the actions necessary to fulfil it, while at the same time recognising the commercial and technical imperatives our members face.

In considering the way forward ENA recommends that MCE SCO give consideration to the following alternative to the proposal:

- Any legislative or regulatory amendments should only allow for trials, assessments and pilots that DBs propose, and that Ministers approve after stakeholder consultation. The ENA anticipates that DBs will be very responsive to the policies of each jurisdiction.
- Once the Minister has approved a proposal, the AER would determine cost recovery in accordance with Chapter 6 of the Rules, which may need to be amended to recognise the particular circumstances of smart metering trials, assessments and roll outs.
- This mechanism can ensure that smart metering is economically beneficial, practically achievable and commercially acceptable within each jurisdiction's context. This mechanism reflects the fact that when each jurisdiction creates its own roll-out mandate, it is approving an investment by customers along with distribution and retail businesses.
- The NSSC should be given the opportunity to develop and submit to the AEMC rule change proposal/s that provide for cost recovery of Minister-approved smart metering. It would seek to build upon Chapter 6, where necessary, to recognise the specific risks of smart metering investment from a distributor, retailer and a customer perspective. ENA endorses the NSSC recommendation that more consideration be given to the roll-out approach before NEL amendments are progressed.

The ENA is committed to working with the MCE SCO, the NSSC and other stakeholders to design and implement an appropriate legal and regulatory framework as soon as possible. Given the scale and complexity of smart metering investment, however, it is important that the MCE SCO takes the time necessary to get the design right.

Below the paper outlines the MCE SCO's proposal and the ENA's more detailed response.

The Proposal

The MCE SCO legislative amendment proposal has two main elements:

1. Ministerial pilot metering determinations

- The Minister (in the main or adjacent jurisdiction) may make a pilot determination requiring a DB to undertake trials and/or an assessment (ss. 118B(1)-(2)).
- The pilot determination may specify the relevant minimum standards and the nature and timing of the trials, and require the DB/s to provide trial or assessment information to a specified person (s. 118B(4)).

- The pilot determination may confer powers and functions on, or leave any matter to be decided by, the AER (s. 118B(5)).
- A DB must comply with a pilot determination or decision/direction of the AER under the determination (s. 118J).
- The functions and powers of the AER would be extended from those set out in the Rules to also include those set out in a pilot determination (Division 2, s. 7).
- SCO envisages that DBs will develop pilot programs in consultation with one another and the NSSC, and that the Minister may consider these programs (explanatory note, p. 5).

2. Ministerial smart meter roll out determinations

- The Minister (in the main or adjacent jurisdiction) may make a roll out determination 'about the provision' of smart metering services by DBs (ss. 118C(1)-(2)).
- The roll out determination may specify the class of DBs, the number/class of customers/supply points and target dates (ss. 118C(3)-(4)).
- The roll out determinations may override any agreement or contract (s. 118C(5)).
- A DB must provide smart metering services required under a roll out determination in accordance with the standards specified under the National Electricity Rules (s. 118K).
- SCO intends to brief the Australian Energy Market Commission (AEMC) to conduct a review of the cost recovery provisions in the Rules applicable to smart metering (explanatory note, p. 5).

In both cases:

- The Minister of a jurisdiction adjacent to SA must consult with the SA Minister before making a determination (s. 118D).
- The determination may adopt wholly or partly any document, standard, rule, method or specification (s. 118E).
- The determination may be general or limited and apply differently to different locations (s. 118F).
- Victoria intends to amend the National Electricity (Victoria) Act 2005 to ensure that it regulates the roll out of smart metering under the Electricity Industry Act 2000.

ENA Response

Complexity of trials, assessments and pilots

The formulation, conduct and interpretation of technology trials, cost benefit assessments and end-to-end pilots are complex. There are many issues such as those around scope, purpose, cost, methodology, commercial confidentiality, intellectual property, liability, the participation of retailers and how these exercises fit in each smart metering program life cycle. These issues vary significantly from business to business and from time to time.

DBs are best placed to define and propose the trials, assessments and pilots that best suit their circumstances and that can be tailored to provide Ministers with the information MCE needs in a manner that is technically and commercially appropriate. Many businesses are already well advanced in developing their own business plans to conduct trials, assessments and pilots that take advantage of new opportunities in the normal course of their activities.

Roll-out mandate for smart metering

The design and implementation of a smart metering program has even greater complexities than the conduct of trials, assessments and pilots. Each DB starts from a different strategic and technological position. In all cases, smart metering services require very large investments, the raising of substantial funding and the transformation of all aspects of the business. Successful business programs require very professional project management, detailed planning and investment approvals at the highest level.

DBs are best placed to define and propose the programs that meet their commercial imperatives, are practically achievable, and that can be tailored to meet each Minister's expectations.

Businesses propose, Ministers approve

Accordingly, the ENA proposes that any legislative changes only allow for trials, assessments or pilots that DBs propose, and that Ministers approve after stakeholder consultation. It may also be appropriate for Ministers to have the power to require DBs to put forward proposals for approval. The ENA anticipates that DBs will be very responsive to the needs of each jurisdiction.

The NEL should allow for a process for smart meter trials, assessments, pilots or roll outs whereby:

- Distribution businesses would make proposals to Ministers that meet specific criteria.
- The Minister would publish a draft approval decision on whether the proposal is approved subject to specified criteria, and consult stakeholders both within the relevant jurisdiction and nationally on the draft decision.
- After considering submissions, the Minister would make a final approval decision.

Once the Minister has approved a proposal, the AER would determine cost recovery in accordance with Chapter 6 of the Rules, which may need to be amended to recognise the particular circumstances of smart metering trials, assessments, pilots and roll outs. We discuss the manner in which the relevant rule changes will be developed and approved below.

National consistency

The NEL amendments create new and wide powers for Ministers to direct DBs and to empower the AER. The MCE SCO's proposal contains no requirement for Ministers to ensure their determinations (pilot or rollout) are consistent with the national smart metering framework.

It seems unnecessary that individual Ministers should have the opportunity to require trials outside the national rules, methods (procedures) and specifications, once they are developed and recommended by the National Smart Metering Program. A better alternative is for MCE SCO to allow the National Smart Metering Program to devise proposals for new smart metering instruments and attain the appropriate approval of the AEMC, IEC and/or NEMMCO to enable businesses to develop their proposals for trials, assessments and pilots using those instruments.

If Ministers wish DBs to conduct trials, assessments and pilots before the new national smart metering instruments are in place, even without an expressed provision in the NEL, there should be nothing constraining a business from bringing forward proposals to Ministers that enable the examination of smart metering for which national rules, procedures and specifications are not yet in place, subject to what the National Electricity Market can accommodate.

In relation to roll out determinations, the MCE SCO's proposal allows for both:

- the ability of the determination to adopt wholly or partly any document, standard, rule, method or specification (s. 118E), and
- a DB must provide metering services under a roll out determination in accordance with the standards specified under the Rules (s. 118K).

This appears to create a potential conflict of obligations. In any case, any approval or obligation under the NEL to roll out smart metering should apply only national rules, and methods (procedures) and specifications. Therefore, once national standards relating to smart meter infrastructure have been established, Ministerial discretion to choose any other standards should not apply.

Cost recovery

The ENA wishes to highlight that the NEL Chapter 6 framework already provides provisions for the recovery of efficient costs which must be justified against the Objectives, Factors & Criteria in the Rules. DBs see that the current regime already has many of the elements and can allow for appropriate cost recovery. The NEL/NER pricing principles already include recognition of risk and efficiency.

NSW and ACT DBs are using the existing Chapter 6 framework (including the cost pass-through provisions) to gain AER approval for pilot/trials cost recovery during 2010-12 as part of their regulatory resets for the period 2009-14. Queensland distributors are preparing to do the same.

If it becomes apparent after the regulatory resets that pilots and trials are justified, a DB would need a workable cost pass through mechanism.

The NSSC is best placed to propose the rule changes that may be necessary to provide for cost recovery of Minister-approved trials, assessments, pilots and roll outs. In this context ENA notes that the NSSC has a broad membership, including retailers and consumer groups the NSSC in seeking legislative support for retailer recovery of costs and charges.

Any NSSC rule change proposal, of course, would need to be considered and approved by the AEMC with regard for the market objective and in accordance with the AEMC's extensive consultation process. This should provide the MCE with the comfort that a well considered integrated package of amendments is provided to the AEMC for Rules consultation which considers the relationship of metering functions and services, roles and obligations, the overall metering framework and cost recovery arrangements.

Further work is required to consider the specific risks of smart metering investment from a distributor, retailer and a customer perspective. The NSSC has representatives from all these sectors, a competent secretariat and working groups to marshal their expertise and knowledge and to create a quality rule change proposal.

Role of the AER

The MCE SCO's proposal contemplates that a Minister may confer broad functions and powers for decisions and direction in relation to trials, assessments and pilots, powers that go beyond those currently set out in the Rules.

The ENA believes that there is no need to widen the AER's functions and powers. In keeping with the current regulatory framework, any decision/direction of the AER should be limited to matters of economic regulation or compliance in the Rules. This goes beyond the current powers of individual ministers under the Australian Energy Market Agreement to confer powers on the AER (AEMA clause 9.1(e)).

Exclusivity

The ENA notes that the MCE SCO proposal is silent on the establishment of exclusivity. While the draft legislation would create obligations on a distribution business to undertake trials or a roll out of smart metering, it does not create an exclusive right for them to do so.

The ENA endorses the MCE's Statement of Policy Principles that distributors will be exclusively responsible for metering that is subject to a mandated smart metering roll-outs, at least for the roll-out period. ENA therefore believes that the definition of exclusivity needs to be strengthened to provide clarity for stakeholders.

It is appropriate, therefore, for the MCE SCO proposed legal and regulatory framework to include the provisions that create exclusivity right at the same point at which they create the mandate obligation. The ENA expects that such provisions will emerge in the National Electricity Rules through rule changes approved by the AEMC and guided by the MCE's Statement of Policy Principles.

Commercial certainty

The need for a metering determination to override contracts or agreements is not clear from the MCE SCO's explanatory note. At this stage, the ENA sees no need for such a provision that could create substantial commercial uncertainty and risk.

Please note that ENA also participated in the consideration of the formulation of the NSSC response to this matter which it fully supports. Further, should you have any queries relating to this submission please contact Mr Bill Layer (tel: 0262721507, email: blayer@asn.au).

Yours sincerely



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