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National Energy Market Branch  
Department of Industry, Tourism and Resources  
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***Energy Market Reform***

***National Electricity Law – Final Response to Exposure Draft***

Thank you for the opportunity to provide a final submission on the Exposure Draft of the National Electricity Law (NEL). This submission largely reflects the content of our joint initial submission but our claims are further substantiated by advice from Liza Carver and Nick Taylor of Gilbert + Tobin Lawyers.

The new NEL will be an important foundation, supporting the key structures of the national regulatory framework and it is essential that thorough consultation be undertaken to ensure that the new regulatory structures are both efficient and effective.

Consultation on the legislative package has been disappointing and esaa feedback on the legislative package is necessarily limited, as the proposed regulations and transitional provisions have not been made available.

On the basis of what we have seen, esaa considers that the majority of the legislative package broadly reflects the policy announcements of the Ministerial Council on Energy (MCE). For this, the Standing Committee of Officials (SCO) is to be commended. However, in considering the package as a whole, there are a number of issues that we believe need either further consideration by Ministers or a redrafting of the legislation to ensure there is an accurate reflection of the original policy intent.

**Confidentiality and information sharing**

The MCE announced in its 11 December 2003 report that the “new regulatory arrangements would provide for consultation and cooperation between the Australian Energy Market Commission (AEMC), the Australian Energy Regulator (AER) and the Australian Competition and Consumer Commission (ACCC)”. However, the MCE chose to place limitations on the degree of cooperation by stating that “the AEMC and the AER will be required to advise the ACCC, on its request, on matters

pertaining to the authorisation or approval of Code changes (subject to the limitations on the disclosure of confidential data)”.

However, the legislative package, which includes the *Trade Practices Amendment (Australian Energy Market) Act 2004*; *Australian Energy Market Act 2004*; *Australian Energy Market Commission Establishment Act 2004*; and the National Electricity Law bill go significantly beyond these MCE policy statements.

There is a common law principle that prevents information being used for a purpose other than for which it was originally provided. We have been advised that:

*“The confidentiality provisions of sub-sections 44AAF(3) and (4) introduced into the TPA by the Trade Practices Amendment (Australian Energy Market) Act and which are extended to be part of the National Electricity Law by clause 18 of the National Electricity Law over-turn that general legal principle. They specifically permit the disclosure of confidential information by the AER to the AEMC, the ACCC, NEMMCO, their consultants and any other person prescribed in the regulations.”*

In the absence of a clearly identified market failure that pertains particularly to the energy industry, we cannot see sufficient justification for this approach and consider that Ministers need to further consider this issue and conduct a transparent public policy debate.

We understand that the AER has been established as a “constituent part” of the ACCC and that Ministers are reluctant to construct ‘Chinese walls’ between the two bodies. However, the functions and purposes of the AEMC, AER, ACCC and NEMMCO will be distinctly different and these differences must be recognised. To proceed with the proposed confidentiality and information collection provisions would fundamentally change the character of information acquisition and provide unnecessary incentives for conservative disclosure. This, in turn, could result in greater use of the AER’s powers to apply for a warrant to enter, search and seize documents over relatively trivial matters and without a requirement to firstly consult with market participants. This would create a highly confrontational and relatively draconian regulatory framework for the energy industry and have a detrimental impact on the confidence needed to deliver future investment in energy infrastructure.

We have also been advised that the “statutory confidentiality provisions in the Exposure Draft of the new Law and the trade practices amendment legislation (or more accurately provisions abrogating key aspects of the general law concerning confidentiality) would constitute a significant abrogation to the general rights of electricity industry participants and of the obligations of the AER.” On this basis, esaa intends to vigorously take up this issue with Ministers.

### **Market objective**

While we support the development of a single composite market objective, we consider that there is a significant risk that the market objective contained in the draft bill may not be interpreted in the same manner under judicial review as it will be in

the AEMC's decision making processes. Judicial review needs to play an effective role in ensuring accountability in relation to decisions under the new NEL and the operation of the rule change process (which uses the market objective as a rule making 'test'). This potential difference in interpretation would reduce the ability for judicial review to provide sufficient accountability. We have been advised that:

*"if the interpretation of the composite national electricity market objective is left to a judge having regard to the plain and ordinary meaning of the term, there is a risk that over time there will be subjective and conflicting interpretations. An economic perspective will bring an intellectual rigour to the interpretation, which may otherwise be lacking. We would recommend that, as a minimum, the second reading speech make clear legislative intent is that the national electricity market objective [is] to be given an economic meaning."*

A second concern in relation to judicial interpretation is the omission of part of the market objective from Section 15(1)(a). Although the manner in which the AER performs or exercises its functions or powers is detailed in both 15(1) and 15(2), we consider that it would provide greater clarity under judicial review if the full market objective, as stated in Section 6, were included in Section 15(1)(a). This would prevent an interpretation that may conclude that the "promotion of efficient investment in, and use of, electricity services" and "price, quality, reliability, safety and security" have been deliberately excluded and that the AER should not have regard to these issues in performing its functions. Our advice states that:

*"When construing legislation, Courts take the approach that when Parliament uses different language different meaning is intended. In this case, there is a real danger that a Court would find that because there is no reference to:*

- *'efficient investment', the AER may regulate networks without having regard to the need to maintain efficient investment; and*
- *'price, quality, reliability, safety and security, the AER can give weight to a range of other factors such as enhancing general environmental or social outcomes.*

*If differences of meaning are intended, these differences should be made explicit both so that industry can analyse and comment on the appropriateness of those differences and to ensure that the Courts apply those differences rather than ascribing an incorrect difference of intention to the language."*

## **Investigation & enforcement**

The investigation and enforcement provisions of the draft bill, when considered as a package, appear unnecessarily draconian and go well beyond the current NEL arrangements and equivalent provisions applying to other industries. These provisions are also inconsistent with the stated goal to introduce a revised NEL that protects the existing substantive rights, obligations and liabilities of parties.

The draft bill proposes replacing the four levels of graduated penalty provisions in the current NEL with a two-tiered penalty structure. As an example, penalties for breaches of minor provisions may be up to \$100 000 under the new arrangements, compared to a graduated maximum penalty of \$5 000 in respect of what were formerly Class A penalties. Under the current NEL, market participants have the certainty of four different 'caps' for maximum penalties, which are directly related to the importance of the relevant Code provision. The proposed approach under the new NEL would significantly add to the costs incurred by market participants and, therefore, energy consumers.

There is no compelling evidence to justify one sector of the Australian economy being subject to more aggressive investigation and enforcement provisions than the economy more broadly. We have been advised that "in combination the warrant powers, the power to issue infringement notices and the civil penalty regime exceed the enforcement and investigation powers of other comparable Commonwealth agencies". esaa is particularly concerned that specific policy consideration does not appear to have been given to the question of the appropriateness of conferring these powers on a Commonwealth regulator (for example by carrying out a regulatory impact statement).

The draft bill also provides a Court with a new power to order the disconnection of a generator or a network service provider. This is an expansion of an existing provision of the National Electricity Code that permits the disconnection of a market customer where it has not paid for electricity consumed by its load. This new power is unjustified and inconsistent with the stated policy intent that the new NEL would not alter the substantive rights and obligations of parties. The extension of this power to order disconnection is not appropriate. Our advice states that:

*"It is particularly significant that the disconnection power has been extended to network service providers and generators because:*

- *On the one hand, it is difficult to conceive of a like policy basis for ordering disconnection to that which applies to particular loads (that is, generators and network service providers do not generally make payments to the spot market but rather they are net recipients of funds); and*
- *On the other hand, ordering the disconnection of a generator or a network would often bring about the demise of a whole business (an almost unprecedented power)."*

## **Authorisation**

esaa welcomes the advice in the information paper that the SCO's intention is to pursue the course set out in Mr Hutley SC's advice, which would obviate the need for ACCC authorisation of Rule changes.

However, to provide industry certainty, we ask that the SCO seek Mr Hutley SC's advice to confirm whether the proposed legislative package is effective in respect of his previous advice.

In addition, we ask the SCO to also seek advice on whether the new Section 90B of the *Trade Practices Act 1974* would need to be repealed. We have been advised that there may be a risk that, if Section 90B remains dormant within statute, “a Court might subsequently find that Parliament intended Rule changes to be submitted for authorisation, as it apparently did at the time section 90B was inserted into the TPA”.

### **Appeal rights**

The draft bill incorporates the previous MCE decision relating to the availability of judicial review on decisions made under the new NEL. However, esaa notes the commitment given by the SCO that the implementation of these decisions will in no way prejudice their consideration of the issue of merits review in the response to the Productivity Commission’s *Review of the Gas Access Regime*.

esaa considers that the availability of merits review on key regulatory pricing decisions remains a fundamental feature of an effective and accountable regulatory regime and we look forward to a full and thorough consultation on this issue.

This letter outlines our concerns with the Exposure Draft of the NEL. However, as noted above, we cannot ensure it is a comprehensive response as we have not been provided with the proposed regulations nor the transitional provisions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brad Page', with a stylized flourish at the end.

**Brad Page**  
Chief Executive Officer