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## ***Energy Market Reform***

### ***National Electricity Law – Initial Response to Exposure Draft***

Thank you for the opportunity to comment on the Exposure Draft of the National Electricity Law (NEL). 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.



Overall, we consider that the majority of the legislative package broadly reflects the policy announcements of the Ministerial Council on Energy (MCE). 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. We have outlined our high level issues in this initial submission and will provide more detail in our individual final submissions.



### **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.



We have serious concerns with the provisions in the draft bill that relate to information and confidentiality arrangements. It is our view that the draft bill extends the operation of unnecessarily intrusive information collection powers. In addition, it overturns the common law protections that prevent information being used for a purpose other than for which it was originally provided. 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 and ACCC 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.

### **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.

Governments could minimise any differences in interpretation of the market objective by clarifying their intention that the market objective should be interpreted as having an *economic* meaning, rather than the ordinary meaning. This could be achieved by explicit insertion in the bill, or in the second reading speech, or in the explanatory memorandum.

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.

## **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. There is no compelling evidence to justify one sector of the Australian economy being subject to more aggressive investigation and enforcement provisions than contained in the existing *Trade Practices Act 1974*.

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.

The draft bill 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. Generators and network service providers do not generally make payments to the spot market and are, in fact, generally net recipients of funds. The mandatory disconnection of a market participant is likely to bring about the demise of the business, despite it being unclear in what circumstances such an order would be used or useful.

## **Appeal rights**

The draft bill incorporates the previous MCE decision relating to the availability of judicial review on decisions made under the new NEL. In particular, we note the commitment given by the Standing Committee of Officials 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*. While we support the provision of judicial review in the draft bill, we consider that the availability of merits review on key regulatory pricing decisions remains a fundamental feature of an effective and accountable regulatory regime.

This letter outlines our preliminary concerns with the Exposure Draft of the NEL. We look forward to discussing our concerns with you at the pre-finalisation hearing on 7 January 2004. To assist us in considering the overall legislative package and preparing a final submission, it would be useful if all legislative provisions could be

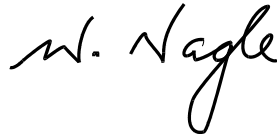
made available, including not only the law and the rules, but also the proposed regulations and transitional provisions.

Yours sincerely



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