

Energy Action Group

PO Box 136
North Melbourne
A0012789L

5 January 2005

Manager – Energy Market Reform Team
National Energy Market Branch
Department of Industry, Tourism and Resources
GPO Box 9839
Canberra ACT 2601
Email : MCEMarketReform@industry.gov.au

Dear Sir or Madam

Re: EAG Initial Submission on National Electricity Law & National Electricity Rules

The Energy Action Group (**EAG**) initial comments to the Ministerial Council on Energy (**MCE**) on the new *National Electricity Law and National Electricity Rules* (**NEL & NERs**).

The EAG is a 27 year old non-profit organisation focused in the main on energy issues relating to small consumer (less than 160 MWh/a and 10 TJ/a). Members determine EAG policies and directions. EAG activities cover both national and sub-national issues for the social action component of our work see <http://www.vicnet.net.au/~eag1/> . EAG has a policy of trying to work collaboratively with market participants and other consumer groups (like EUAA) on issues of common interest

EAG is particularly disappointed with the MCE process to date as there has been little effective analysis of the strengths and weaknesses of the current NEM arrangements.

The following brief comments illustrate this point.

Currently some \$17 B worth of network capital investment has either been approved or is in the process of being approved by the ACCC and the jurisdictional regulators to replace aging assets, to provide new investment for increased per capita consumption and new connections to the year 2009. At least \$6 to 7 B of the \$17B will be spent to meet summer peak load growth and continue the process of lowering the asset utilisation curve!

There has been a noticeable deterioration across the NEM in the network's annual load duration curve due to the increase in temperature dependant summer peak loads. This outcome also requires new generation investment particularly gas peaking plant. (The only exception to this outcome appears to be Tasmania.) This is not an economically efficient market outcome!

The current market arrangements fail to effectively allocate the summer peak load costs to the source of the demand.

Almost all market participants obtain significant rewards from summer peak load growth, even host (1st tier) retailers.

This is one of the most significant outcomes to come from the old NEC.

The new NEL/NER fails to address the issue rewarding inefficient summer peak load growth providing a policy setting to address this issue!

It is EAG contention that the NEL/NER acts as a behavioural driver on market participants and one of objective of this new package should be to address some of the deficiencies of the Code.

Lack of meaningful consultation

The EAG would like to express outrage about the timeframes for, and timing of, public/stakeholder consultation. EAG believe there are major issues of substance and not just process that need to be addressed in the new NEL/NERs. We strongly recommend that more work and public discussion needs to occur before they are finalised and enacted. The holiday months of December and January (for most of government and industry) are not the time to be 'tackling' these crucial reforms.

EAG is distressed to see that the current draft NEL/NER legislation fails to address several significant issues like Merits Review in the package. THE SCO has failed to show why we only have the current incomplete package when with some more time (at least 6 months) we could have a complete reform package. At this stage there is an implicit "Trust Us Approach" EAG doesn't!

As governments appreciate, electricity markets and associated infrastructure provide essential services to the community. EAG believes that Ministers are rather sensitive to energy price increases and major outages. These essential services have to date been provided by the National Electricity Market (NEM) which was developed over 3 years from 1995 to 1998 with the benefit of considerable consultation with industry. It is alarming that governments now seek to change the institutional and governance arrangements of the NEM without the benefit of the considered views of industry, major users and consumers.

The SCO has provided no justification for the haste of this consultation process. It therefore appears the SCO is unaccountable to the MCE and, indirectly, to the industry, major users and consumers.

Prudent regulatory and parliamentary practice requires either adequate time for affected parties to fully assess and consider proposed regulatory amendments or, where adequate time is not possible, the provision of a comprehensive regulatory impact statement to assist affected parties quickly understand the affects of the proposed changes. Neither of these options has been followed in this case.

EAG is of the opinion along with a number of market participants that the SCO is providing insufficient time for a comprehensive and considered review of the proposed changes to the NEL and NER, and has not provided a regulatory impact statement. EAG believes that this is irresponsible considering the essential nature of electricity services and the complexity of the NEM, there is considerable risk to all parties that the issues raised by the proposed changes will not be properly identified and/ or addressed in the limited time available over the summer holiday period.

NEM reform should be an opportunity to governments to put in place robust and efficient governance arrangements. However, it appears that governments are prepared to quickly make changes without fully understanding the potential implications of their actions. Due to the essential nature of the services concerned, any risk of error by government in changing the NEM is too great to be treated in the current cavalier manner. Therefore, we urge the MCE to permit industry, major users and consumers adequate opportunity to full assess the proposed changes and to provide considered and meaningful assistance to the process over the next 6 months.

Single Market Objective

The EAG supports the concept of a single market objective this is a significant move forward from the old Code. We are also strongly supportive of the objective of promoting the “long-term interests of consumers”. Nonetheless, we seek further guidance from the MCE/ SCO as to the intended meaning of this objective, in particular whether the objective is to be interpreted in accordance with the ordinary meaning of its words or whether concepts such as "long-term" and interests" are to be read as economic concepts. Furthermore, the EAG wishes further guidance as to how the "long-term interests of consumers" are likely to be affected by the reference in the market objective to "efficient investment".

The EAG will examine in further detail the role of the market objective in respect of the functions and activities of the both AEMC and the AEMC. The EUAA is particularly concerned to ensure the rule making test, and processes in respect of Code enforcement and transmission price/revenue capping appropriately reflect the interests of end users.

The EAG considers that, if the market objective is to be successfully implemented, the framework of the NEL itself must be consistent with, and supportive of, the objective. Below at paragraphs 0-0, we identify a number of significant aspects of the NEL framework which *together* form an essential basis for supporting the objective.

The use of Judicial Review as the only legal basis outlined in Section 7 and Section 68 strongly disadvantages consumers in trying to address poor regulatory decisions and unacceptable behaviour by market participants and the AER, AEMC and ACCC

Standing of End Users

The EAG supports the broadening of groups that can propose Rule changes with the introduction of the “other interested parties” inclusion. Nonetheless, the EAG considers there should be an *express* right of standing for appropriate industry associations/groups representing electricity end users to ensure that there is no prospect that standing of such associations and groups may be open to question. This express right of standing needs to be applied broadly throughout the NEL and the NERs, and not merely restricted to matters concerning Rule changes. Further to the standing issue is the need to provide adequate resources for a consumer group to mount a case to ensure that a rule change or an appeal that has merit (and is not frivolous or vexatious) can be sustained to it is finalised.

Checks and Balances of the AEMC, AER, NEMMCo and ACCC

The EAG is unconvinced that there are appropriate checks and balances in respect of AEMC's, AER's, NEMMCo and ACCC's performance of their respective functions (as outlined in the NEL and NERs). Such checks and balances are essential to ensure that these bodies fulfil the single market objective and that there are effective representation, review and appeal mechanisms to allow end users fair and equitable participation.

Merits review can form a significant part of such checks, balances and the reversability of poor decision making which is particularly important in an industry with significant natural monopolies and hence the need for economic regulation. A merits review process acts as an important discipline for regulators in ensuring they undertake an objective, robust and transparent evaluation. However, it is also important to develop a ‘sound’ and ‘fair access’ merits review process (see, for example, issues of standing and funding as discussed in this submission).

The EAG is of the opinion that a merits review process given appropriate resourcing being made available to consumers, coupled rules about vexatious and frivolous appeals will lead to better decision making by the market operator and the various regulatory bodies (AEMC, AER, NEMMCo and ACCC) involved in the NEM..

The provision of Judicial Review in the NEL/NER provides for a expensive and hopeless outcome where at best “a decision is set aside” and is then sent back to the body that made the poor determination/decision in the first place. It is clear that an independent merits review should give a better outcome and provide scrutiny on poor regulatory decisions. The issue then becomes how to resource consumers in a merits review process so they can effectively participate.

The current arrangements in the Gas Code reward market participants for appealing a determination (With the one exception of the Western Australian Epic pipeline case, where Epic paid too much for the assets in the first place).

Enforcement Procedures

The EUAA believes that the strength of the Rules and penalties entrusted to the AER under the Rules will be critical to the issue of whether the Rules provide acceptable outcomes for end users. Again, the EUAA considers that the NEL must expressly provide for end users to request that the AER investigate breaches of the Code. In addition, the NEL should expressly permit end users to seek damages for breaches.

Funding of End Users to Effectively Participate

There is no reference in the NEL or the NERs on how end users and their representatives should be resourced to participate in the new institutional arrangements. The EAG will be examining this matter further.

It is clear that the NEM Advocacy Panel doesn't understand the specific funding requirements for less than 160 MWh consumers in this market. Their recent 20th of December decision to part fund a SACoSS project and to put a condition that they find 40% of the project funding from other sources shows a total failure to understand that small consumer groups don't have access to financial resources.

The Advocacy Panel decision making process have also acted as a deterrent to consortia funding were groups can run a common project, minimising wasteful project duplication.

Reliability Panel

The EAGA will continue to examine the function of the Reliability Panel to ensure that its functions are consistent with the single market objective, that is, whether the Panel is required to consider the end user consequences of their decisions.

But in the interim EAG recommends that the Reliability Panel be more self sufficient that the current arrangements, where NECA or the AEMC provides the secretariat functions, call tenders and employs the consultants to work on the Panels various Legal and Rule obligations. The Panel needs to have access to robust and independent advice from NEMMCo, AEMC and AER.

Adequate support for the market objective

As noted earlier, the issues identified the above commentary effectively reflect aspects of the NEL framework which must be designed to support the single market objective. *All* aspects of this package must be appropriately implemented. In the absence of adequate support for the market objective, it will be necessary to ensure that consumers' interests are protected by way of significant amendment to the market objective. In addition, further safeguards to protect the interests of the consumers will

be required, such as the requirement of "consumer impact statements" for decisions or actions under or in respect of the NEL or the NERs.

Managing market power

It is also important to ensure that appropriate measures are in place for the mitigation of the potential exercise of market power by generators. The EAG seeks confirmation from the MCE that section 46 of the *Trade Practices Act* will continue to apply to market participants in respect of their conduct in the NEM, notwithstanding the NERs status as a statutory instrument.

Further, the EAG believes that there is prima facie evidence that the current behaviour under the NEC and the proposed sections in the NEL and NER governing market power abuse are too weak to have any real impact and, combined with less than desirable competition in the generator sector, have lead to higher than necessary volatility on the NEM pool and higher risk premiums, the costs of which are ultimately borne by end users. The EAG hopes to address this matter in more detail in 2005.

Regards

John Dick
President