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Mr John Ryan
Deputy Secretary
Department of Industry, Tourism and Resources
GPO Box 9839
CANBERRA ACT 2601

Dear Mr Ryan

EnergyAustralia final submission to the MCE on the National Electricity Law Exposure Draft

I am pleased to submit to the Ministerial Council of Energy Standing Committee of Officials EnergyAustralia's final comments on the National Electricity Law (NEL) Exposure Draft.

As indicated in the initial submission dated 24 December, 2004, EnergyAustralia has sought further legal and economic advice on a number of issues. In addition to the initial issues raised, EnergyAustralia submits the following concerns.

1. Economic advice on the proposed National Electricity Market objective

As stated in the initial submission, EnergyAustralia has strong reservations about the wording of the proposed national electricity market (NEM) objective and whether it will provide a robust test for application to rule changes. EnergyAustralia commissioned economic advice from Network Economics Consulting Group (NECG) seeking an assessment of the NEM objective from an economic perspective. The NECG report is attached and forms part of EnergyAustralia's submission.

NECG assessed the proposed NEM objective against key features of an effective objects clause while also drawing on experience from the telecommunications sector. A summary of NECG findings is presented in the following table.

Factors for an effective objectives clause	Summary assessment of draft NEM objective
Appropriate to the regulated industry - explicitly referencing economic efficiency.	<ul style="list-style-type: none"> ▪ <i>A narrow definition of promoting economic efficiency has been adopted.</i> ▪ <i>It is not clear that promoting the "long-term interests of consumers of electricity" provides the best approach to maximising social welfare, as the subset of electricity customers is potentially narrower than the general public.</i> ▪ <i>Setting the promotion of the interests of one section of the community as the object of a regulatory scheme may therefore lead to outcomes inconsistent with economic efficiency as a whole.</i>
Simple and easy to interpret.	<ul style="list-style-type: none"> ▪ <i>By its exclusion of any reference to economic efficiency, and focus on a subjective interpretation of the "long-term interest of consumers of electricity" the proposed NEM objective is susceptible to misinterpretation.</i>
Conflicting objectives should be avoided.	<ul style="list-style-type: none"> ▪ <i>The introduction of the "long term interest of consumers of electricity" appears an unnecessary inclusion at best, and potentially conflicting complication – in terms of interpretation – at worst.</i> ▪ <i>The inclusion of this term is also contrary to the Productivity Commission's findings in relation to the "long term interest of end-users" (LTIE) in the telecommunications sector, and inconsistent with the proposed objective for Part IIIA.</i>
Sub-objectives only included where they assist interpretation.	<ul style="list-style-type: none"> ▪ <i>The sub-objectives (of price, quality, reliability, safety and security) provide scope for regulatory discretion, decreasing transparency and requiring trade-offs between potentially conflicting sub-objectives on a qualitative basis by the regulator.</i> ▪ <i>Further, it is not clear the extent to which these considerations may or may not conflict with the general efficiency objectives of the objects clause, and if so, how any conflicts would be resolved.</i> ▪ <i>The economic elements such as price and quality are all part of the same "value for money" concept addressed by efficiency. Therefore, it is questionable whether they require a separate explicit listing.</i> ▪ <i>Issues such as safety and security may be best addressed primarily by technical regulation, it could be appropriate for the regulator to be required to exercise its mandate subject to those goals being met.</i>

EnergyAustralia calls on the MCE to clearly articulate that the national electricity market objective is to promote the long term economic efficiency in the provision of electricity services. And if this is so, that the draft national electricity market objective be changed to reflect this ultimate objective. The objects clause proposed for Part IIIA provides, in EnergyAustralia's view, the most appropriate footprint for the national electricity market objective, such as, for example:

"promote the economically efficient operation and use of, and investment in, electricity services for the long term"

As previously submitted, EnergyAustralia also considers it imperative that the AEMC and the AER operate under the same objectives to promote a consistent regulatory framework for the national electricity market.

2. Consultation on Regulations and transitional arrangements

EnergyAustralia highlighted its disappointment with the compressed consultation timetable for consultation on the draft national electricity law (NEL) and Rules in the initial submission. It is essential that industry be given adequate opportunity to consider and comment upon such fundamental changes to the regulatory frameworks because they impact directly on the ability of the participants to operate and carry out their business. EnergyAustralia supports the process for industry participation in change to the national electricity rules and submits that similar opportunity must be given when the Regulations and transitional arrangements are being developed.

Whilst EnergyAustralia understands that Regulations under the NEL need to be exempted from the usual tabling and disallowance requirements to provide certainty, there is no reason why the Regulations should not be subject to public scrutiny and justification prior to their being made.

Most jurisdictions require the preparation some form of public consultation to take place before a Regulation is made. The draft NEL provides for a number of very significant matters to be determined by Regulations. These include:

- Prescribing persons who are relevant participants;
- Providing additional powers to the AER under section 14(g) and the AEMC under section 30;
- The subject matter of Rules to be made by the AEMC including Rules which may be made at the initiative of the AEMC;
- Conferring functions on the Reliability Panel under section 37;
- Specifying civil penalty provisions;
- An order which can be made by the Court under section 60 of the NEL;
- The content of notifications and other important matters relating to the Rule Change process under Part 7; and
- Prescribe the monetary limits of NEMMCO and Network Service Provider liability for system operation functions.

These are all issues upon which the views of industry and the public more generally should be sought and considered. EnergyAustralia strongly submits that the Regulations should be subject to formal requirements that they cannot be made unless a draft of the proposed Regulations have been made publicly available and a reasonable opportunity has been given for any interested persons to make a submission in relation to the proposed Regulations.

3. Enforcement: disconnection of networks

EnergyAustralia queries the inclusion of the power for a Court to order the disconnection of a network service provider found to be in breach of the NEL. This provision is a substantive change to the existing rights and obligation of network service providers and has been included without previous notice or consultation. The current power of the Tribunal under clause 44 of the NEL is limited to ordering the physical disconnection of a Code participant's market loads (as contemplated by the Code) where there has been a breach of the Code or NEL.

Whilst this would lead to a retailer of last resort event in the market, otherwise the impact of the disconnection would be isolated to the affected Code participant. This would not be the case if a network service provider was disconnected. Such a disconnection would almost certainly affect the ability of generation to dispatch and for retailers to supply, thereby disabling the market served by the relevant network.

EnergyAustralia submits that there appear to be good reasons why such powers do not exist under the current NEL and urges that the need for this provision be reconsidered. As a minimum, very strict criteria should be applied to the circumstances in which such a disconnection could be ordered, such as the Court being satisfied that it was the only appropriate course of action to address the breach.

4. Infringement notice regime

EnergyAustralia has no objection in principle to an infringement notice regime to address Code breaches, however such regimes must provide for the alleged code breaches to be contested before any penalty sought to be imposed can be enforced.

Proposed section 74(i) requires that the infringement notice must state that the relevant participant is entitled to disregard the notice and defend any proceedings in respect of the relevant civil penalty provision. However, it is not clear from the procedural requirements set out in proposed sections 75- 82, that the AER may not proceed to enforce an infringement penalty which remains unpaid without bringing proceedings before a Court.

Section 82 in particular appears to provide for the AER to enforce an infringement penalty as a civil debt. It is not clear why such a provision would be required as the scheme required to be set out in an infringement notice would result in infringement penalties either being paid or the subject of proceedings before a Court. The issue of enforcement of an infringement penalty would not arise as a penalty ordered by the Court would not be an "infringement" penalty but a "civil" penalty. EnergyAustralia therefore submits that these provisions should be carefully reviewed to ensure that the powers and obligations conferred upon the AER are consistent with the scheme indicated in section 74(i).

5. Abolition of reviewable decisions

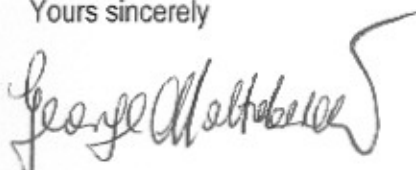
The abolition of the right for a full review of some decisions of NEMMCO and the AER is inconsistent with the stated policy intention not to interfere with the existing rights of market participants.

Whilst the decisions of NEMMCO and the AER will now be generally subject to judicial review, there are some decisions which are currently reviewable by the Tribunal which could not be reviewed through judicial review in the same way as currently could occur by the Tribunal. These are decisions which relate to the fundamental right of participants to operate in the market and which generally involve some degree of discretion or require the formation of a reasonable opinion by either NEMMCO or the AER.

The specific decisions of concern to EnergyAustralia are all of NEMMCO's reviewable decisions under Chapter 2 (clauses 2.2.1(c), 2.2.2(d), 2.2.3(d), 2.9.2 and 2.10.1), the AER's decision under clause 2.5.1(h) to grant exemptions from providing access undertakings and NEMMCO's decisions under 3.3.8(h), 7.1.4.(b) and 7.4.3(b). EnergyAustralia strongly submits that these decisions should continue to be fully reviewable such that the decision of NEMMCO or the AER can be substituted by the review body. In relation to the decision of NEMMCO to issue a notice under clause 4.11.1(d) this decision should be made subject to the dispute resolution provisions under Chapter 8 of the Code.

I hope that careful consideration is given to the issues raised in EnergyAustralia's submissions. Further enquiries can be directed to Ms Nives Matosin, Manager Regulatory Policy on telephone (02) 9269 4257 or email nmatosin@energy.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read "George Maltabarow". The signature is fluid and cursive, with a large, sweeping flourish at the end.

(GEORGE MALTABAROW)
A/Managing Director