

1. Introduction

EnergyAustralia is pleased to submit to the Ministerial Council on Energy Standing Committee of Officials comments on the National Electricity Rules (NER) Exposure Draft. EnergyAustralia has reviewed each chapter of the Draft Rules and compared them against the current governance arrangements, rights and obligations. There are a number of areas in the draft Rules that, EnergyAustralia believes, require modification. These comments are offered with a view to improving the regulatory and trading arrangements in the national electricity market.

2. Chapter 1 - Introduction

NEMMCO's role

Provisions relating to NEMMCO's functions as market and system operator have been removed from the draft Rules and these provisions now reside in the National Electricity Law (NEL) in a slightly recast but substantially in the same form as in section 49 of the NEL.

The only function EnergyAustralia is concerned has been amended in a substantial way is the function relating to power system planning. Currently clause 1.6.3 (e) of the Code states as one of NEMMCO's functions to "undertake its coordination of power system planning responsibilities in accordance with the provisions of Chapter 5 of the Code." Section 49(1)(f) of the NEL casts this function more broadly as "To undertake the coordination of the planning of augmentations to the national electricity system". NEMMCO's current functions in relation to coordination of planning of augmentations is limited under Chapter 5 to inter-regional planning. It has no substantive functions in relation to intra-regional planning which is the responsibility of the relevant Distribution Network Service Providers (DNSPs) and Transmission Network Service Providers (TNSPs).

This appears to be a substantial change, and EnergyAustralia argues, inappropriate expansion to the role of NEMMCO. This proposed change would potentially have a significant impact on the planning processes of transmission and distribution network service providers. This is contrary to the assurances by the MCE Standing Committee of Officials that it was the intention to maintain the same rights and obligations on participants in the transition from the existing arrangements to the National Electricity Law and Rules. EnergyAustralia strongly argues that the effect of the proposed change to the Rules would be to expand the functions of NEMMCO, which is not appropriate without a full consultation and justification process.

EnergyAustralia submits that NEMMCO's function should be more limited than those proposed under proposed s49(f) and should be limited to the coordination and planning role currently conferred by the Code.

Reviewable decisions

EnergyAustralia does not support the proposition to remove the ability of Registered Participants to have access to reviewable decisions. To reiterate EnergyAustralia's comments in its submission on the NEL dated 7th January 2005 - "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".

The draft Rules contain many provisions which are of technical, engineering and commercial nature where a degree of expert judgement is required to arrive at a decision. Other decisions 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.

These issues are not suitable for judicial review. EnergyAustralia is proposing that Registered Participants have access to review processes either through the Chapter 8 dispute resolution process or review by the Reliability Panel. This issue is raised again throughout the submission and in particular the comments on Chapter 8.

Application of interpretation provisions: Provision to amend and repeal determinations

Clause 1.7.1 provides for clause 21 of Schedule 2 of the National Electricity Law (NEL) to apply to determinations under the NEL as well as the Rules. Clause 21 provides that if the Law (or Rules) authorises or requires the making of an instrument, decision or determination, the power includes the power to amend or repeal the instrument, decision or determination. The application of the power to repeal (under clause 21 of Sch 2) to economic regulatory determinations by the AER and Jurisdictional Regulators is not clear and raises some serious concerns for EnergyAustralia as to the level of regulatory discretion introduced.

For instance, Chapter 6 of the draft National Electricity Rules retains clauses 6.2.4(d) (in relation to transmission) and 6.10.5(e) (in relation to distribution) which restricts the circumstances in which the regulator may revoke a determination. Consequently 6.2.4(d) and 6.10.5(e) are directly inconsistent with the broad power to repeal now conferred by clause 21.

EnergyAustralia supports the principle that economic regulators have the power to vary and or revoke determinations in certain, clearly specific situations. However, EnergyAustralia is seriously concerned that a general power to vary or revoke may undermine the certainty that underlies the current five year revenue or pricing determination process. This principle of certainty is the cornerstone of economic incentive regulation. Furthermore, good regulatory practice should ensure determinations have built-in adjustments to the revenue or price path, for exceptional events beyond the control of the regulated business.

Consequently, EnergyAustralia is of the firm view that the circumstances under which the AER or the relevant Jurisdictional Regulator may amend and or revoke a determination must be carefully defined, to ensure that changes can only be implemented in appropriate circumstances and with the agreement of the affected network service providers. Consequently the powers conferred by clause 21 need to be explicitly qualified by the Rules. EnergyAustralia has further comments on the AER's proposed power to revoke which are outlined later in the submission in the comments on Chapter 6.

Review of access arrangements

It is understood that the MCE intends to have the access arrangements settled by the time the National Electricity Rules commence. However, EnergyAustralia is concerned that the delay in the consultation on access arrangements will limit the time available to provide comprehensive comments (as has occurred with the NEL and NER). It is difficult to imagine how the access arrangements could be ready in time and include an effective consultation period.

EnergyAustralia calls for the immediate release of consultation papers on the proposed access arrangement.

National electricity market objective

Changes to the Rules will be subject to the National Electricity Market (NEM) objective. As argued in previous submissions and in the NECG report commissioned by EnergyAustralia, we do not believe that the wording of the draft NEM objective will form an effective test for assessing proposed changes.

Clause 2.2.1 also proposes that the NEM objective should be applied as a test for granting certain registration exemptions. EnergyAustralia's previously expressed concerns about interpreting the NEM objective will be further compounded if it is utilised as part of a test to be satisfied in specific circumstances such as participant registration.

EnergyAustralia is concerned that reference to the "second reading speech" may not be an effective tool to assist in the interpretation of the market objective. The interpretation provisions in clause 8 of Schedule 2 to the NEL provides for the use of extrinsic material in what could be read as fairly limited circumstances; ie where a provision is ambiguous or obscure or if the ordinary meaning leads to a result that is manifestly obscure or unreasonable. It is not clear that this provision requires a Court to have regard to extrinsic material as a matter of course, particularly if the Court can give effect to the ordinary meaning without what it regards as absurd or unreasonable results. It appears that clause 8 is a discretionary tool available to the Court in the circumstances specified. EnergyAustralia suggests that if the intention of the jurisdictions is to require a Court to give the market objective an economic meaning, then the legislation itself should specifically state this.

However the first and best option would be to have an unambiguous objective without having to rely on the second reading speech (as has been proposed to the MCE). EnergyAustralia urges that the MCE take consideration of EnergyAustralia's submission dated 7 January 2005 which included an report from NECG on the problems with the wording of the draft NEM objective.

3. Chapter 2 - Registered participants and registration

Registration of Network Service Providers

Clause 2.5.1(d) provides for the Australian Energy Regulator (AER) to exempt persons who are required to register as network service providers (NSPs) from the requirement to register or from the requirement to comply with Chapter 5 and provide an access undertaking to the ACCC as part of the registration process. Significantly the clause provides for the AER to develop its own exemption guidelines to guide it in carrying out this function.

Both components of this role were previously carried out by NECA. The proposed role allocation to the AER, in particular the role of developing guidelines, is not an appropriate role for the AER. The Legislative and Regulatory Framework Information Paper issued by the MCE Standing Committee of Officials in August 2004, states that the AER will be responsible for economic regulation and market rule enforcement. The granting of registration exemptions is neither an economic regulatory or a market rule enforcement function. The function of developing exemption guidelines is a combination of a policy and rule making role whilst the actual granting exemptions is partly an energy market development role, but is also closely connected to the administration of the market, performed by NEMMCO.

Consistent with EnergyAustralia's submission on the NEL the exemption role would more appropriately be carried out by NEMMCO in accordance with clearly defined criteria set out in the rules developed by the AEMC through the rule change process. This is also consistent with NEMMCO's role of granting exemption where an intermediary is acting in the place of the NSP.

Also, it is also not clear why clauses 2.5.1(a) and 2.5(1)(d)(1) are necessary as the requirement to register is already imposed by section 10(2)(a) of the National Electricity Law and the AER is (inappropriately) conferred power to exempt NSPs from registration by section 10(2)(b).

Market network service

Clause 2.5.2(c) provides the AER or Jurisdictional Regulator to determine which parts of a network service, which is no longer a market network service, should be prescribed services, ie subject to network revenue determination. This is consistent with the role that the AER and IPART currently carry out to determine which parts of the transmission and distribution system are prescribed.

However, as with previous comments made about the allocation of regulatory roles, EnergyAustralia queries whether it is appropriate for the AER to carry out this role as it impinges on competition and market development. This issue is also raised in comments on Chapter 6. It is an area EnergyAustralia wishes to raise as an item for consideration in the forthcoming review of Chapter 6.

Registration by an intermediary

The provisions of clause 2.9.3 in relation to registering intermediaries are unchanged except that in relation to Network Service Providers the AER has been allocated the role exempting from registration and approving the intermediary. Previously NEMMCO approved all intermediaries and the consequent exemption from registration includes those of a NSP. Consistent with above comments, EnergyAustralia believes granting exemptions for registration to Network Service Providers should continue to be carried out by NEMMCO.

Reviewable decisions

Chapter 2 contains provisions which relate to the fundamental right of participants to operate in the market. With the removal of reviewable decisions from the Rules, EnergyAustralia believes that these type of decisions should be made subject to review other than judicial to maintain the rights and obligations of Participants. EnergyAustralia believes that the following provisions which are reviewable under the Code still require review through dispute resolution process under the Rules:

- 2.21.(c) relating to NEMMCO's decision to exempt participants from registration.
- 2.2.2(d) relating to NEMMCO's decision not to approve classification of generating units as scheduled.
- 2.2.3(d) relating to NEMMCO's decision not to approve the classification of a generating unit as non-scheduled.
- 2.5.1(h) The AER's decision (previously NEMMCO's) to grant exemptions from providing access undertaking.
- 2.9.2 NEMMCO's decision to register as a Code participant.
- 2.10.1 NEMMCO's decision to reject a notice from a Code participant to cease registration.

4. Chapter 3 - Market rules

Reviewable decisions

In the draft Rules the following decisions have been affected by the removal of reviewable decisions:

- Clause 3.3.8 the decision of NEMMCO in relation to determining a participant's maximum credit limit.
- Clause 3.8.3 in relation to accepting applications for aggregation for the purposes of central dispatch and settlements.
- Clause 3.13.2 in relation to the AEMC's (previously NECA's) decision to require a Market Participant to provide information to NEMMCO. In relation to the AEMC's decision under 3.13.2, it effectively determines whether the commercially sensitive material must be provided to NEMMCO, by forming a reasonable opinion as to whether the information is fundamental to the efficient operation of the market or disclosure would result in a public benefit which outweighs the detriment disclosure would bring to the participant.
- Clause 3.15.11 in relation to NEMMCO's rejection of a reallocation request.

These issues which were previously reviewable by the National Electricity Tribunal are no longer fully reviewable in this way but are subject to the more limited judicial review. EnergyAustralia believes that due to the technical and commercial nature of certain issues there is a compelling requirement to maintain some review mechanism in addition to judicial review.

In the absence (at this stage) of a full merits review the regulatory decisions listed above should be subject to dispute resolution procedures in Chapter 8 by removing them from clause 8.2.1(h) of the draft Rules

Spot Market Operations Timetable

Clause 3.4.3 now provides for the AEMC instead of NECA to approve the Spot Market Operations Timetable. EnergyAustralia believes that there is a case for the AER to be responsible for approving the spot market operations timetable as it is of operational nature rather than a market design issue.

Determination of Regions. Boundaries and regional reference nodes.

Clause 3.5.1 provides for the AEMC instead of NECA to approve the regions to apply in the spot market. Clause 3.5.3 provides for the AEMC instead of NECA to approve changes to regional boundaries or regional reference nodes.

To improve these provisions, EnergyAustralia believes that guidance needs to be provided to the AEMC in carrying out the function of approving boundary changes, such as, and as a minimum, reference to achieving the NEM objective

Value of lost load (VoLL)

Clause 3.9.4 retains the role of the reliability panel in annually reviewing VoLL. However the procedure for implementing a change to VoLL has been altered. Currently the Reliability Panel makes its recommendations to NECA who then is required to initiate a Code change. This is understandable in relation to the provision of reports as they will now be provided to the AEMC in accordance with section 37(3) of the NEL. However it is not clear why the automatic trigger for a Code change process has not been retained.

The explanation given in the summary table of amendments to the Rules released with the draft Rules is that the intent is for the Reliability Panel's report to be published and that any interested party or the Reliability Panel could seek a rule change. Further that "the making by the Reliability Panel of recommendations in relation to rule changes will not itself initiate a rule change". Given this, there does not appear to be an obligation on the Reliability Panel or any other party to initiate a Rule change if the Panel has made a recommendation to change VoLL. This seems to be a deficient process in that it removes accountability on the Reliability Panel and is not supported by EnergyAustralia. EnergyAustralia believes that the Reliability Panel should be obliged to seek a Rule change if it recommends a change to VoLL or, alternatively, that the AEMC be required to treat a recommendation as a request for Rule change.

Market floor price

Clause 3.9.6 retains the role of the Reliability Panel in reviewing the market floor prices but, as with VoLL, there is no nomination to whom the Reliability Panel is making its recommendations or obligation to initiate a rule change based on the Reliability Panel's recommendation. As with VoLL, EnergyAustralia believes that the Reliability Panel should be obliged to seek a Rule change if it recommends a change to the market floor price or that the AEMC be required to treat a recommendation as a request for Rule change.

Reliability safety net

In Clause 3.12.1(b), the reliability safety net has been extended to 1 July, 2006. The current safety net runs out July 2005 and NECA is currently consulting on this 12 month extension.

As with VoLL and market floor price, EnergyAustralia believes that there should be an automatic trigger which initiates a Rule change if the Reliability Panel recommends a change to the reliability safety net.

Monitoring of significant variation between forecast and actual prices

Under clause 3.13.7 of the Code, NECA prepares criteria in consultation with the ACCC, to determine whether there is a significant variation between the spot price forecast published by NEMMCO and the actual spot price in any trading interval and carries out such monitoring.

Under the Rules it is proposed that the AER carry out the monitoring and develop the criteria and that the AEMC be consulted in the development of the criteria. EnergyAustralia does not support the AER developing the criteria as it is not consistent with the approach to the separation of powers underpinning the move to a national regulatory framework, in particular, the roles of regulator and rule maker. Whilst it is appropriate for the AER to carry out the monitoring, it is not appropriate for it to develop the criteria as these effectively form part of the rules that apply to market participants. The criteria should be developed independently of the regulator by the AEMC as rulemaker.

EnergyAustralia does not support the ability for the ACCC to request information from the AER under the draft Rules. It is not clear for what reasonable purpose the ACCC needs a separate power to request the AER to report on a particular market outcome. To the extent that such a request may be necessary to carry out a function under the Trade Practices Act, the ACCC should rely on existing powers under the Trade Practices Act.

NEMMCO Software changes for market operation

Clause 3.17.1 provides for the AER instead of NECA to authorise changes by NEMMCO to its computer software for the operation of the market. EnergyAustralia considers that this provision should be should be reviewable on its merits or subject to the dispute resolution processes under Chapter 8.

5. Chapter 4 - Power system security

Power to issue directions

Clauses 4.8.9 (c) and new clause 4.8.9A impose obligations upon registered participants to comply with directions given by NEMMCO under clause 4.8.9 and section 115 of the NEL and Chapter 4 of the draft Rules respectively.

However, it needs to be pointed out that the obligations under these provisions are inconsistent. Clause 4.8.9(c) requires Registered Participants to use reasonable endeavours to comply with a direction under clause 4.8.9, unless to do so “would in the registered participants reasonable opinion, be a hazard to public safety or materially risk damaging equipment...” .

Clause 4.8.9A appears to impose an overriding obligation to follow any direction including those under clause 4.8.9 irrespective of hazards to public safety. That is, “Notwithstanding any other provision of the Rules, a registered participant must follow a *direction* issued by or on behalf of NEMMCO ..” “Direction” is defined as referring to clause 4.8.9(a1)(1) that “NEMMCO may require a registered participant to do any act or thing if NEMMCO is satisfied that it is necessary to do so to maintain or re-establish the power system .”

EnergyAustralia does not support the over-riding provisions proposed in clause 4.8.9A. EnergyAustralia believes that the Registered Participants should have discretion to take into consideration issues of public safety as provided for in clause 4.8.9.

Duplication of powers of direction

NEMMCO’s power to give directions under clause 4.8.9 has been maintained, even though an identical power has been included in section 115 of the NEL. It is also not clear why NEMMCO has power to issue directions under both the NEL and the Rules. EnergyAustralia suggests that it should be sufficient for the power to be imposed by the NEL and that any more detailed provisions be provided for in the Rules.

Reviewable decision

Clause 4.11.1(d) relates to NEMMCO's discretion to require a Network Service Provider to install, upgrade modify and replace or remove monitoring equipment. EnergyAustralia considers there to be broad discretion for NEMMCO to form a view about the necessity for such equipment.

Previously this requirement was a decision reviewable before the National Electricity Tribunal, but this will no longer apply as reviewable decisions have been abolished. However, EnergyAustralia argues that to ensure accountability of NEMMCO in its decision making and to maintain the rights of Participants that this decision should be subject to a review process.

Given the technical nature of the decision, neither judicial nor merits review, before a Court would be adequate. EnergyAustralia proposes that NEMMCO’s requirements

under Clause 4.11.1(d) be available for review by the Reliability Panel or through the Rule dispute resolution procedures.

6. Chapter 5 - Network connection

Planning and Development of Networks

While most of the anomalies which previously existed in relation to the obligations of DNSPs have generally been addressed there is one relating to distribution networks which remains. In clause 5.6.2(g) it is not clear that economic cost effectiveness analysis does not need to be carried out in relation to options that are not new small or new large network assets, ie those of value less than \$1million. This needs to be clarified so that the anomalous position does not arise whereby an economic cost effectiveness analysis (through application of the Regulatory Test) may need to be carried out in relation to new small distribution network assets but not in relation to new small transmission assets.

Annual National Transmission Statement

Under clause 5.6.5 NEMMCO is made solely responsible for the National Transmission statement, which replaces the Interconnector Planning Review and Statement of Opportunities.

This is a significant and fundamental shift in responsibility to NEMMCO and places it in the position of the National Planning organisation. Previously, the IRPC (a consortium of the TNSPs) had this role. While EnergyAustralia believes that this new role may be more appropriate, NEMMCO needs to be assigned additional accountabilities. For example, the interconnector capabilities and forecast loads are derived from information submitted by the TNSPs. NEMMCO should be obliged to use information submitted by TNSPs, or, if it does not, disclose why it did not.

Further, NEMMCO's development of "technically feasible options" cannot be carried out in isolation from the TNSPs with their detailed knowledge of local matters and constraints. The final clause 5.6.5(e) states NEMMCO "may seek the assistance of the IRPC". EnergyAustralia strongly argues that NEMMCO should be obliged to consult with the IRPC and TNSPs.

Regulatory test

Clause 5.6.5A states that the AER must promulgate the Regulatory Test. EnergyAustralia recognises that the AER is the most likely body to apply the regulatory test but given that the regulatory test is effectively a rule making function that it is the AEMC that should develop the Regulatory Test and the principles which underpin it.

Clause 5.65A could be improved by providing an explanation about the purpose of the Regulatory Test.

Applications to establish a new large transmission network assets

Clause 5.6.6 continues to refer to applications for the establishment of new large transmission assets. However, it is not clear how the owner of a transmission system "applies" to establish assets on its own network. EnergyAustralia requests that this anomaly be fixed.

Involuntary disconnection

Pursuant to clause 5.9.3 and section 61 of the NEL, NEMMCO may direct disconnection of a network. As argued in a previous submission by EnergyAustralia (dated 7th January 2005), this provision is a substantive change to the existing rights and obligations of network service providers and has been included without previous notice or consultation. 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 urges reconsideration of this new provision.

7. Chapter 6 - Transmission and distribution pricing

Inconsistent regulatory objectives

EnergyAustralia understands that the MCE is reviewing the potential options for the access regime applicable to the energy sector and that the AEMC will be reviewing Part B and C of the Rules (transmission pricing) by July 2006. However, there are a number of general observations EnergyAustralia wishes to point out in relation to Chapter 6 of the draft Rules.

The AER, in performing its role as economic regulator, is subject to the objectives and pricing principles stated in the NEL and NER. EnergyAustralia is concerned that there appears to be a number of inconsistencies in the overall regulatory policy direction provided to the AER through these instruments.

The most fundamental inconsistency regards what is the predominant concern driving regulatory decision making. Section 15 of the NER states that the AER must perform its role “in a manner that promotes the long term interest of consumers of electricity”.

However, one of the objectives of the transmission revenue regulatory regime to be administered by the AER under clause 6.2.2(k) is to seek to achieve an incentive with “reasonable and well defined regulatory discretion which permits an acceptable balancing of interests of Transmission Network Service Providers, Transmission Users and the public interest”. The term “public interest” obviously has a wider scope than “consumers”. The apparent inconsistency in the scope of regulation is of concern, perhaps indicating that the full scope of regulatory objectives have not been clearly thought through at a policy level. EnergyAustralia implores the careful consideration of a consistent set of objectives for the national electricity market and, in particular, economic regulation.

The objectives within clause 6.1.1 (c) are also internally inconsistent. Clause 6.1.1(c)(1) relating to efficiency is inconsistent with clause 6.1.1(c)(4) relating to equity which in the draft NER primarily equates to not allowing price discrimination. There is recognition in the NER of this inconsistency. Schedule 6.7 clause 4 recognises that non-discriminatory pricing and economically efficient pricing are to “some extent incompatible”. EnergyAustralia wishes to point out that the Productivity Commission has recommended the principle of price discrimination be included when it aids the pursuit of efficiency¹. However, the draft Rules (including clause 6.1.1(b)(2) and Schedule 6.7 clause 2) prevent it. EnergyAustralia proposes that consideration be given to amending the pricing principles to allow price discrimination when it aids efficiency.

¹ Productivity Commission 2004, *Review of the Gas Access Regime*, Report no.31. Canberra. Recommendation 7.1 s8.1(b)

The NEL and NER

The scope of the principles in clause 15(2) of the NEL does not encompass the same concepts in the NER. For instance, in the NEL the focus is on recovering efficient costs of regulatory obligations while the Rules relate to “sustainable commercial revenue stream” and “fair and reasonable rate of return” but contain no mention of regulatory obligations. EnergyAustralia believes the objectives and pricing principles in the NEL and NER are not satisfactorily synchronised and have the potential to lead to regulatory uncertainty amongst regulators, the industry, users and the public. The conflicting array of objectives and principles as currently drafted in the Code needs to be streamlined and made consistent. EnergyAustralia considers that the best guide would be to follow the recommendations of the Productivity Commission in its reviews of the national and gas access regimes.

Lessons from the Productivity Commission Access Reports

The National Electricity Code was prepared at a time when access regimes in Australia were an emerging concept. Consequently, there are lessons to be drawn from the Productivity Commission’s reports on access regimes in terms of appropriate objectives and pricing principles. The Productivity Commission has found that:

- to seek outcomes that emulate a market outcome is an unattainable objective² yet this concept is retained in Chapter 6.
- regulatory risk is a factor to be considered in determining a return on investment as well as commercial risk³.

EnergyAustralia believes that, in order to achieve greater convergence between the gas and electricity markets, a pre-requisite is a consistent set of objectives and pricing principles covering network access pricing. EnergyAustralia has made this point in previous submissions.

At this stage, EnergyAustralia believes that:

1. There needs to be a simpler structure of objectives and principles in the NEL and new NER. While the MCE has restructured the NEM objective into a simple structure the objectives of network pricing are multi-layered and inconsistent.
2. There are inconsistencies in the objectives and principles as proposed in the current drafts of the NEL and NER.
3. The proposed pricing principles are not consistent with the recommendations and findings of the Productivity Commission’s reports on the national access regime and the gas access regime.
4. To avoid greater inconsistency in energy and regulatory policy, the AER and AEMC should operate under the same objective which should be based on achieving economically efficient outcomes in electricity services in the long run.

² *ibid*, Finding 7.2

³ *ibid* recommendation 7.1 s8.1(a)(ii)

Principles for the regulation of transmission aggregate revenue

As a general comment, EnergyAustralia strongly suggests that a provision be included to confer on the AER an obligation to provide timely regulatory decisions so that TNSPs can carry out the work required to implement a determination and meet its obligation under clause 5.7.2 of the Rules to publish prices by 15 May each year. This is necessary to provide greater accountability and certainty to TNSPs and other affected parties and avoid the position recently faced by EnergyAustralia and TransGrid where a jurisdictional derogation had to be sought to enable prices to be established on the basis of a draft ACCC determination, because the final determination was not in place before the expiry of the previous determination.

Clause 6.2.3 provides for the AER to decide on whether “sufficient competition exists to warrant the application of a regulatory approach which is more light-handed than revenue capping and, if so, the form of that regulation”. This issue is linked to the key principle in Clause 6.1.1(b) (1) of promoting competition. However, we do not believe that the AER is in the best position to decide on competition issues, as this is clearly an issue that is better addressed by the AEMC in its rule making capacity. The promoting of competition is linked to market development and as such should involve the AEMC. This is an issue EnergyAustralia wishes to canvas for the forthcoming review by AEMC of Chapter 6. EnergyAustralia notes that it has been a strong advocate of price capping (as opposed to revenue capping) for network businesses, and believes that this more “light handed” approach is more appropriate for network businesses – an issue that will be raised during the Chapter 6 consultation process.

Clause 6.2.3(d)(5)(iv)(D) now provides for the AER to have regard to “any regulatory intentions previously expressed” in addition to previous decisions of the AER and ACCC. Currently, this provision is limited to decisions made by the ACCC. The MCE explanatory table states that this is intended to apply to intentions expressed by the ACCC or the AER outside its formal decisions. The term “regulatory intention previously expressed” is very broad and could extend to correspondence as well as draft determinations or reports supporting determinations and the ACCC’s Statement of Regulatory Principles. This may be advantageous to the extent that it provides increased scope for consistency and accountability but may be disadvantageous if it creates uncertainty as to which regulatory intentions may be taken into account at a later stage and which are overtaken by further consideration or events.

EnergyAustralia submits that this provision should only apply to statements where it is explicitly expressed by the regulator as a statement of regulatory intention.

Form and mechanism of economic regulation

Clause 6.2.4(d)(3) allows the AER to revoke a determination where there is a substantial change in ownership of network assets which may lead to a material change in the revenue requirement of the TNSP following the change in ownership.

Whether or not this is appropriate from an economic perspective is debatable, but in any case is difficult to understand how the AER would be in a position to make this

decision. This type of unfettered power could cause significant uncertainty for potential investors. This is a policy issue that will be addressed in more detail in EnergyAustralia's submissions to the AEMC's review of Chapter 6. Where there is a change in ownership, EnergyAustralia argues that the AER should only be able to revoke a determination in accordance with the Rules with permission from the owners.

Information gathering and disclosure by the Regulator

The provision of clauses 6.2.5 and 6.2.6 is inconsistent with sections 18 and 29 of NEL regarding information gathering and disclosure by the AER. This conflict should be reconciled so that the regime under clauses 6.2.5 and 6.2.6 of the Rules apply to information gathering and disclosure for the purpose of the AER's economic regulatory functions, including the monitoring and enforcement associated with its economic regulatory functions.

Distribution pricing: Clause 6.10.5(d)(2) and service standard.

The provisions applying to TNSP and DNSP on service standards are not uniformly aligned as the TNSP provisions recognise standards set more generally in the relevant jurisdiction and not just those set under a regulatory regime administered by the Regulator. In NSW, it would be possible for a safety obligation to translate to a service standard, but since safety is not administered by IPART it is questionable as to whether it would be caught by this clause. This clause should be amended so that it recognises any service standards imposed by the relevant jurisdiction

National regulatory arrangements

Under proposed clause 6.2.1, the AER in agreement with the TNSP may deem assets of between 66kV and 220 kV that do not operate in parallel, or provide support to, higher transmission voltages, to be subject to regulatory arrangements for distribution pricing. In Chapter 10, "transmission network" refers to these same assets as being able to be deemed by the AER as transmission. Therefore depending on the decision by the AER these assets can be either transmission or distribution. Under the Code, there was power for the TNSP to deem assets operating between 132kV and 66kV (which had been deemed by the regulator to be transmission assets under subclause (b) of the definition of "transmission network") to be distribution assets. It is not apparent why clause 6.2.1 has been amended to so that the TNSP no longer has this power to initiate a change to the status of assets.

Due to the potentially substantial economic regulatory implications, EnergyAustralia believes that the changes proposed are not appropriate, and change the basic rights and obligations for a network service provider. Therefore EnergyAustralia seeks that decisions on deeming assets be initiated by the network service provider who owns the assets with agreement by the regulator (as under the Code). This provision should also be subject to dispute resolution processes where agreement of the AER or Jurisdictional Regulator is not forthcoming.

CPI

The Code requires the use of the March CPI (as specified in the Glossary) for the calculation of transmission prices, which only becomes available in late April. NSW distribution prices, however, which include transmission prices, are already submitted to the Jurisdictional Regulator by April. This has forced distribution prices to be based on estimates of transmission prices requiring an adjustment in the following year.

EnergyAustralia notes that the definition of CPI in the Glossary has been deleted without replacement. EnergyAustralia proposes that transmission prices make use of December CPI to remove the need for adjustments.

EnergyAustralia also proposes that transmission prices must be published by 15 March rather than the current 15 May (clause 6.5.7) to better align with regulatory timetables and avoid the need for annual adjustments. This is an issue to be issued. EnergyAustralia wishes to flag for the forthcoming review of Chapter 6.

Reviewable decision

Clause 6.8.2(d) relating to the AER's decision to approve pricing software is no longer a reviewable decision. EnergyAustralia argues that due to the importance of this decision it needs to be subject to review either through the Chap 8 dispute resolution processes.

8. Chapter 7 - Metering

Carrying over of previous registration with NEMMCO

The Rules currently make no provision for Metering Providers currently registered with NEMMCO to be automatically registered under the Rules. EnergyAustralia requests that a suitable transitional provision be included to ensure that all Metering Providers currently registered will be automatically registered under the Rules, without having to take any further action.

Clause 7.4.3 Deregistration of Metering Providers

Metering Providers are now required to be qualified and registered under the Rules and under the proposed arrangements Metering Providers will be required to comply with all provisions of the Rules and relevant procedures under the Rules which are expressed to apply to Metering Providers (clause 7.4.2(bb)). If a Metering Provider does not comply with these Rules and procedures they may be subject to proceedings by the AER for breaches of the Rules in addition to deregistration as a Metering Provider by NEMMCO⁴. The registration requirements are set out in Schedule 7.4, which is in substantially the same form as under the Code for accreditation and registration with NEMMCO.

Previously Metering Providers were not Code Participants and therefore were not directly bound by the Code. Consequently Meter Providers were required to meet certain qualifications and be registered with NEMMCO, but were not directly subject to the Code provisions. Obligations to comply with the requirements of the Code were intended to be applied indirectly through Deeds of Agreement with NEMMCO.

Deregistration of Metering Providers is still provided for under clause 7.4.3. These provisions in the new Rules are substantially the same as currently under the Code except that NEMMCO's decision whether or not to deregister is no longer a reviewable decision, nor is there provision for it to be raised as a dispute.

The only review available in relation to NEMMCO's decision whether or not to register and to deregister will be judicial review which is not adequate in relation to this type of decision. A decision made by NEMMCO which affects the ability of a Metering Provider to commence or to continue to carry on its business must be subject to a full and proper review. A decision by NEMMCO that a Metering Provider has acted unethically, for example, would be very difficult to challenge on judicial review grounds.

⁴ Sections 59 and 60 of the NEL provide for the Law and Rules to be enforced by the AER against "relevant participants". It is anticipated that Meter Providers will be prescribed as "relevant participants" for the purpose of the National Electricity Law.

EnergyAustralia strongly argues that NEMMCO's ability to register and deregister a meter provider should be subject to a review process, preferably by a suitable Tribunal, but if this is not available in the short term then the decision should be subject to the Dispute Resolution Process under the Rules. (It is noted that clause 7.4.2 (ba) requires that NEMMCO's guidelines on accreditation procedures must include a dispute resolution process).

A further issue which requires availability of review processes concerns clause 7.1.4.(b) and NEMMCO's refusal to permit a Market Participant to participate in the market in respect of any connection point that does not comply with 7.1.4(a).

Schedule 7.4.1 Metering Provider

EnergyAustralia would like to ensure that any changes to NEMMCO's qualification process are subject to the Rules consultation process as well as a dispute or review process should a Metering Provider (or interested party) have a genuine issue with the changed qualification process.

9. Chapter 8 - Administrative functions

Clause 8.2 Dispute Resolution

The dispute resolution procedure will only apply to Registered Code participants and NEMMCO (except decisions of NEMMCO which were previously reviewable). Dispute resolution will not apply to the AEMC and the AER which is a change from the Code where NECA was subject to the dispute resolution procedures. This change has been justified by the MCE on the basis that the decisions of the AEMC and the AER will be subject to judicial review.

This is a substantial and unacceptable alteration of the rights and obligations of Registered Participants to seek redress if required on a range of issues listed in Clause 8.2.1(a). In relation to the AER, the proposed arrangements are only justified in relation to core enforcement functions. However, there are other types of functions allocated to the AER which when carried out by NECA would have been subject to the dispute resolution process. Examples of such decisions are:

- the authorisation of modifications to computer software under clause 3.17.1; and
- the requirement to provide information under 3.8.22 which is part of the AER's monitoring function, which when carried out by NECA would have been subject to the dispute resolution provisions.

EnergyAustralia submits that a full review of the functions allocated to the AER under the Rules should be undertaken to ensure that any functions which are not enforcement functions are still subject to the dispute resolution process.

In EnergyAustralia's view there is no justification for removing the AEMC from being subject to dispute resolution processes where it makes decisions and carries out functions under the Rules. Previously decisions of NECA, except those relating to enforcement and reviewable decisions, could be subject to the dispute resolution process if they arose in the context of the matters set out in clause 8.2.1(a).

Judicial review is not a suitable replacement for the dispute resolution process because judicial review will only assist where it can be established that there has been some unlawful element in the decision-maker's decision. Clause 8.2.1(a) previously provided scope for disputes to be raised in broader circumstances than illegality. For example, clause 8.2.1(a)(1) provides for the process to apply to any dispute arising between NECA and a Code Participant "about the application or interpretation of the Code".

There are many functions of NECA, some of which involved formal decisions, and all of which involve interpreting and applying the Code, to which the dispute resolution provisions would have applied. One example would be 3.1.4.6 (c) under which the AEMC has the function of determining whether it is appropriate in all the circumstances that compensation be paid following an administered price cap. This provision provides very little basis for the exercise of that discretion and would be very difficult to address through judicial review. It would be a significant derogation from the existing

rights of market participants if there was not a continuation of the existing right to raise a dispute in relation to the application of the Rules in this and similar circumstances.

Reviewable Decisions

Clause 8.2.1(h) excludes certain decisions of NEMMCO which were previously reviewable decisions from the dispute resolution procedures. EnergyAustralia has previously made a submission in relation to some of these decisions that they should be subject to a full merits review as that is the only mechanism which would give a similar level of review to that previously available from the National Electricity Tribunal.

In the absence of merits review or prior to a full merits review scheme being implemented it may be appropriate for the dispute resolution procedures to apply to those decisions which provide broad discretion to NEMMCO and the AER. This is because those types of decisions would be difficult to challenge on judicial review grounds.

These include 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) to refuse an application for disaggregation, and 7.1.4.(b) and 7.4.3(b) relating to the decision whether or not to register and deregister Metering Providers.

EnergyAustralia has also in this submission made the point that, for certain technical and engineering decisions, an expert panel such as the Reliability Panel may be the more appropriate body to provide an avenue for reviews of decisions. For instance, In relation to NEMMCO's decision under clause 4.11.1(d) to issue a notice requiring the installation of remote monitoring equipment, EnergyAustralia submits that this should be reviewable by the Reliability Panel.

Appointment of dispute resolution adviser

Clause 8.2.2. now provides for the AER instead of NECA to appoint persons to perform the functions of Dispute Resolution Adviser. It is not apparent why this function has been allocated to the AER and not the AEMC. It is not consistent with the previously stated policy basis for the allocation of functions whereby rule making and energy market development was to be carried out by the AEMC and economic regulation and market rule enforcement would be carried out by the AER. The appointment of the Dispute Resolution Adviser is clearly an energy market development function and on this basis would be expected to be allocated to the AEMC.

Dispute resolution process

Clause 8.2.6(c)(2) provides for the AER instead of NECA to agree to the DRP extending certain time periods for the DRP to determine disputes. Again this allocation of function is not consistent with the previously stated policy basis whereby rule making and energy market development was to be carried out by the AEMC and economic regulation and market rule enforcement would be carried out by the AER. This function

is not a rule enforcement function and arguably is an energy market development function and on this basis would be expected to be allocated to the AEMC.

8.2.10(b) and (c) provides for the AER instead of NECA to publish DRP decisions and for the AER instead of NECA to develop and issue guidelines relating to the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute. This is a further example of the allocation of a functions to the AER which are either market development or a rule making and not an enforcement function. This function should also be allocated to the AEMC.

Reporting requirements and reporting standards

Clause 8.7.2 provides for the AER instead of NECA to:

- establish reporting requirements for Registered Participants and NEMMCO; and
- procedures and standards applicable to the AER, NEMMCO and Registered Participants relating to information and data received by or from Participants or NEMMCO in relation to matters relevant to the Rules.

Whilst this was a function previously carried out by NECA which relates to enforcement, the establishment of reporting requirements are in effect rules which should be made independently of the regulator. The establishment of procedures and standards for the treatment of information does not in any way relate to enforcement functions, clearly relate to market development and should therefore be established by AEMC, particularly given that they will also apply to the AER. It would therefore be appropriate for both of these functions to be carried out by the AEMC not the AER.

In addition, it is not clear how these information requirements, which are to apply to the AER, will be affected by the confidentiality provisions which apply to the AER as a result of the application of section 44AAF of the Trade Practices Act. Section 44AAF applies to the AER by virtue of section 18 of the NEL and imposes a general obligation upon the AER to take all reasonable measures to protect confidential information provided and information obtained through compulsion powers from unauthorised use or disclosure. However section 44AAF(3) specifically authorises disclosure of such information to the ACCC, the AEMC and NEMMCO or any other prescribed body. This provision would have the potential to undermine any requirements specifically developed under the Rules to control the use and disclosure of information by the AER and NEMMCO. EnergyAustralia submits that it should be made clear that the authorisation of the AER to disclose information as contemplated by the section 44AAF is subject to the specific requirements of the National Electricity Rules.

Clause 8.8 Reliability Panel

EnergyAustralia submits that serious consideration be given to conferring review powers in addition to the function listed in Clause 8.8.1. As discussed above EnergyAustralia considers that NEMMCO's decisions under clause 4.11.1(d) could be suitable for review and determination by the Reliability Panel.