



24 December 2004

Manager - Energy Market Reform Team
National Energy Market Branch
Department of Industry, Tourism and Resources
GPO Box 9839
Canberra ACT 2601

By e-mail to MCEMarketReform@industry.gov.au

Dear Sir or Madam

Re: Consultation – National Electricity Law

The ERAA supports the main changes to the National Electricity Law (the Law) in the Exposure Draft, subject to our comments later in this letter. The ERAA requests time at the Pre-finalisation Hearing on 7 January 2005 to present key elements of its position on the Law.

We support the Law defining the Market Objective, roles and functions of the AER, AEMC and NEMMCO and aspects of the current National Electricity Code (the Code) that are protected provisions. We believe the new package of legislation, regulations and statutory rules (the governance instruments) will be clearer than the existing collection of instruments. However, the ERAA is concerned regarding:

- The consultation process. Not all documents necessary to understand the full changes to the governance regime are currently available and, according to SCO officials, some will not be consulted;
- Changes to and application of the Market Objective. Further clarification and consultation on the market objective is required if the NEL objective is to be adopted for other elements of energy market reforms;
- The adequacy of the National Electricity Rules (the Rules). We consider that Senior Counsel advice should be sought to confirm that the Rules adequately implement the earlier advice.
- The investigation and information sharing provisions. The ERAA is concerned that the new investigation regime defined by the governance instruments represents a significant loss of rights to participants and should be changed;

- The new penalty scheme. The ERAA is not convinced that the removal of defined maximum penalties for minor offences is warranted. While we support the principle of the Infringement Notice approach, we are concerned that the implementation in the current Law is flawed;
- Removal of the reviewable decisions. The existence of a right of review for key NECA and NEMMCO decisions, and the general right of review if consultation was insufficient, provides a discipline on the actions of those bodies; and
- Subtle and small changes that occur in the new governance instruments. For example, unanimous agreement of the MCE is no longer required for directions, participants are no longer consulted when protected provisions are altered and the proceeds from penalties are no longer applied against the costs of running the National Electricity Market.

More information on these issues is attached.

If you have any queries on the content of this submission, please contact me or Diane Campbell at the ERAA Secretariat on (02) 9369 3263.

Yours sincerely,

Deane Russell
Executive Director

Comments on the Exposure Draft of the National Electricity Law

These comments are provided as an initial set of issues only. The ERAA reserves the right to amend these comments in its final submission to be lodged on 7 January 2005.

The consultation process

The ERAA commend the Standing Committee of Officials (SCO) for consulting on the contents of the Law. We are, however, concerned that all elements of the governing instruments are not available. To fully understand the governance changes the ERAA considers that we need to see the transitional provisions and the National Electricity Regulations (the Regulations). We consider that the National Electricity Regulations are an essential link between the Law and the National Electricity Rules (the Rules).

The Rules also contain a number of provisions, particularly in relation to the access regime, that we understand² are to be finalised just prior to the Rules coming to effect. We are concerned that participants will either not be consulted on these important issues or will not be consulted in a timely and meaningful way.

To enable effective consultation while meeting the MCE time frame, it is essential that the Regulations, and transitional provisions as much as possible, are available for consultation in very early January. The proposed options for the access regime should be made available for consultation to allow comment and participant involvement as the package is being developed.

We note that the current changes are only those to change the governance regime of the NEM. We urge the MCE to maximise its consultation on the remaining elements of the energy market reform program, particularly changes to the legislative framework required to bring gas, distribution and retail regulation (other than retail pricing) into a national framework.

Changes to and application of the Market Objective

The ERAA is concerned that the Market Objective has changed significantly.

We are concerned that the change to a single, aspirational objective may have more impacts than the MCE intends. We ask that more consultation occur on the market objective. In particular, we consider that it is important that the MCE clarify that the objective be interpreted in an economic sense. We also note that the MCE intends to widen the scope of the Law to encompass other elements of energy market reforms, including the national framework for distribution and retail (other than retail pricing) and gas regulation. The ERAA strongly contends that the MCE must fully consult on any objective to apply to this enlarged scope of the Law.

The ERAA is also concerned that the Australian Energy Regulator (AER), NEMMCO and other market bodies are not explicitly required to have regard to the Market Objective. While the AER is guided by §15 of the Law for its economic functions, it is given no guidance for other functions that are or that might be assigned by the Law or Regulations. We therefore think that each governing or market body must have a clause, similar to §33, to apply the Market Objective to their operations.

The ERAA is also concerned that the MCE intends to direct the AEMC to have regard to specific aspects of the Market Objective. The new objective is a composite objective and our understanding is that case law means that its elements must always be viewed together. We

consider that it is inappropriate and that §87(2) of the Law allows for aspects of the objective to be weighted more heavily and that this section should therefore be removed.

Adequacy of the National Electricity Rules (the Rules)

The standing of the rules, particularly the protection of participants operating under the Rules, needs to be confirmed by Senior Counsel. The SCO took advice from Senior Counsel that if the Code was replaced by a statutory instrument then the Trade Practice Act would not apply to actions in accordance with and under that instrument. While we accept this advice, we would request that the SCO to confirm with the Senior Counsel that the Rules and the Law adequately implement the advice and that it will provide adequate protection for participants

The investigation and information sharing provisions

The ERAA is concerned that the new investigation regime defined by the governance instruments represents a significant loss of rights to participants and should be changed. While NECA had wide powers under the old Law, it was constrained in its operation by clause 8.5.4 of the Code, which defined a process for investigations under the Code. The Rules do not contain a similar provision. The ERAA considers that this is an unacceptable loss of participant rights and that a process similar to clause 8.5.4 should be included in the Regulations.

The investigative powers of the AER are of particular concern since section 18 of the Law¹ allows information gathered to be used for any purpose and to be shared with the ACCC, AEMC and NEMMCO specifically and, more generally, to others under sections 44AAF(7) and (8) of the TPA.

The new penalty scheme.

The ERAA is not convinced that the removal of defined maximum penalties for minor offences is warranted. We believe that at least for breaches that are currently class A, a maximum penalty should be set. This should be relatively simple since the current Regulations include these values.

While we support the principle of the Infringement Notice approach, we are concerned that the implementation in the current Law is flawed since it allows the AER significant latitude in its use. The ERAA seeks, as a minimum, that once an infringement notice has been paid the breach is expunged and that the AER can only issue a single infringement notice for a specific event or sequence of events that breach the Rules.

The ERAA considers that, if a corporation is considered guilty of a breach, it is not unreasonable that liability would only extend to officers involved in that breach². The inclusion of both the new §66 of Law with the existing §84³ implies that all officers of a corporation are considered guilty of a breach of the Rules even when they have not been involved. Section 84 should be removed.

¹ By applying section 44AAF of the TPA.

² Although section 80 of the current Law is not expressed that clearly

³ This is a transfer of the old section 80 into the new Law.

The new Law also introduces a breach for officers who are considered to have attempted to breach the Law and Rules but were unsuccessful (section 66(2)). It is not clear what practical value this clause will have or why it has been included.

Removal of the reviewable decisions

The ERAA is concerned that the MCE is not retaining the status quo while it investigates merits reviews in the governance of the energy markets. The ERAA considers that merits reviews are an important right and that the MCE should consider very carefully this reduction in participant rights.

While there is limited right of appeal in the NEM, the existence of a right of review for key NECA and NEMMCO decisions, and the general right of review if consultation was insufficient, provides a discipline on the actions of those bodies. The ERAA considers that this should be retained. As a minimum, decisions of NEMMCO that were reviewable should now be disputable under the Rules.

Scope for the AER to make guidelines

It is important that there is separation of powers between rulemaking and enforcement. Accordingly, the ERAA considers that the functions of the AER should be defined by the governance instruments. Any power to make guidelines should be limited to providing advice to participants on how the AER intends to operate and to define administrative procedures for participants in relation to the AER functions.

Scope of the Rules

The ERAA does not believe that it is appropriate that the scope of the Rules can be extended by regulation, as is envisaged by clause 36 of Schedule 1.

Other comments.

The ERAA notes other changes to the governance regime that have not been highlighted. For example:

- unanimous agreement of the MCE is no longer required for directions, despite the statement in the information memorandum on page 11. The ERAA seeks clarification as to what is intended.
- the proceeds from penalties are no longer applied against the costs of running the National Electricity Market. The ERAA considers that the Civil Penalties Fund should be retained and funds received into it should be applied to fund the Advocacy Panel.