

24 December 2004

Ref.

Manager – Energy Market Reform Team
National Energy Market Branch
Department of Industry, Tourism and Resources
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Emailed to: MCEMarketReform@industry.gov.au

Dear Sir/Madam

Draft National Electricity Law

Enertrade appreciates the opportunity to comment on the draft National Electricity Law (NEL).

Enertrade has identified two specific concerns with the NEL:

- the national electricity market objective (the Market Objective); and
- the provisions relating to sharing of information among regulatory agencies.

In addition, Enertrade has some comments relating to the proposed penalty provisions.

Market Objective

Clause 6 of the NEL provides that:

The national electricity market objective is to promote efficient investment in, and use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability, safety, and security.

The Standing Committee of Officials (SCO) to the Ministerial Council on Energy (MCE) released an explanatory note to the Market Objective as an attachment to Market Bulletin 32. The explanatory note stated that the SCO had taken a policy position that the Market Objective should be a “single efficiency-focused overarching objective”.

Enertrade considers it is critical for the Market Objective to be appropriate since it is the touchstone guiding regulators and rule-makers in the operation of the National Electricity Market.

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Enertrade strongly endorses the view reached by the SCO that the Market Objective for the National Electricity Rules should:

- consist of a single, clear aim; and
- focus on the promotion of economic efficiency.

However, Enertrade is not convinced that the Market Objective in clause 6 accords with the SCO's view.

Firstly, Enertrade strongly agrees with the view expressed that the Market Objective should be a single overarching statement rather than as a series of dot points reflecting multiple objectives. Such multiple objectives have led to difficulties for regulators in terms of balancing and prioritising conflicting objectives. The WA Supreme Court pointed to these difficulties in the case of *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASCA 231; (2002) 25 WAR 511, and the difficulties are also well enumerated in the explanatory note attached to Market Bulletin 32.

However, as currently expressed, it is clear that the Market Objective has a dual objective of promoting: (a) efficient investment; and (b) the long term interests of consumers. This dual objective could cause it to be interpreted in a variety of conflicting ways, posing the dilemmas for regulators noted in the SCO's explanatory note.

Secondly, Enertrade is not convinced that the Market Objective is correctly focused. Enertrade considers that the Market Objective should be to promote economic efficiency in the operation of the market. The aim of the National Electricity Law and Rules should be to create an efficient market for electricity services, with appropriate provision for access to monopoly transmission and distribution services. This will be in the best interests of all participants. The key problem with the current objective is that it is expressed to favour consumers as the preferred set of participants in the market, and suggests that the market should work to promote their interests over the interests of other market participants.

The problem with this approach is that investors will not be interested in investing in markets that have the objective of favouring consumers. Investors invest because they expect an adequate return on their investment. However, the market objective is expressed to promote efficient investment *for the purpose of promoting consumers' interests*.

Well-functioning, competitive markets operate on the basis of participant self-interest rather than altruism. This means that producers participate because they expect to make profits and consumers participate because they expect to purchase goods with a higher utility to themselves than the cost of those goods. The Market Objective should not favour one set of participants or another but set out the rules for efficient exchange among producers and consumers.

The bias in the market objective becomes clear if it is expressed in the opposite direction. Would consumers be happy to participate in markets where the Market Objective was to "promote efficient purchasing decisions for the long term interests of producers of electricity"?



These arguments have been well put by Synergies Economic Solutions in a submission on behalf of the National Generators' Forum to an MCE consultation on the rule change process, and Enertrade attaches a copy of that submission.

Thirdly, these problems become clearer when it is considered how the Market Objective is likely to be interpreted by a Court. One argument that has been put in defence of the Market Objective is that the term "long term interests of consumers" is an economic term, and that the focus on the 'long term' eases concerns that the Market Objective will be unduly biased towards consumers. This is because, in its economic sense, 'long term' connotes a sense of establishing a set of market conditions that are sustainable, and thus must support a favourable investment climate so that consumers continue to benefit from new investments in the market. The theory is that, in the short term, consumers benefit from lower prices, but in the long term, they will be disadvantaged unless prices are sufficient to lure the new investment needed to provide secure supplies of electricity. Thus, references to "long term" interests is supposed to support positive investment climates for investors.

The problem with this argument is that it is well established at law that Courts will interpret terms according to their plain, ordinary, natural meaning unless such terms are considered 'terms of art' with specialised meanings. While it has been argued that the term "long term interests of consumers" will be interpreted as a term of art, the case law would suggest that it will be interpreted according to its ordinary, natural meaning: *Telstra Corporation Ltd & ors v Seven Cable Television Pty Ltd & ors* (2000) 178 ALR 707 at 738. This is likely to result in confusion and inconsistency in the interpretation of the Market Objective, and may well result in an interpretation of the term that does not support a favourable investment climate. This will be to the long term detriment of all participants, and is likely to discourage the long term investments by suppliers that are critical to a healthy market.

Fourthly, there is a clear disconnect between the market objective expressed in clause 6 and the objectives for the Australian Energy Regulator (AER). The AER's objective, expressed in clause 15 (1)(a), is to "promote the long term interests of consumers of electricity", but makes no reference to promoting efficient investment. By contrast, the Australian Energy Market Commission's (AEMC's) objective in clause 33 is to have regard to the Market Objective. Courts would take the approach of interpreting the AER's and the AEMC's objectives differently because they are expressed as different objectives. It is a clear concern that the AER does not have to have regard for the Market Objective in performing its functions but has a different and more narrow objective of promoting consumer interests.

Confidentiality

Clause 18 extends the operation of section 44AAF of the Trade Practices Act to the NEL and the National Electricity Rules.

Section 44AAF provides that the AER may disclose confidential information provided to it to the AEMC, the ACCC, NEMMCO, their consultants, and any other person prescribed in the regulations. Section 44AAF (4) provides that parties in receipt of this



information may “use the information for any purpose connected with the performance of the functions, or the exercise of the powers, of the person or body”.

Section 44AAF overturns the well-established legal principle that confidential information provided to a party must be kept in confidence and must be used solely for the purpose for which it is provided. This principle is well-established because it encourages parties to communicate openly, honestly, and fully with other parties without concern about the misuse of that information.

Clause 18 is likely to make parties far more guarded about providing confidential information to the AER. This will be a particular concern where the party is providing the information voluntarily and has the option of not providing it. In any event, clause 18 is likely to heighten distrust and poor working relationships between the AER and regulated companies.

Penalty provisions

Enertrade notes that the three classes of penalty (classes A, B, and C) have been abolished and all breaches of the NEL or National Electricity Rules will attract a maximum penalty of \$100,000. Previously, breaches of Class A provisions attracted penalties from \$5,000 to \$20,000, class B breaches attracted penalties up to \$50,000, and class C breaches attracted penalties up to \$100,000.

The effect of abolishing the distinction between class A, B, and C breaches is to expose all breaches to the same maximum penalty (with the exception of breaches of the rebidding rules that attract a penalty up to \$1 million).

Enertrade is concerned at the abolition of the grading of breaches, as it removes guidance to regulators and Courts on legislators' views of the appropriate seriousness of particular breaches. While it is appropriate for some breaches to be severely punished with heavy fines, other breaches may be of a minor nature, with no impact on the functioning of the market or market prices.

Enertrade considers it would be critical for the AER to issue market guidance following the establishment of the NEL of its views on the appropriate penalties for particular offences.

Yours sincerely

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