

Legislative Package for Establishment of the Australian Energy Market Operator (AEMO)

Response to Exposure Drafts of the National
Electricity Law and National Electricity Rules

30 January 2009

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1. Summary

Grid Australia makes this submission in response to the draft legislative package for the establishment of the Australian Energy Market Operator (**AEMO**) released on 19 December 2008. This submission outlines Grid Australia's comments in relation to the National Electricity (Australian Energy Market Operator) Amendment Bill 2009 (**AEMO Bill**) and the National Electricity (Australian Energy Market Operator) Amendment Rules 2009 (**AEMO Rules**).

In this submission Grid Australia wishes to highlight a number of concerns its members have in relation to the AEMO Bill and Rules. A summary of those areas of the AEMO Bill and Rules in relation to which Grid Australia has particular concerns is set out below.

- Grid Australia does not accept that the need for the information gathering powers proposed in section 16 of the AEMO Bill (inserting a new Division 5, Part 5 into the NEL), has been demonstrated. Grid Australia submits that the issuing of market information instruments should be seen as a last resort to compel the provision of necessary information, rather than as the primary means of gathering information.

Further, Grid Australia considers the following aspects of the proposed information gathering powers to be particularly problematic:

- AEMO may issue a market information instrument if it considers it 'reasonably necessary' for the exercise of a relevant function. Whether it is reasonably necessary to issue a market information instrument is a matter to be determined by AEMO. In making this decision, AEMO is only required to have regard to the reasonable costs that are likely to be incurred in complying with the instrument. The AEMO Bill does not require AEMO to consider the factors similar to those in section 28F of the NEL, or like factors, in deciding whether it is reasonably necessary to issue a market information instrument.
- AEMO may use the information or documents obtained under a market information instrument for any purpose connected with the exercise of any of its statutory functions.
- AEMO may disclose information or documents obtained under a market information instrument (including confidential information) to other, designated, entities, including the Australian Competition and Consumer Commission (**ACCC**). These entities may use the information provided by AEMO for any purpose connected to the performance or exercise of their functions or powers
- The AEMO Bill confers National Transmission Planning (NTP) functions on AEMO. However, the Bill does not include an NTP objective or NTP considerations. Grid Australia considers that the AEMO Bill should provide additional guidance on the factors to which AEMO must have regard to in performing its NTP functions.

- The AEMO Bill and Rules fail to implement a number of the MCE's key recommendations in relation to AEMO's budgeting and cost allocation decisions. In particular, contrary to the MCE's recommendations, the AEMO Bill and Rules do not:
 - expressly require AEMO to provide members with a copy of its proposed annual budget and an opportunity to comment on it;
 - exempt AEMO's budgeting and cost allocation decisions from the operation of the dispute resolution procedures in Chapter 8 of the National Electricity Rules (NER); or
 - expressly require AEMO to publish a statement of how costs are allocated to the various functions of AEMO which are to be recovered by different fee mechanisms.
- The AEMO Bill permits the MCE or a Minister of a participating jurisdiction to require information, a report or other services from AEMO. Grid Australia considers that such requests should be limited to information, reports or other services within AEMO's functions and powers.
- The AEMO Bill introduces new provisions giving AEMO, its contractors, agents and employees a complete immunity as against market participants in certain circumstances.

The remainder of this submission is structured as follows:

- Section 2 sets out Grid Australia's key concerns in relation to the information gathering powers;
- Section 3 discusses Grid Australia's concerns in relation to AEMO's exercise of its NTP functions and powers;
- Section 4 discusses Grid Australia's concerns in relation to AEMO's budgeting and cost allocation decisions; and
- Section 5 includes a table summarising the key issues of concern to transmission network service providers (TNSPs).

2. The AEMO's proposed information gathering powers

Section 6 of the AEMO Bill inserts a new section 53(1) into the NEL, allowing AEMO, if it considers it reasonably necessary for the exercise of a relevant function, to:

- (a) make a general market information order (**MIO**) requiring information from persons of a class defined in the order; or

- (b) issue a market information notice (**MIN**) requiring information from the person to whom the notice is addressed.

Section 53(2) defines a relevant function as:

- (a) an NTP function;
- (b) an additional advisory function;
- (c) a declared network function; or
- (d) any other statutory function for which this Law authorises AEMO to gather information by means of a market information instrument.

The scope of these functions is very broad. In particular, “additional advisory functions” encompass the preparation and publication of reports on an adoptive jurisdiction’s declared power system and to report to the Minister for the adoptive jurisdiction on matters relevant to the future capacity and reliability of the declared power system. Grid Australia understands that these particular provisions are intended to provide the basis for transfer of the Electricity Supply Industry Council of South Australia’s (**ESIPC’s**) functions to AEMO, however this is not clear from the legislation.

Potentially therefore, this provision is broader than that originally recommended by the MCE in its *Statement of Proposed Approach*. There, the MCE recommended that AEMO only have the capacity to serve MIOs and MINs for its NTP and Gas Statement of Opportunity (**GSOO**) functions.¹ The MCE stated that:

*“at a later stage consideration can be given to whether MIOs and MINs should be extended to other functions”.*²

Proposed section 53 is also broader than that recommended by the AEMC in its *National Transmission Planning Arrangements: Final Report to the MCE*. There, the AEMC stated that AEMO’s power to serve market information instruments should be limited to the exercise of its NTP functions.³

Grid Australia notes that, proposed section 53(1) of the NEL is expressed in similar terms to the current section 28F of the NEL and National Gas Law (**NGL**). Under this provision, the Australian Energy Regulator (**AER**), if it considers it reasonably necessary for the performance or exercise of its functions or powers, may:

¹ Ministerial Council on Energy, *Australian Energy Operator Establishment: Legislative Framework: Statement of Proposed Approach* (August 2008), [109].

² Ministerial Council on Energy, *Australian Energy Operator Establishment: Legislative Framework: Statement of Proposed Approach* (August 2008), [109].

³ Australian Energy Market Regulator, *National Transmission Planning Arrangements: Final Report to MCE* (June 2008), p 25

- (a) serve a regulatory information notice on a regulated network service provider or a related provider (this is equivalent to a MIN); or
- (b) make a general regulatory information order (this is equivalent to a MIO).

However, while these powers may be necessary for the performance and exercise of the AER's functions and powers, the same is not true in relation to AEMO. Given the effectiveness of existing, co-operative arrangements for the supply of information, Grid Australia considers such broad information gathering powers to be unnecessary for the exercise of AEMO's functions and powers.

Further, for the reasons set out below, Grid Australia has significant concerns in relation to the following aspects of the information gathering regime proposed in the AEMO Bill:

- the circumstances in which a market information instrument can be issued and the factors which must be taken into account in determining whether to issue an instrument;
- the way in which information or documents obtained under a market information instrument can be used by AEMO; and
- the extent to which information or documents obtained under a market information instrument can be disclosed to other entities, including the ACCC.

2.1 When can AEMO issue a market information instrument?

The need for market information instruments

Grid Australia does not accept that the need for such expansive information gathering powers has been demonstrated. However, Grid Australia acknowledges that the introduction of market information instruments was recommended by the AEMC in its National Transmission Planning Arrangements: Final Report to the MCE.⁴

Industry participants currently co-operate closely with the National Energy Market Management Company (**NEMMCO**) to supply the information needed to prepare the Statement of Opportunities (**SOO**) and the Annual National Transmission Statement (**ANTS**). This information appears to have been sufficient for NEMMCO to produce the SOO and ANTS to a satisfactory standard. The information required by AEMO to develop the National Transmission Development Plan (**NTNDP**) will be derived largely from the same sources.

Grid Australia strongly encourages cooperation with NEMMCO and other regulatory bodies and will continue to do so under the new arrangements. Grid Australia is concerned that the serving of market information instruments will discourage this

⁴ Australian Energy Market Regulator, *National Transmission Planning Arrangements: Final Report to MCE* (June 2008), p 25

cooperative approach. Therefore, Grid Australia submits that the issuing of market information instruments should not be AEMO's primary information gathering tool. Rather, MIOs and MINs should only be issued as a last resort, in the event that requested information reasonably required has not been forthcoming from an overtly intransigent or obstructive party. In all other cases, AEMO should adopt a cooperative approach to information gathering and work with industry participants to acquire the necessary information.

Factors that must be taken into account in deciding whether to issue a market information instrument

In addition to the comments made in the previous section, Grid Australia makes the following submissions regarding the use of market information instruments.

Under proposed section 53(3) of the NEL, in deciding whether to issue a market information instrument and, if so, the terms of the instrument, AEMO must have regard to the reasonable costs of efficient compliance. However, the AEMO Bill does not identify any other criteria on which AEMO must base its decision to issue a market information instrument.

Grid Australia considers that, AEMO merely being required to have regard to the reasonable costs that are likely to be incurred in complying with the order or notice is inadequate. The AEMO Bill should provide additional guidance on the factors AEMO must take into account in deciding whether it is 'reasonably necessary' to issue a market information instrument.

Section 28F(2) of the NEL and NGL provides an indication of the factors which may be relevant in deciding whether to issue an information instrument. Under section 28F(2), in deciding whether it is "reasonably necessary" to make a regulatory information instrument, the AER must have regard to:

- (a) the matter to be addressed by:
 - i) the service of the regulatory information notice; or
 - ii) the making of the general regulatory information order; and
- (b) the likely costs that may be incurred by an efficient network service provider or efficient related provider in comply with the notice or order.

Further, under section 28F(3) of the NEL and NGL, the AER may not issue a regulatory information instrument solely for the purpose of:

- (a) investigating breaches or possible breaches of provisions of the NEL, National Electricity Regulations (**Regulations**) or NER;
- (b) instituting and conducting proceedings in relation to breaches of provisions of the NEL, Regulations or NER;

- (c) instituting and conducting appeals from decisions in proceedings referred to in paragraph (b);
- (d) collecting information for the preparation of a service provider performance report; or
- (e) any application for merits review of an AER decision.

Grid Australia notes that the MCE's position has been to reject inclusion of a provision similar to section 28F(2) in the AEMO Bill.⁵ The MCE considered such a provision unnecessary as:

*"an initial consultation process will assist AEMO to determine the availability, relevance and cost of providing information and encourage cooperation in information gathering."*⁶

As noted above, it is Grid Australia's view that reliance on these instruments in the form presented in the legislative package will have quite the opposite effect to encouraging cooperation. For this reason, Grid Australia considers that MIOs and MINs should only be issued as a last resort. To this end, AEMO should be prevented from issuing a market information instrument if:

- the recipient is not reasonably able to produce the information; or
- the instrument would impose disproportionate costs or be unduly onerous to the recipient

Further, the AEMO Bill should be amended to expressly require AEMO to consider the factors in section 28F(2) of the NEL, or like factors, in deciding whether it is reasonably necessary to issue a market information instrument. An example of a relevant like factor is that AEMO must consider the nature of the information sought and whether serving a market information instrument is the most efficient and appropriate means of obtaining information of that kind.

Obligation to consult before issuing a market information instrument

The AEMO Bill imposes an obligation on AEMO to consult with the intended recipient of a market information instrument before serving that instrument. However, under proposed sections 53A and 53B, AEMO is not required to notify any other person that it intends to serve a market information instrument.

⁵ Ministerial Council on Energy, *Legislative Framework: Statement of Proposed Approach for the Australian Energy Market Operator Establishment – Implementation Steering Committee Response to Stakeholder Submissions*, No. 30.

⁶ Ministerial Council on Energy, *Legislative Framework: Statement of Proposed Approach for the Australian Energy Market Operator Establishment – Implementation Steering Committee Response to Stakeholder Submissions*, No. 30.

This obligation to consult is narrower than that currently imposed on the AER under the NEL and NGL. Under section 28J(1) of the NEL and NGL, before serving a regulatory information notice, the AER must notify the intended recipient that it intends to serve the notice and provide the recipient with a copy of the notice. Under section 28J(4), the AER must invite the recipient to make written representations to the AER as to whether the AER should serve the notice. However, where the AER plans to issue a general regulatory information order, it must consult “with the public”, not just the intended recipient.⁷ Grid Australia submits that this broader consultation obligation should also be imposed on AEMO.

Grid Australia is concerned that a market information instrument may require the person or class of persons named in it to provide information given to them by other market participants. If this occurs, other market participants will be directly affected by AEMO’s decision to issue a market information instrument. However, under the AEMO Bill, these participants will not be entitled to receive a copy of the proposed instrument or comment on it.

Given that other market participants may be directly affected by AEMO’s decision to issue a market information instrument, Grid Australia considers that AEMO should be required to consult with all participants before serving the instrument. To this end, the AEMO Bill should be amended to require AEMO, before serving a market information instrument, to provide all market participants with a copy of the proposed instrument and an opportunity to comment on it. The Bill should require AEMO to consider these comments before making its final decision to issue a market information instrument.

In relation to this issue, Grid Australia further submits that AEMO should not be permitted to issue a market information instrument requesting information that other market participants have previously provided to the recipient. Where AEMO requires information from other market participants, it should approach those participants directly and request the relevant information from them. AEMO should not attempt to acquire the information from TNSPs under a market information instrument.

2.2 How can AEMO use the information or documents obtained under a market information instrument?

In its *Response to Stakeholder Submissions*, the MCE expressly rejected submissions that information obtained under a MIO or MIN should only be used for the purpose for which it was sought. The MCE stated:

“One of the benefits of establishing a national energy market operator with various functions including in relation to planning is the creation of an opportunity to co-optimize the exercise of those different functions and

⁷ Section 28H of the NEL and NGL.

decisions. Capitalisation on that opportunity necessarily involves providing for relatively free information flows between functions.”⁸

Consistent with this view, proposed section 53D allows AEMO to use information obtained by a market information instrument, or in any other way, for any purpose connected with the exercise of its statutory functions. This provision mirrors section 28ZD of the NEL and NGL. Under section 28ZD of the NEL and NGL, the AER may use information obtained under a regulatory information order for any purpose connected with the performance or exercise of a function or power of the AER.

However, whilst this capability may be relevant for the AER, Grid Australia submits that it may not be relevant to AEMO. Grid Australia considers that AEMO should only be permitted to use information obtained under a market information instrument for the purpose for which it was obtained. In particular, Grid Australia considers that AEMO should not be able to use information received for the purposes of developing the NTNDP for any other purpose which may cause harm to the participant who provided it, or any other party.

2.3 Disclosure of information to other regulatory bodies

Under proposed section 54C(2) of the NEL, AEMO may disclose information:

- (a) given to it in confidence; or
- (b) given to it in connection with the performance of its statutory functions and classified under the NER as confidential information;

to:

- (a) the ACCC;
- (b) the AER;
- (c) the AEMC;
- (d) the Economic Regulation Authority of Western Australia;
- (e) a jurisdictional regulator;
- (f) if the information is reasonably required by a recognised energy industry ombudsman to resolve a dispute between a Registered Participant and a customer under an industry dispute scheme but the information is not end-use consumer information – the recognised energy industry ombudsman;

⁸ Ministerial Council on Energy, *Legislative Framework: Statement of Proposed Approach for the Australian Energy Market Operator Establishment – Implementation Steering Committee Response to Stakeholder Submissions*, No. 36.

- (g) a prescribed body; or
- (h) any staff or consultant assisting a body mentioned above in performing its functions or exercising its powers.

Further, proposed section 54C(5) allows disclosure by a person in the ordinary course of carrying out functions as a member, officer or employee of, or consultant to, AEMO or one of the above bodies.

Under proposed section 54C(3), a person or body to whom information is disclosed may use that information for any purpose connected with the performance or exercise of its functions or powers.

Grid Australia is concerned that proposed section 54C(2), as currently drafted, allows named regulators to obtain information without complying with the terms of their individual enabling instrument. This is particularly true in relation to the ACCC. Under section 155(1) of the *Trade Practices Act 1974* (Cth) (TPA), the ACCC may only require a person to provide information or documents if it has reason to believe that the recipient is capable of furnishing information or providing documents relating to a matter that constitutes, or may constitute a contravention of the TPA. However, where the information or documents are already held by AEMO, the ACCC may obtain the material under proposed section 54C(2), without complying with section 155 of the TPA. Subject to any conditions imposed by AEMO, that material can then be used by the ACCC in the performance or exercise of any of its functions or powers.

In its submission to the MCE dated 19 September 2008, Grid Australia also argued that, where AEMO provides confidential information to another entity as a result of it having a specific regulatory role, the entity should only be permitted to use the information in performing that role.⁹ The entity should not be allowed to use the information in performing or exercising its other functions or powers.¹⁰

This submission was “noted” by the MCE in its *Response to Stakeholder Submissions*.¹¹ However, the MCE did not recommend expressly limiting the purposes for which other entities may use the information provided by AEMO.¹² Rather, the MCE recommended

⁹ Grid Australia, *Australian Energy Market Operator Establishment Legislative Framework: Statement of Proposed Approach* (19 September 2008), p 2.

¹⁰ Grid Australia, *Australian Energy Market Operator Establishment Legislative Framework: Statement of Proposed Approach* (19 September 2008), p 2.

¹¹ Ministerial Council on Energy, *Legislative Framework: Statement of Proposed Approach for the Australian Energy Market Operator Establishment – Implementation Steering Committee Response to Stakeholder Submissions*, No. 34.

¹² Ministerial Council on Energy, *Legislative Framework: Statement of Proposed Approach for the Australian Energy Market Operator Establishment – Implementation Steering Committee Response to Stakeholder Submissions*, No. 34.

that AEMO have the capacity to impose conditions to be complied with in relation to the disclosure of information.¹³ This is now reflected in proposed section 54C(4).

In addition to any conditions imposed by AEMO under proposed section 54C(4), Grid Australia considers that the body to whom information is disclosed should be subject to the same or similar restrictions on the disclosure of protected information as AEMO is under proposed Division 6 of the NEL. In particular, the body to whom information is disclosed should be bound by proposed section 54(1) and required to take all reasonable measures to protect from unauthorised use or disclosure information that is protected information.

Further, Grid Australia submits that AEMO should be required to consult with the relevant market participant before releasing confidential information to any other entity.

3. The exercise of AEMO's NTP functions

In its *National Transmission Planning Arrangements: Final Report to the MCE*, the AEMC recommended that the NEL include an NTP objective and NTP considerations and require AEMO to have regard to these factors in exercising its NTP functions.

Grid Australia notes that, the MCE has previously rejected the introduction of an NTP objective and NTP considerations.¹⁴ In its *Response to the AEMC's Final Decision*, the MCE expressed concern that:

"a separate objective for an individual AEMO function is inconsistent with the agreed governance and accountability arrangements for the national markets and will unnecessarily complicate the AEMO Board's efficient performance of the function".¹⁵

Contrary to the MCE's view, Grid Australia considers that the inclusion of an NTP objective and considerations will in fact assist the AEMO board in performing its NTP functions, by identifying factors which may be relevant in assessing development projects. Further, by requiring the AEMO board to consider the same factors in all cases, the inclusion of an NTP objective and NTP considerations should also increase the consistency and predictability of AEMO's NTP decision making.

¹³ Ministerial Council on Energy, *Legislative Framework: Statement of Proposed Approach for the Australian Energy Market Operator Establishment – Implementation Steering Committee Response to Stakeholder Submissions*, No. 34.

¹⁴ Ministerial Council on Energy, *National Transmission Planning Arrangements: Ministerial Council on Energy Response to Australian Energy Market Commission Final Report* (November 2008), pg 7

¹⁵ Ministerial Council on Energy, *National Transmission Planning Arrangements: Ministerial Council on Energy Response to Australian Energy Market Commission Final Report* (November 2008), pg 7

Grid Australia also agrees with the AEMC¹⁶ that including an NTP objective and NTP considerations in the NEL recognises the importance of AEMO's NTP functions. For these reasons, Grid Australia submits that the NEL should include an NTP objective and considerations. The NTP objective should be defined as:

“to contribute to the achievement of the national electricity objective in a manner that promotes the efficient and long term development of a nationally coordinated transmission network and optimises investment between transmission and generation across the power system”.

Grid Australia has previously submitted that the following would be relevant considerations¹⁷:

- the focus of the NTP on strategic, long term, high level planning; and
- avoiding duplication of the planning which NSPs have to do to meet their obligations with respect to reliability.

4. AEMO Budgeting and Cost Allocation

Schedule 3 of the AEMO Rules amends clause 2.11.3(a) of the NER to require AEMO to “prepare and publish before the beginning of each financial year a budget of the revenue requirements for AEMO for that financial year.”

4.1 AEMO's obligation to consult with members about its annual budget

In its *Statement of Proposed Approach*, the MCE concluded that AEMO should not be required to consult broadly upon its proposed budget.¹⁸ However, the MCE recommended that AEMO members be given a copy of the proposed annual budget and an opportunity to comment on it.¹⁹ The AEMO board would be required to consider these comments in finalising its budget.²⁰

This is similar to, but narrower than the obligations currently imposed on NEMMCO. NEMMCO's Members Agreement requires the NEMMCO board to prepare and submit a

¹⁶ Australian Energy Market Commission, *National Transmission Planning Arrangements: Final Report to MCE* (30 June 2008), p 11.

¹⁷ Grid Australia, *National Transmission Planning Arrangements, Response to AEMC Draft Report* (30 May 2008), pg 18.

¹⁸ Ministerial Council on Energy, *Australian Energy Operator Establishment: Legislative Framework: Statement of Proposed Approach* (August 2008), p 14, recommendation 4

¹⁹ Ministerial Council on Energy, *Australian Energy Operator Establishment: Legislative Framework: Statement of Proposed Approach* (August 2008), p 14, recommendation 4

²⁰ Ministerial Council on Energy, *Australian Energy Operator Establishment: Legislative Framework: Statement of Proposed Approach* (August 2008), p 14, recommendation 4

draft budget to members, no later than 1 month before the commencement of each financial year. Under the Agreement, the board must consider any written comments on the draft budget received during the first month of the financial year. NEMMCO also provides a copy of the draft budget to, and accepts comments from, members of the Participant Advisory Committee, Registered Participants in the National Electricity Market (NEM) and the electricity supply and energy industries. A copy of the draft budget is also published on the NEMMCO website.

As currently drafted, the AEMO Bill and Rules do not expressly require AEMO to give members a copy of the proposed annual budget or an opportunity to comment on it. Nor do the Bill or Rules expressly require the AEMO board to consider members' comments.

Grid Australia notes that the MCE did not expressly require the obligation to consult with members to be included in the NEL or NER. In its *Public Consultation Paper on Governance Arrangements for the Proposed Australian Energy Market Operator*, the Market Operator Working Group (MOWG) recommended that the NEMMCO budgeting arrangements be applied to AEMO.²¹ Under this arrangement, the obligation to consult with members would be imposed on AEMO via its Members Agreement.

Given the importance of AEMO consulting with its members, Grid Australia submits that this obligation should be included in the NEL. However, if the obligation is to be dealt with under AEMO's Members Agreement, Grid Australia considers that the NEL should expressly require AEMO to enter into an agreement with its members and identify the obligations to be included in it, including the obligation to consult with members about AEMO's annual budget.

4.2 Subjecting AEMO's budget to a dispute resolution procedure

In its *Statement of Proposed Approach*, the MCE concluded that AEMO's budget should not be subject to a dispute resolution procedure, such as that set out in Chapter 8 of the NER.

Under clause 8.2.1(a) of the NER, the Chapter 8 dispute resolution procedure applies to any dispute which may arise between 2 or more Registered Participants about:

1 the application or interpretation of the Rules;

...

5 the payment of moneys under or concerning any obligation under the Rules.

Clause 8.2.1(a1) of the NER (as amended by Schedule 3 of the AEMO Rules) defines "Registered Participant" for the purposes of Rule 8.2 as including "not just Registered Participants but also AEMO". Therefore, unless expressly excluded under clause 8.2.1(h)

²¹ Market Operator Working Group, *Public Consultation Paper on Governance Arrangements for the Proposed Australian Energy Market Operator* (October 2007), p 41

of the NER, AEMO's budgeting and fee decisions may be subject to the dispute resolution procedures in clause 8.2 of the Rules.

The AEMO Rules do not expressly exempt AEMO's budget decisions from the Chapter 8 dispute resolution procedure. Consistent with the MCE's original recommendation, Grid Australia submits that the AEMO Rules should amend clause 8.2.1(h) of the NER to expressly exempt AEMO's budgeting decisions from the dispute resolution procedure.

4.3 AEMO's obligation to publish a statement of how costs are allocated between its functions

In its *Statement of Proposed Approach*, the MCE recommended that AEMO be required to publish a statement of how costs are allocated to the various functions of AEMO which are to be recovered by different fee mechanisms. However, the draft legislative package does not impose such an obligation on AEMO.

Grid Australia notes that, schedule 3 of the AEMO Rules amends clause 2.11.1(e) of the NER to require AEMO to publish the structure of Participant fees determined, the methods used in determining the structure and an assessment of the extent to which the structure complies with the principles in clause 6.11.1(b). This mirrors the obligation currently imposed on NEMMCO to publish its fee structure and the methods used to determine that structure.²²

Grid Australia does not accept that this amendment adequately implements the MCE's original recommendation and submits that the AEMO Rules should be amended to expressly require AEMO to publish a statement of how costs are allocated to the various AEMO functions which are to be recovered by different fee mechanisms.

²² Clause 2.11.1(e), *National Electricity Rules*

5. Key issues of concern to transmission network service providers

In the following table, 'MCE's recommendation' refers to:

- the MCE's comments in relation to the establishment of AEMO, as set out in the Australian Energy Market Operator Implementation Plan;
- the MCE's recommendations in relation to the implement of AEMO, as set out in its Statement of Proposed Approach, dated August 2008; and
- the MCE's response to the AEMC's Final Report on the National Transmission Planning Arrangements, dated November 2008.

	MCE's recommendation	Draft legislative package	Grid Australia's response to the draft legislative package
Information gathering powers			
1	AEMO will be able to make a MIO and/or MIN requiring persons and/or identified classes of persons to provide information relevant to the performance or exercise of certain of its functions and powers	<p>Implements the MCE's recommendations.</p> <p>The AEMO Bill inserts a new section 53(1) into the NEL, allowing AEMO to:</p> <ul style="list-style-type: none"> a) make a general market information order requiring information from persons of a class defined in the order; or b) issue a market information notice requiring information from the person to whom the notice is addressed. 	The need for market information instruments has not been demonstrated.

	MCE's recommendation	Draft legislative package	Grid Australia's response to the draft legislative package
2	Initially, the MIO and MIN framework will be applied to AEMO's functions in relation to the NTP and GSOO only. However, there will be capacity for the NER to supplement the circumstances in which AEMO might use a MIO or MIN.	Unclear whether the AEMO Bill and Rules implement the MCE's recommendations. Under proposed section 53(1) of the NEL, AEMO may issue a MIO or MIN in relation to "a relevant function". 'Relevant function' is defined in proposed section 53(2) as: a) an NTP function; b) an additional advisory function; c) a declared network function; or d) any other statutory function for which this Law authorised AEMO to gather information by means of a market information instrument.	Grid Australia understands that the additional advisory function is the ESPIC function and the declared network function is the VENCORP function. However, this is not clear from the AEMO Bill. The AEMO Bill should be amended to clarify that this is the case.
3	A MIO or Min may be issued in 3 situations: <ul style="list-style-type: none"> when AEMO considers such "reasonably necessary for the exercise of NTP functions and powers"; subject to and in accordance with the NGR, for the exercise of GSOO functions and powers; otherwise, where the NER and NGR expressly provide for issue of a MIO or MIN, subject to and in 	Implements MCE's recommendations in part. Under proposed section 53(1) of the NEL, AEMO may issue a MIO or MIN if it "considers it reasonable necessary to do so for the exercise of a relevant function". The AEMO Bill does not identify any other criteria on which AEMO must base its decision to issue a market information instrument	MIOs and MINs should only be issued as a last resort, after all other, cooperative attempts to obtain the relevant information have failed. AEMO should only be permitted to issue a MIO or MIN if requested information reasonably required has not been forthcoming from an overtly intransigent or obstructive party. AEMO should not be able to issue an information instrument if: <ul style="list-style-type: none"> the recipient is not reasonably

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	MCE's recommendation	Draft legislative package	Grid Australia's response to the draft legislative package
	accordance with the provisions of those rules.		<p>able to produce the information; or</p> <ul style="list-style-type: none"> it would impose disproportionate costs or be unduly burdensome to the TNSP.
4	There should be no limit on the way in which AEMO may use information obtained in a MIO or MIN.	<p>Implements MCE's recommendation.</p> <p>Under proposed section 53D, "AEMO may use information obtained by market information instrument or in any other way for any purpose connected with the exercise of any of its statutory functions".</p>	<p>AEMO should only be permitted to use the information obtained under an MIO or MIN for the purpose for which it was sought.</p> <p>In particular, AEMO should not be permitted to use information obtained for the purpose of preparing its NTNDP for any other purpose which may cause harm to the market participant who provided the information or any other party.</p>
5	AEMO should be bound by confidentiality provisions similar to those currently applying to the AER. Notwithstanding any confidentiality claim, AEMO may provide information to the ACCC, AER, ERA, AEMC, ESPIC, energy industry ombudsman, relevant jurisdictional regulators and any other person prescribed by regulation.	<p>Implements MCE's recommendations in part.</p> <p>The AEMO Bill inserts a new Division 6, Subdivision 2 into the NEL governing the disclosure of protected information held by AEMO.</p> <p>Under proposed section 54C AEMO may disclose 'protected information' to:</p> <ol style="list-style-type: none"> the ACCC; the AER; 	<p>AEMO should not be permitted to disclose confidential information to other regulatory bodies.</p> <p>Where AEMO provides confidential information to another entity as a result of it having a specific regulator role, the entity may only use the information in performing that role. The information should not be used by the entity in exercising or performing</p>

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		<p>c) the AEMC;</p> <p>d) the Economic Regulatory Authority of Western Australia;</p> <p>e) a jurisdictional regulator;</p> <p>f) a recognised energy industry ombudsman;</p> <p>g) a prescribed body;</p> <p>h) any staff or consultant assisting a body mentioned above in performing its functions or exercising its powers.</p> <p>Proposed section 54C(5) further allows for the disclosure of protected information by a person in the ordinary course of carrying out functions as a member officer or employee of, or consultant to, AEMO or one of the above bodies.</p> <p>Under proposed section 54C(3), those persons or bodies “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”.</p> <p>However, under proposed section 54C(4) “AEMO may impose conditions to be complied with in relation to protected information disclosed under subsection (2)”.</p>	<p>its other functions and powers.</p>

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AEMO's role as National Transmission Planner			
6	<p>The NEL should not include an NTP objective.</p> <p>Exercise of the NTP function should be governed by the national electricity objective only.</p>	<p>Implements MCE's recommendations.</p> <p>The Amendment Bill and Rules do not include an NTP objective. However, under proposed section 49(3)(a), in performing its functions (including its NTP functions), AEMO must have regard to the national electricity objective.</p>	<p>The NEL should include an NTP objective which AEMO must have regard to in performing and exercising its NTP functions and powers.</p> <p>The NTP objective is to contribute to the achievement of the national electricity objective in a manner that promotes the efficient and long term development of a nationally coordinated transmission network and optimises investment between transmission and generation across the power system.</p>
7	<p>The NEL should not include NTP considerations.</p>	<p>Implements MCE's recommendations.</p> <p>The Amendment Bill and Rules do not include NTP considerations.</p> <p>Proposed section 49(3) of the NEL merely provides that, in carrying out its functions (including its NTP functions), AEMO must:</p> <p>(a) have regard to the national electricity objective; and</p> <p>(b) act in accordance with the NEL and NER.</p>	<p>The NEL should include NTP considerations which must be taken into account by AEMO in performing and exercising its NTP functions and powers.</p> <p>The NTP considerations should include those set out by the AEMC and the following:</p> <ul style="list-style-type: none"> • the focus of the NTP on strategic, long term, high level planning; and

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			<ul style="list-style-type: none"> avoiding duplication of the planning which NSPs have to do to meet their obligations with respect to reliability.
Cost recovery			
8	AEMO members will receive a copy of the proposed annual budget and be given an opportunity to comment on it. The AEMO Board must consider any members' comments.	<p>Does not implement MCE's recommendation.</p> <p>The draft legislative package does not expressly require AEMO to give members a copy of the proposed annual budget or an opportunity to comment on it. Nor does the AEMO Bill expressly require the AEMO Board to consider member's comments.</p>	<p>The AEMO Bill should expressly require AEMO to consult with members about its proposed budget.</p> <p>This consultation obligation should be included in the NEL.</p> <p>If the consultation obligation is to be included in AEMO's Member's Agreement, the AEMO Bill should expressly require AEMO to enter into such an agreement and identify the obligations to be included in the obligation.</p>
9	AEMO's budget will not be subject to a dispute resolution procedure such as that in Chapter 8 of the NER.	<p>Does not implement MCE's recommendation.</p> <p>The AEMO Rules do not expressly exempt AEMO's budget decision from the operation of the dispute resolution procedure in clause 8.2 of the NER.</p>	The AEMO Rules should amend clause 8.2.1(h) to expressly exempt AEMO's budgeting decisions from the operation of the dispute resolution procedure in chapter 8 of the NER.

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AEMO's obligation to provide information to Ministers of participating jurisdictions			
10	<p>The establishing legislation will empower governments (individually and collectively through the MCE) to:</p> <p>a) require AEMO to undertake certain actions during emergency situations; and</p> <p>b) enable advice to be sought and information requested from AEMO on matters related to its functions, subject to:</p> <ul style="list-style-type: none"> • appropriate mechanisms being established for the protection and use of commercially sensitive information; and • the cost associated with a request being met by the requesting party or parties where the advice or information sought requires a material commitment of resources.” 	<p>Implements MCE's recommendations.</p> <p>Proposed section 51(1) allows the MCE or a Minister of a participating jurisdiction to ask AEMO for information, a report or other services.</p> <p>Under proposed section 51A(1), AEMO must comply with a request from the MCE or a Minister. However, under proposed section 51A(2), if compliance with the request would disclose protected information, AEMO may only provide the information if its disclosure is authorised under the NEL or NER.</p>	<p>Consistent with the AEMO Implementation Plan, proposed section 51 should be expressly limited to information, reports or other services within AEMO's functions.</p> <p>The interaction between proposed section 51 and proposed section 50A should be clarified. Proposed section 50A requires AEMO, at the written request of the Minister for an adoptive jurisdiction, to provide information about the performance of its adoptive functions with respect to that jurisdiction. Although the adoptive functions are intended to be relevant only in Victoria and South Australia, the interaction between proposed section 51 and proposed section 50A is unclear.</p> <p>Proposed section 50A(2) provides that, protected information provided in response to a request made by a Minister must be identified as protected information by AEMO at the time of providing the information. This strongly suggested that there is no</p>

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			<p>restriction on AEMO providing protected information to the requesting information, as long as that information is identified as protected information. If this is intended to be the case, it should be expressly dealt with in the exceptions to the disclosure of protected information proposed Division 6, Subdivision 2.</p>
11	<p>Ordinarily, the terms on which AEMO is authorised by legislation to disclose confidential information should apply uniformly to Ministers and others.</p> <p>However, in the event of an emergency or apprehended emergency, Ministers may request AEMO provide all relevant information without regard to confidentiality, but on the condition that the information be used for the sole purpose of managing the identified emergency.</p>	<p>Does not implement MCE's recommendations.</p> <p>The AEMO Bill and Rules do not expressly allow Ministers, in situations of emergency or apprehended emergency, to obtain from AEMO all relevant information without regard to confidentiality.</p>	<p>Grid Australia notes that, proposed section 54G allows the disclosure of protected information where the disclosure is necessary, including for the safety, reliability or security of the supply of electricity or the national electricity system. This would include emergency situations.</p> <p>Although allowing disclosure in emergency situations, proposed section 54G does not contain the safeguards envisaged by the MCE Implementation Steering Committee. In particular, section 54G does not expressly require that the information be provided on the condition that it is used for the sole purpose of managing the identified emergency.</p>

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			Grid Australia considers that the AEMO Bill should be amended to expressly reflect the MCE's original recommendations.
Immunity and indemnity provisions			
12	A provision in similar terms to clause 3.17.2 of the NER should appear in the NEL to give AEMO, its contractors, agents and employees a complete immunity as against market participants in respect of the software used to operate the market. Clause 3.17.2 could then be removed from the NER.	<p>Implements MCE's recommendation.</p> <p>The Amendment Bill inserts a new section 120A into the NEL. Under proposed section 120A of the NEL:</p> <ul style="list-style-type: none"> a) A protected person incurs no civil liability for loss or damage suffered by a market participant or other person in consequence of the use of computer software to operate the national electricity market. b) In this section: protected person means any of the following: <ul style="list-style-type: none"> (c) AEMO; (d) an officer, employee or agent of AEMO. <p>Schedule 3 of the Amendment Rules omits Clause 3.17.2 from the NER</p>	