

Memorandum

Date: 24 December 2004
To: Manager – Energy Market Reform Team
From: Energy & Resources Practice Group, Johnson Winter & Slattery
Subject: **NEM Reform – National Electricity Law**

Thank you for the opportunity to make submissions on major issues identified from our review of the draft National Electricity Law (NEL).

The views expressed in this memorandum are personal to the authors and are not made on behalf of any client.

1 Disclosure of information by AER

Information compulsorily obtained by the Australian Energy Regulator (AER) pursuant to section 29 of the NEL should be kept confidential to the AER.

Section 18 of the draft NEL applies section 44AAF of the Trade Practices Act (TPA). This authorises the disclosure of information by the AER to the Ministerial Council on Energy (MCE), Australian Energy Markets Commission (AEMC) or National Electricity Market Management Company Limited (NEMMCO).

At the very least, those other organisations ought to be under the same confidentiality obligations in respect of the information provided to them by the AER, as the AER is under section 44AAF(1) of the TPA. Section 44AAF(4) of the TPA appears to give broader discretion for disclosure to the other entities.

There is no guarantee of the confidentiality of information. Although information may be given to the AER on a confidential basis, section 44AAF(4) permits the other bodies to use (and disclose it) for any purpose within power.

Likewise, section 32 of the draft NEL applies section 24 of the Australian Energy Market Commission Establishment Act 2004, which (via regulations) enables the AEMC to disclose the information given to it to other bodies.

Information which is obtained by any of the bodies compulsorily, or which is given to one of the bodies on a confidential basis, should be deemed to be confidential information when received by the other bodies, without the need for the disclosing body to expressly designate confidentiality conditions on the information. At present, although the bodies have the right to impose conditions on the handling of information passed to other bodies, there is no guarantee that they will do so.

2 ***Receipt of information by AER***

The AER's access to information via other agencies should be confined to and be on the basis of the rules in section 29 of the NEL, and not otherwise.

The AER should not be able to rely upon other information-sharing arrangements to obtain information which is then not subject to the rules provided by section 29.

The limits and excuses from disclosure contained in section 29 should also extend to other obligations on Registered participants to provide information to other agencies such as NEMMCO and the AEMC, otherwise the rules in section 29 for the protection of privilege and self-incrimination may be circumvented by joint action with other agencies.

3 ***Self-incrimination in information supplied***

In section 29 of the NEL, consideration should be given to extending the privilege against self-incrimination (presently expressed only as a privilege exercisable by natural persons) to corporations, at least in respect of information which might incriminate and lead to personal liability of the officers or employees of the corporation.

A natural person is not required to provide evidence in relation to an offence that would incriminate that natural person.

Where a corporation has committed an offence or civil liability provision, an officer of that corporation ought not be in a worse position, in terms of the rules against self-incrimination, than if the offence had been committed by the officer directly as a natural person.

That is, the corporation should not be required to provide information which would incriminate its officers.

Alternatively, if the corporation is required to provide information which would incriminate its officers, that information at least ought not be admissible as evidence against the officers.

4 ***Liability for officers***

We are uncertain as to the need for section 85 of the draft NEL, which deems a participant to be liable for the acts of its officers or employees committed in their capacity as officer or employee of the participant. In respect of corporations, we would expect that that would ordinarily follow.

5 ***Definition of "electricity services"***

The definition of "electricity services" in section 2 requires adjustment. "Electricity" is a phenomenon that occurs in some matter. Electric energy and electric power are derived from that phenomenon. Although generators generate electricity, and networks transmit electricity, technically what is consumed at any moment is "electric energy" and what is bought and sold is "electric power" (energy over time) rather than "electricity". The phenomenon itself is not consumed. The electric power bought and sold is usually measured in MWh (a unit of power over time), with a constraint on customers as to the maximum energy load or power requirement that can be presented at any moment (usually measured in MW). Hence the common expressions "power supply" and "power purchase agreement".

We would define “electricity services” to mean “services that are necessary or incidental to the supply of electric power to consumers of electric energy, including:

- the generation of electricity;
- services provided by means of, or in connection with, a transmission system or distribution system;
- the sale of electric energy or electric power.”

Similar provisions in the NEL also require consideration. For instance, in section 10(4) the reference to purchasing electricity should be to purchasing electric power.

6 “Wholesale exchange”

The reference throughout the NEL to the exchange operated by NEMMCO as a “wholesale” exchange is a little misleading. Theoretically, sales can be and are made to direct consumers. The expression “wholesale” adds little and could be deleted. It is also an exchange for “electric power”, rather than an exchange for “electricity”. Alternatively, you could describe it as a “power exchange”.

7 MCE statement of policy principles

It would be useful if there was an initial set of MCE policy principles.

8 Light-handed regulation

Desirably, the initial principles would include a principle of “light-handed regulation” (currently contained in the Code). The requirement of the AEMC to adopt *any* rule which is likely to contribute to the market objective needs to be weighed against the burden created by a multitude of rules. There does not presently seem to be a basis for the AEMC to weigh the combined effect of the rules and determine that, although the adoption of a single rule might contribute to the market objective, the weight of adoption of *all* of those single rules would be detrimental to the market objective.

9 Registration of generators

Care needs to be taken with the registrations and exemptions. Generators which are connected only intermittently or for standby purposes (this is often the case with co-generation units that typically supply a single local load, with a standby connection to the grid in case of failure of the generation unit) may fall outside the coverage of the Rules altogether if they are given blanket exemptions from registration as a Registered participant, which may be undesirable from a system security and system control viewpoint, especially as the Rules are directed only to a defined class of persons rather than society at large.

10 Coverage of NEL and Rules

Consistent with our prior point, we see merit in directing liability under the NEL and the Rules to all persons in society that fall within the activities regulated under the NEL and the Rules, rather than endeavouring to build defined classes of liable persons. The defined

classes were essential when the Code was constructed as a consensual instrument, and perhaps not so now.

11 *AER performing distribution network determinations*

Section 15 - It would be preferable that the AER's capacity to make determinations in relation to networks was not defined solely in respect of *transmission* networks, so as to facilitate with minimal further amendment the transfer of distribution functions to the AER at a later date.

12 *Coverage of retail sectors*

The National Electricity Law should ultimately govern all aspects of the electricity system, including retail functions, when responsibility for retail and distribution functions moves from participating jurisdictions to the AEMC and AER.

Any thought that there should be a separate body of "retail" electricity legislation and rules ought to be dismissed.

Distinctions between "wholesale" and "retail" functions are arbitrary and unnecessary. There may be a need in the legislation for distinction between small and large customers when it comes to consumer protection provisions, but the issues of wholesale and retail are best dealt with under one consistent umbrella instrument.

A significant gap in the development of the NEM occurred when NECA declined to take responsibility for "retail" issues arising out of full retail contestability. Many of these issues, such as metering and customer transfer systems, were central to the development of effective competition in the electricity market. Significant inconsistencies, jurisdictional differences and barriers to effective retail competition arose when "retail issues" were not dealt with on the same basis as the rest of the market.

13 *Market Settlement and Transfer Solution Procedures*

Under clause 7.2.8 of the Code, NEMMCO has responsibility for developing and promulgating rules in relation to transfer and settlement of customers and metering.

A number of these rules (formerly the NEMSAT rules) contain matters which represent significant policy decisions, particularly in the areas of:

- (a) a market participant's liability for consumption by a defaulting consumer;
- (b) the relationship between distributors and retailers; and
- (c) the disconnection of customers after termination of the retailing contract.

Whilst these comments may be more relevant to the consultation on the Rules than on the Law, we take this opportunity to suggest that:

- (a) a number of the NEMSAT rules (soon to be Market Settlement and Transfer Solution Procedures), particularly in the areas mentioned above, ought to be elevated to the status of Rules under the NEL, so that the relevant rule-making and consultative body is the AEMC and not NEMMCO; and
- (b) the Market Settlement and Transfer Solution Procedures permitted to be promulgated by NEMMCO ought to be required to be consistent with the Rules, with the Rules prevailing in the event of any inconsistency.

NEMMCO should not have a rule-making function which can impact on market development or participant liability. That function ought to sit with the AEMC.

Johnson Winter & Slattery