

**NATIONAL ELECTRICITY LAW AND NATIONAL ELECTRICITY  
RULES**

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**INFORMATION PAPER**

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**Ministerial Council on Energy  
Standing Committee of Officials**

**DECEMBER 2004**

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## Energy Market Reform

### Proposed National Electricity Law and National Electricity Rules

The Ministerial Council on Energy Standing Committee of Officials (**SCO**) is issuing this paper as part of its consultation process in relation to the proposal to replace the current National Electricity Law, which is a schedule to the *National Electricity (South Australia) Act 1996* (SA), with a new National Electricity Law (**new NEL**) and convert the provisions of the National Electricity Code into the National Electricity Rules (**Rules**) made under the new NEL. An exposure draft of the new NEL has been released with this paper. An exposure draft of the Rules will be released by 10 December 2004. SCO is interested in obtaining the views of all stakeholders on each of these drafts.

The consultation process on the new NEL and Rules will comprise a consultation session on 10 December 2004, as advised in Bulletin 28, and the opportunity to provide initial written comments on the new NEL and Rules to the SCO by 24 December 2004. Final written comments on the new NEL must be provided to the SCO by 7 January 2005 and final written comments on the Rules must be provided to the SCO by 28 January 2005. Additionally, on 7 January 2005, all submitters will be given an opportunity to present their views at a consultation hearing, as advised in Bulletin 28. A similar consultation hearing for the Rules will be held on 1 February 2005.

When making written submissions, please include your name, address, organisation, and contact details, including your email address, if applicable. Wherever possible submissions should be provided electronically.

To ensure the SCO is able to consider all views within the work program timeframe, it is requested that written submissions be limited to five pages. Any supporting documents should be clearly labelled as attachments.

It is intended to make electronic submissions publicly available on the Ministerial Council on Energy website at the end of the process. If you do not want all or part of your submission made publicly available, or you consider any part of your submission to be confidential or commercial-in-confidence, you should make this clear in your submission.

Submissions should be addressed to:

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Please direct any enquiries regarding the consultation process for the new NEL and Rules to Alison Wiltshire, on (02) 6213 7484.

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## ENERGY MARKET REFORM

### NATIONAL ELECTRICITY LAW AND NATIONAL ELECTRICITY RULES

#### Overview and consultation

##### Overview

This paper describes the main features of the proposal to replace the current National Electricity Law<sup>1</sup> with a new National Electricity Law (**new NEL**) and convert the provisions of the National Electricity Code (**current Code**) into statutory Rules (**Rules**) made under the new NEL. An exposure draft of the new NEL has been released with this paper. An exposure draft of the Rules will be released by 10 December 2004. These drafts have been endorsed for public consultation by the Ministerial Council on Energy Standing Committee of Officials (**SCO**).

##### The reforms proposed in the new NEL and Rules

As set out in the Background section to this paper, these reforms stem from the report by the Ministerial Council on Energy (**MCE**) in December 2003 which was endorsed by the Council of Australian Governments in June 2004 in the Australian Energy Market Agreement (**AEMA**). The MCE report stated that reforms should be made to strengthen competition and encourage investment in Australia's energy market.<sup>2</sup> An objective of the AEMA was the promotion of the long term interests of consumers. These policies are reflected in the national electricity market objective specified in the new NEL (see section 2 of this paper).

A critical element of the reforms announced by the MCE is the improvement of the governance arrangements for the Australian energy market, through separating high level policy direction, Rule making and energy market development, and economic regulation and market Rule enforcement. Accordingly, this paper describes the reforms that are proposed to achieve these governance arrangements, and examines the new NEL by reference to the roles of the MCE (see section 3 of this paper), the Australian Energy Market Commission (**AEMC**) (see section 4), the Australian Energy Regulator (**AER**) (see section 5) and the National Electricity Market Management Company Limited (**NEMMCO**) (see section 6).

A further important element of the reforms is a streamlined Rule change process. This paper describes the Rule change process proposed under the new NEL and Rules (see section 7). A detailed table comparing the current Code with the Rules will be released at the same time as the exposure draft of the Rules.

The remaining sections of this paper examine the reforms proposed in the new NEL and Rules in relation to participation in the national electricity market (see section 8), rights of review (see section 9), enforcement (see section 10), information sharing and gathering (see section 11),

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<sup>1</sup> The National Electricity Law is a schedule to the *National Electricity (South Australia) Act 1996* (SA).

<sup>2</sup> These reports are available on the MCE website at [www.mce.gov.au/](http://www.mce.gov.au/)

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derogations (see section 12), immunities (see section 13) and savings and transitional provisions (see section 14).

### **Consultation which has led to these reforms**

The reforms proposed in the new NEL and Rules are the result of a lengthy consultation process. Since the MCE Report was issued in December 2003, consultation has been undertaken on:

- the regulatory arrangements that will provide for cooperation between the AER, AEMC and the Australian Competition and Consumer Commission (**ACCC**);<sup>3</sup>
- the reforms proposed in relation to the legislative and regulatory framework that applies to the Australian energy market;<sup>4</sup>
- the proposed streamlined Rule change process;<sup>5</sup> and
- the proposal to convert the provisions of the current Code into Rules made under the new NEL.<sup>6</sup>

Since August 2004, work has progressed on the drafting of the new NEL and the conversion of the current Code into the Rules.

### **Future consultation**

The consultation process on the exposure drafts of the new NEL and Rules will comprise a consultation session with all interested parties on 10 December 2004, as advised in Bulletin 28. The purpose of this session is to map the provisions of the draft Bill and to facilitate an understanding of the content of the draft Bill. There will be the opportunity to provide initial written comments on the new NEL and Rules to the SCO by 24 December 2004. Final written comments on the new NEL must be provided to the SCO by 7 January 2005 and final written comments on the Rules must be provided to the SCO by 28 January 2005. Additionally, on 7 January 2005, all submitters will be given an opportunity to present their views at a consultation hearing, as advised in Bulletin 28. A similar consultation hearing for the Rules will be held on 1 February 2005.

## **1 – Background**

### **1.1 The current system for electricity regulation**

The current co-operative legislative scheme for electricity market regulation came into operation in December 1998. The “lead” legislation is the *National Electricity (South Australia) Act 1996*. The current National Electricity Law (**current NEL**) is a schedule to that Act. The current Code is “in force” under the NEL.<sup>7</sup> The NEL is “picked up” and applied by Application Acts in each of the other

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<sup>3</sup> See SCO Discussion Paper, “AER – AEMC – ACCC Memorandum of Understanding (MoU) Framework”, March 2004 (available on MCE website).

<sup>4</sup> See SCO Information Paper, “Legislative and Regulatory Framework”, August 2004 (available on MCE website).

<sup>5</sup> See SCO Discussion Paper, “Streamlining of the Code Change Process”, March 2004 (available on MCE website).

<sup>6</sup> See SCO Consultation Paper, “Proposed National Electricity Rule Change Process”, August 2004 (available on MCE website).

<sup>7</sup> The current Code is available at <http://www.neca.com.au/TheCode/>

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participating jurisdictions, New South Wales, Victoria, Queensland, and the Australian Capital Territory.<sup>8</sup> The current NEL and Code establish a wholesale exchange for electricity for participants in the national electricity market and an open access regime for the transmission and distribution networks.

## 1.2 MCE reforms leading to the new NEL and Rules

On 11 December 2003, the MCE announced a program for major reforms to the Australian energy market to be implemented in the period 2004 to 2006.<sup>9</sup> This reform program, which was subsequently endorsed by the Council of Australian Governments in the AEMA, is intended to strengthen competition and encourage investment in the Australian energy market.<sup>10</sup>

One of the critical elements of this reform package is the reform of electricity and gas market regulatory structures and institutional mechanisms, particularly to improve the governance arrangements for the Australian energy market. The proposed new governance arrangements entail the separation of:

- high level policy direction – which is to be the responsibility of the MCE;
- Rule making and energy market development – which is to be the responsibility of the AEMC; and
- economic regulation and market Rule enforcement – which is to be the responsibility of the AER.

As a consequence of these reforms, both the National Electricity Code Administrator Limited (**NECA**) and the National Electricity Tribunal (**NET**) will be dissolved.<sup>11</sup>

The Australian Competition and Consumer Commission (**ACCC**) will retain responsibility for competition regulation under Part IV of the TPA, as well as for access under Part IIIA. An information paper including a discussion of authorisation and the new Rules has previously been released.<sup>12</sup> The MCE is still considering options for a national access regime for electricity and gas. NEMMCO will continue as market and system operator, responsible for the day-to-day operation of both power system security and the wholesale electricity spot market in the national electricity market. A memorandum of understanding between the AEMC, AER and ACCC (which is to be endorsed by the MCE) will address consultation and cooperation between these bodies.<sup>13</sup>

An additional feature of the reforms announced by the MCE on 11 December 2003 was that a more accountable, streamlined Rule making process should be developed which strikes an appropriate

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<sup>8</sup> See for example, the *National Electricity (New South Wales) Act 1997* (NSW).

<sup>9</sup> See Ministerial Council on Energy, "Report to the Council of Australian Governments – Reform of Energy Markets", 11 December 2003.

<sup>10</sup> Ministerial Council on Energy Communiqué, 11 December 2003.

<sup>11</sup> See AEMA, cll.11.1, 11.2, and 11.5.

<sup>12</sup> See SCO Information Paper, "Legislative and Regulatory Framework", August 2004.

<sup>13</sup> See SCO Discussion Paper, "AER – AEMC – ACCC Memorandum of Understanding (MoU) Framework", March 2004.

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balance between development and implementation of energy market rules, industry regulation and general competition regulation.

The new NEL, which is proposed to replace the current NEL, and the Rules, which are proposed to replace the current Code, have been drafted in the context of this policy decision to implement a new governance structure and streamlined Rule making process.

### **1.3 The scope of the new NEL and Rules**

It is important to note that the changes proposed in the new NEL and Rules are not aimed at changing the regulatory obligations that are currently placed on participants in the national electricity market. Rather, the changes provide for a more appropriate governance framework for the market and facilitate the conversion of the Code into statutory Rules. Accordingly, the substantive rights and obligations on participants in the market under the current NEL and current Code will remain the same in the new NEL and Rules.

Similarly, like the current NEL and Code, the rules contained in the new NEL and Rules do not deal with social equity or environmental policy issues. Such issues (for example, community service obligations or measures for the reduction of greenhouse emissions), are more appropriately addressed under other policy instruments. Such instruments may have an effect on commercial arrangements, but would be outside the new NEL and Rules that relate to the wholesale exchange for electricity and access to transmission and distribution networks.

The MCE reforms also include the development of an agreed national framework for energy distribution and retailing. Following MCE agreement on this framework, the AER is to assume responsibility for regulation of distribution and retailing (other than retail pricing) by 2006.<sup>14</sup> These particular reforms are being separately progressed. At present, the new NEL and Rules do not provide for the transfer of any of the current distribution and retail regulatory functions to the AER.

It is also to be noted that the proposed changes in the new NEL and the Rules relate only to the national electricity market as defined in the new NEL. SCO confirms that:

- the outcomes in the new NEL and Rules in relation to merits review will not preclude further consideration of merits review issues for both electricity and gas when the MCE makes its response to the Productivity Commission's *Review of the Gas Access Regime (gas access review)*;
- the MCE remains committed to a national approach to energy access, as indicated in its December 2003 report, and will consider access issues for both gas and electricity in its response to the gas access review; and
- the long term funding arrangements for the AEMC and AER are yet to be finalised and are outside the scope of the new NEL.

### **1.4 Amendments to *National Electricity (South Australia) Act 1996***

It is proposed that a Bill to amend the *National Electricity (South Australia) Act 1996 (SA Application Act)* will be introduced into the South Australian Parliament in early 2005. This Bill will

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<sup>14</sup> See AEMA, cl.8.1(c).

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substitute the new NEL for the current NEL. It will also make the following changes to the SA Application Act:

- the preamble will be deleted;
- the Regulations will be able to deal with the transition from the current NEL and Code to the new NEL and Rules. Any provision of such regulations may be expressed to take effect from a time that is earlier than when the regulation is made. However, where this occurs, that provision must also provide that it does not operate to prejudicially affect the rights of a person existing before the date of the making of the regulation or impose liabilities on any person in respect of anything done or omitted to be done before the making of the regulation;
- the NET will be abolished; and
- the *Subordinate Legislation Act 1987* (SA) will not apply to the Rules and Regulations.

Also, the new NEL will reflect the policy position that some NEL provisions may be supplemented by Regulations.<sup>15</sup>

## **2 – National electricity market objective**

An important feature of the new NEL is that it clearly sets out the nature of the national electricity market which is regulated under the new NEL and Rules and provides clear guidance as to the national electricity market objective.

### **2.1 Definition of the national electricity market**

Under the new NEL and the Rules, the “national electricity market” means:

- the wholesale exchange operated and administered by NEMMCO under the Law and the Rules;
- the generating systems and other facilities connected to the interconnected transmission and distribution system; and
- the interconnected transmission and distribution system in the participating jurisdictions, used to convey, and control the conveyance of, electricity that connects:
  - (i) generating systems and other facilities; and
  - (ii) loads settled through the wholesale exchange.<sup>16</sup>

### **2.2 National electricity market objective**

The national electricity market objective under the new NEL and Rules 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.<sup>17</sup>

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<sup>15</sup> For example, additional functions may be conferred on the AER or AEMC (new NEL, ss.14(g) and s.30(1)(c)) and the Regulations may prescribe additional classes of people against whom the AER may seek court orders (see definition of “relevant participant” in s.2 of the new NEL).

<sup>16</sup> See definitions of “national electricity market” and “national electricity system” in the new NEL, s.2.

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The significance of this statement of the national electricity market objective is that it will provide clear guidance in the following areas:

- the AEMC may only make Rules which will or are likely to contribute to the achievement of the national electricity market objective, and must make a Rule if it will or is likely to contribute to that achievement;<sup>18</sup>
- the AEMC must have regard to the national electricity market objective when performing its functions;<sup>19</sup> and
- the MCE statements of policy principles must be consistent with the national electricity market objective.<sup>20</sup>

The national electricity market objective under the new NEL replaces the list of “Market objectives” and “Code objectives” under the current Code.<sup>21</sup> This change reflects the policy position agreed to by Commonwealth, State and Territory governments that reform should be made to promote the “long term interests of consumers”.<sup>22</sup>

A single objective that comprehends a number of specific components or elements has the advantage of conveying the message that the long term interests of consumers will be served through a **composite** of efficient investment in, and efficient use of, infrastructure and capabilities having regard to price, quality, reliability, safety and security of electricity services. Such a composite definition encapsulates all of the components of the more detailed version currently in clause 1.3 of the current Code.

The alternative approach of listing a series of sub-objectives (such as those from clause 1.3 of the current Code) was considered but not adopted. The current Market Objectives are a product of committee considerations in the early 1990s at a time when the national electricity market and its various institutions did not exist. The national electricity market and its institutions have developed and evolved to a degree that detailed prescription of sub-objectives is not only unnecessary but also potentially counter-productive.

Accordingly, the generalised single national electricity market objective in the new NEL provides a more legally robust and economically testable statement of the national electricity market objective for the purpose of Rule making than the specific objectives listed in the original formulation of the current Code.

### **3 – Ministerial Council on Energy**

#### **3.1 Overview of functions**

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<sup>17</sup> New NEL, s.6.

<sup>18</sup> New NEL, ss.87(1) and (3).

<sup>19</sup> New NEL, s.33.

<sup>20</sup> New NEL, s.7(2).

<sup>21</sup> See current Code, cl.1.3, and 1.4.

<sup>22</sup> See AEMA, cl.2.1(a).

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The new NEL and Rules have been drafted to reflect the agreed position in the AEMA that the MCE will not be engaged directly in the day-to-day operation of the energy market or the conduct of regulators.<sup>23</sup> Instead, the function of the MCE will be to give high level policy direction in relation to the energy market.

The means by which the MCE will perform this role under the new NEL and Rules is through:

- directing the AEMC to carry out reviews and report to the MCE in relation to market development issues<sup>24</sup>. The results of such reviews may entail the AEMC making recommendations to the MCE on any relevant changes to the Rules that relate to the national electricity market;
- initiating proposals to change the Rules that relate to the national electricity market<sup>25</sup> (including in response to a review, or advice carried out or provided by the AEMC as a result of a request by the MCE). An MCE initiated Rule change proposal will be subject to the usual AEMC Rule change process; and
- publishing MCE statements of policy principles in relation to any matters that are relevant to the exercise by the AEMC of its functions under the NEL, the Regulations or the Rules.<sup>26</sup> MCE statements of policy principles must be consistent with the national electricity market objective.<sup>27</sup> The MCE will be required to give a copy of such statements to the AEMC and the AEMC must then publish the statement in the South Australian Government Gazette and on the AEMC's website.<sup>28</sup>

Decisions on policy and governance issues will be made by MCE Ministers in accordance with their jurisdictional interests, with proposals affecting national policy, legislation and governance arrangements requiring unanimous approval of the MCE.

## **4 – Australian Energy Market Commission**

The AEMC has been established as a statutory commission under the *Australian Energy Market Commission Establishment Act 2004* of South Australia<sup>29</sup>.

### **4.1 Overview of functions**

Under the new NEL and Rules, the AEMC will have Rule making, market development (in the form of a review role in relation to the Rules) and other functions under the Rules and the Regulations in

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<sup>23</sup> AEMA, cl.4.5.

<sup>24</sup> New NEL, ss.39-43.

<sup>25</sup> New NEL, s.90(1).

<sup>26</sup> New NEL, s.7(1).

<sup>27</sup> New NEL, s.7(2).

<sup>28</sup> New NEL, ss.7(3), and 7(4).

<sup>29</sup> See *Australian Energy Market Commission Establishment Act 2004* (SA), s.5.

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relation to the national electricity market.<sup>30</sup> The AEMC will take over some of the functions of NECA in this regard.

The principal initial functions of the AEMC under the new NEL and Rules will include:

- making and amending the Rules<sup>31</sup> (presently embodied in the current Code). The AEMC itself will not be empowered to initiate any change to the Rules (other than where the proposed change seeks to correct a minor error or is non-material).<sup>32</sup> However, it will be required to manage the Rule change process and to consult and decide on Rule changes that are proposed by the MCE, the Reliability Panel or any other person;
- conducting such reviews as are directed by the MCE<sup>33</sup>; and
- conducting reviews into the operation and effectiveness of the Rules or any matter relating to the Rules and recommending to the MCE such changes to the Rules as the AEMC considers appropriate<sup>34</sup> (it will then be for the MCE to decide whether to actually initiate a Rule change proposal through the Rule change process).

As previously pointed out, in performing its functions under the new NEL and Rules, the AEMC will be required to have regard to the national electricity market objective.<sup>35</sup> Further, the AEMC must have regard to any relevant MCE statements of policy principles in making a Rule change or conducting a review into the Rules.<sup>36</sup>

## 5 – Australian Energy Regulator

The AER will be established as a statutory body under the TPA.<sup>37</sup>

### 5.1 Overview of functions

Under the new NEL and Rules, the AER will have enforcement, market monitoring, and economic regulatory functions, and such other functions as are conferred on it under the new NEL, the Regulations and the Rules.<sup>38</sup>

The AER will monitor, investigate, and enforce compliance with the Law, and Rules. In this respect, it will take over some of these functions from NECA. The AER will be able to authorise officers to obtain search warrants,<sup>39</sup> and require a person to provide information if it has reason to believe that

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<sup>30</sup> New NEL, s.30(1).

<sup>31</sup> New NEL, s.35 and Part 7.

<sup>32</sup> New NEL, s.90(2).

<sup>33</sup> New NEL, ss.39-43.

<sup>34</sup> New NEL, s.44.

<sup>35</sup> New NEL, s.33 and *Australian Energy Market Commission Establishment Act 2004* (SA), s.8.

<sup>36</sup> New NEL, s.34.

<sup>37</sup> See s.44AE of the TPA (which has been enacted by the *Trade Practices Amendment (Australian Energy Market) Act 2004* (Cth), but has not yet commenced).

<sup>38</sup> New NEL, s.14

<sup>39</sup> New NEL, s.20.

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the person has information required for the performance or exercise of the AER's functions and powers.<sup>40</sup>

The AER will<sup>41</sup> also be responsible for the economic regulation of electricity transmission services and systems in the national electricity market jurisdictions (and, to this end, will take over the ACCC's functions in relation to the regulation of revenue and pricing for electricity transmission services). The AER's market-monitoring will include, for example, compliance with the Rules and verification and substantiation of rebids.

The AER will also take over NECA's function of granting to transmission and distribution system owners any exemptions from the obligation to register.<sup>42</sup>

## **5.2 AER economic regulatory functions**

The new NEL enhances the accountability of regulation by prescribing minimum requirements on the AER when performing its economic regulatory functions, such as making revenue and price determinations. The Rules will set out the AER's economic regulatory functions in more detail, consistently with the Law.

When exercising its economic regulatory functions, the AER must perform the function in a manner that promotes the long term interests of consumers of electricity and, if the function relates to the making of a transmission revenue or price determination, ensure that the regulated transmission system operator is informed of the issues being considered by the AER and has a reasonable opportunity to make submissions before the determination is made.<sup>43</sup> Further, the AER must, when making a transmission revenue or price determination:<sup>44</sup>

- provide an opportunity for the transmission system operator to recover the efficient costs in complying with its regulatory obligations;
- provide effective incentives to the operator to promote the efficient provision of services, including the making of efficient investments;
- make allowance for the value of the operator's existing and proposed new assets; and
- have regard to previous asset valuations.

The new NEL requires that the AEMC, by 1 July 2006, make Rules on a range of matters relating to transmission revenues and pricing that are set out in the new NEL.<sup>45</sup> Those Rules will relate to the AER's economic regulatory functions and will be subject to the general rule making process.

## **6 – National Electricity Market Management Company**

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<sup>40</sup> New NEL, s.29.

<sup>41</sup> AEMA, cl.9.1(a)-(d).

<sup>42</sup> New NEL, s.12.

<sup>43</sup> See new NEL, s.15(1)(b).

<sup>44</sup> See new NEL, s.15(2).

<sup>45</sup> New NEL, s.91.

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## 6.1 Overview of functions

Consistent with the strengthening of the governance arrangements for the national electricity market, key functions of NEMMCO will be elevated to the new NEL.<sup>46</sup> In all other ways, NEMMCO's functions remain the same as currently exists. NEMMCO will continue to operate, administer, develop, and improve the wholesale exchange for electricity.<sup>47</sup>

NEMMCO will also continue to register participants, and exempt generators and purchasers from registration.<sup>48</sup>

NEMMCO must also maintain and improve power system security,<sup>49</sup> and coordinate planning of augmentations to the national electricity system.<sup>50</sup>

It will also have any other functions conferred on it under the Law and Rules.<sup>51</sup>

## 6.2 Power system security functions

The Code currently contains part of NEMMCO's power system security functions as "protected provisions".<sup>52</sup> The Rules will not continue the concept of protected provisions, so some of the key elements of those provisions have been uplifted to the new NEL and integrated into the new Part 8.

The new NEL will provide that NEMMCO may direct the shedding or restoration of loads (including sensitive loads) in a participating jurisdiction, if it is necessary to do so to maintain power system security, or for reasons of public safety.<sup>53</sup> NEMMCO must develop load shedding procedures for this purpose.<sup>54</sup> The NEMMCO procedures must be consistent with any jurisdictional load shedding guidelines prepared by jurisdictional system security coordinators (called jurisdictional co-ordinators under the current Code).<sup>55</sup> Such guidelines must nominate sensitive loads that NEMMCO must not shed without the prior approval of the relevant jurisdictional system security coordinator,<sup>56</sup> in which case NEMMCO must use its reasonable endeavours to obtain that approval before shedding those loads.<sup>57</sup>

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<sup>46</sup> New NEL, Parts 5 and 8.

<sup>47</sup> New NEL, ss.49(1)(a) and (b).

<sup>48</sup> New NEL, ss.49(1)(c) and (d). See also, section 8 – Participation in the National Electricity Market, below.

<sup>49</sup> New NEL, s.49(1)(e). See also, new NEL, Part 8.

<sup>50</sup> New NEL, s.49(1)(f).

<sup>51</sup> New NEL, s.49(1)(g).

<sup>52</sup> Current Code, cl.4.3.2.

<sup>53</sup> New NEL, s.114.

<sup>54</sup> New NEL, s.111.

<sup>55</sup> New NEL, s.111(3). See also, new NEL, s.110.

<sup>56</sup> New NEL, s.110(2).

<sup>57</sup> New NEL, s.114(2).

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Also, if it is necessary to maintain power system security or for reasons of public safety, NEMMCO may direct a Registered participant to take certain actions.<sup>58</sup> The actions include: switching off a generator; calling equipment into service or taking it out of service; maintaining, increasing, or reducing power output; shutting down or varying operation; and shedding or restoring load.<sup>59</sup> This power is substantially the same as that contained in the current NEL.

## **7 – Rule making under the new NEL**

### **7.1 The National Electricity Code will become the National Electricity Rules**

The current NEL applies as a law of each of the participating jurisdictions. As contemplated by the current NEL<sup>60</sup>, the Ministers of the participating jurisdictions approved the initial version of the current Code, and that version has since been progressively amended in accordance with Chapter 8 of the current Code and the current NEL.

The new NEL (and the Regulations made under the SA Application Act) will continue to be applied as a law of each participating jurisdiction by an Application Act of that jurisdiction. The new NEL, the Regulations made under the SA Application Act and the Rules will now also be applied as a law of the Commonwealth in the offshore adjacent area of each State and Territory<sup>61</sup>.

However, unlike the Regulations (which are made under the SA Application Act), the Rules will be made initially and on an ongoing basis under the new National Electricity Law. The effect is that the Rules will operate in each of the participating jurisdictions (including the Commonwealth) by virtue of the Application Acts passed in those jurisdictions that apply the new NEL as law in each jurisdiction.<sup>62</sup> As Rules made under a law, these Rules will be binding on any persons to whom they are expressed to apply (including Registered participants and NEMMCO).<sup>63</sup>

### **7.2 Rules which the AEMC will be able to make**

As the Rules are now made under the new NEL, a head of power that is sufficiently broad is required to enable the making of the Rules, both initially and on an ongoing basis. The power of the AEMC to make Rules is expressed both generally and more specifically in a Schedule listing specific subject matters about which the AEMC may make Rules.

The general power will allow Rules to be made with respect to the regulation of the operation of the national electricity market; the operation of the national electricity system for the purposes of the safety and security and reliability of that system; and the regulation of people participating in the market or involved in operating the system.<sup>64</sup>

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<sup>58</sup> New NEL, s.115.

<sup>59</sup> New NEL, s.115(6), definition of "relevant action".

<sup>60</sup> Current NEL, s.6.

<sup>61</sup> *Australian Energy Market Act 2004* (Cth), s.6(a)(i); see also ss.7 and 8. For these purposes an "adjacent area" in respect of a State or Territory is the area that is identified as such in s.5A of the *Petroleum (Submerged Lands) Act 1967* (Cth).

<sup>62</sup> See for example, the *National Electricity (New South Wales) Act 1997* (NSW).

<sup>63</sup> New NEL, s.8.

<sup>64</sup> See new NEL, s.35(1).

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Examples of the specific subject matter on which the AEMC will be able make Rules include Rules with respect to:<sup>65</sup>

- registration and exemption of persons under the new NEL and Rules;
- fees in respect of services provided under the Rules;
- the setting of prices, including maximum and minimum prices, for electricity purchased through the wholesale exchange;
- the operation of transmission systems and distribution systems (including Rules regarding access to those systems), generating systems and other facilities;;
- transmission and distribution pricing and revenues;
- metering;
- disputes in relation to the Rules; and
- ancillary matters.

The AEMC must publish on its website, or specify where it is possible to obtain every document (however described) that is applied, adopted or incorporated by a Rule.<sup>66</sup>

### **7.3 Rule making test**

Under the new NEL and Rules, in making a decision on a Rule change proposal, the AEMC may only amend the Rules if it is satisfied that the amendment will, or is likely to, contribute to the achievement of the national electricity market objective.<sup>67</sup> The AEMC may give the various aspects of the national electricity market objective such weight as is appropriate in all the circumstances having regard to any relevant MCE statement of Policy Principles.<sup>68</sup> If the AEMC is satisfied that a Rule will, or is likely to, contribute to the achievement of the national electricity market objective, the AEMC must make the Rule.<sup>69</sup>

The Rule making test is not dissimilar to the Code change test applied by NECA under the current Code.<sup>70</sup>

### **7.4 The Rule change process**

#### ***7.4.1 Stage 1 – Initiation and Preliminary Assessment of a Proposal***

##### **Any person can initiate a Rule change proposal**

The 2003 MCE Report foreshadowed the need for more active participation of energy users and suppliers in the energy markets. In accordance with the MCE Report, the new NEL enables “any

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<sup>65</sup> New NEL, s.35(2) and Schedule 1.

<sup>66</sup> New NEL, s.36.

<sup>67</sup> New NEL, s.87(1).

<sup>68</sup> New NEL, s.87(2). See also AEMA, cl.4.4(a).

<sup>69</sup> New NEL, s.87(3).

<sup>70</sup> Current Code, cl.8.3.6(c).

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person” to initiate Rule changes.<sup>71</sup> It is recognised that this could impose significant costs on the market, with the potential for opening a floodgate of proposed changes in the future. However, the AEMC as a Rule change “gatekeeper” (see below) will be obliged to ensure that Rule change proposals are adequately developed before they go forward.

#### **AEMC initiation of Rule changes**

In most cases, the AEMC will not be able to initiate a Rule change proposal. This is in accordance with the policy position stated by the MCE in its December 2003 Report that the initiator of a Rule change should not also decide whether the Rule change should be made. However, the AEMC will be able to initiate a Rule change where the change is to correct a minor error or involves a non-material change to the Rules.<sup>72</sup>

#### **Reliability Panel can initiate specific Rule change proposals**

Under the current Code, the Reliability Panel is able to recommend a Code change. Consistent with this role:

- The Reliability Panel will retain functions to monitor, review and report on the reliability of the national electricity system.<sup>73</sup>
- Any reports of the Reliability Panel are to be to the AEMC (although the Rules may also require such reports to be made available to others).<sup>74</sup>

Under the new NEL, the Reliability Panel will only be able to directly sponsor a Rule change proposal that relates to its functions.<sup>75</sup> This “standing” to initiate Rule changes is supported by:

- the representative nature of the Panel will be strengthened to ensure there are representatives for retail, generation, TNSP, DNSP and end users on the Panel;
- decisions of the Reliability Panel must be by a majority of the members (governance arrangements will be clarified in the Rules); and
- The Value of Lost Load (**VoLL**) will be a specific Rule and so will only be able to be changed through the Rule change process under the new NEL.

Retaining the power for the Reliability Panel to initiate substantive Rule change proposals is consistent with the MCE policy decision that the AEMC will not be able to initiate Rule changes. The functions of the Reliability Panel are effectively a “standing review arrangement” and are considered as “technical” in nature since they relate directly or indirectly to the safety, security and reliability of the national electricity system. SCO is of the view that the functions are of sufficient importance (and technical in nature) to warrant the retention of the Reliability Panel regime that allows the Panel to initiate a rule change.

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<sup>71</sup> New NEL, s.90(1). The new NEL also allows the MCE and the Reliability Panel to initiate Rule Changes.

<sup>72</sup> New NEL, s.90(2).

<sup>73</sup> New NEL, s.37(2).

<sup>74</sup> New NEL, s.37(3).

<sup>75</sup> New NEL, s.90(4).

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#### **MCE initiation of Rule Change Proposals**

As stated above, under the new NEL, the MCE will have the power to initiate a Rule change proposal including where the Proposal results from a recommendation made by the AEMC as part of a review undertaken by the AEMC.<sup>76</sup>

#### **A Rule Change application must contain the information prescribed by the Regulations**

The Regulations will specify the information to be included in an application for a Rule change proposal.<sup>77</sup>

It is proposed that an application would need to include matters such as:

- a statement of the problem with the existing Rules and how the Rule change proposal will address the problem;
- a proposed Rule change solution (it will be optional to include the proposed Rule wording); and
- prima facie demonstration as to how the Rule change proposal will or is likely to contribute to the achievement of the national electricity market objective (ie how will it satisfy the Rule making test (see above)).

#### **AEMC's "gatekeeper" role - grounds for AEMC to Reject an Application for a Rule Change Proposal**

Under the new NEL, the AEMC will be able to reject an application for a Rule change proposal:

- where the application does not contain the information prescribed by the Regulations;<sup>78</sup>
- where the application is misconceived or lacking in substance;<sup>79</sup>
- where the AEMC would, if it were to make the Rule, be acting beyond its powers under the NEL.<sup>80</sup>

The AEMC will be required to give written reasons to a party if it rejects an application for a Rule change proposal.<sup>81</sup> A further feature of the AEMC's gatekeeper role is that while a person lodging a Rule change proposal may include a suggested Rule wording,<sup>82</sup> the AEMC, which is the body responsible for the integrity of the Rules as law in the participating jurisdictions, will determine the draft Rule wording for consideration in the Rule change process.

#### **7.4.2 Stage 2 – Publication of Rule Change Proposal and Call for Submissions**

If the AEMC has accepted a Rule change proposal (in Stage 1), the AEMC will be required under the new NEL to undertake public consultation on the Proposal.

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<sup>76</sup> New NEL, s.90(1).

<sup>77</sup> New NEL, s.92(1)(a).

<sup>78</sup> New NEL, s.94(1)(a)(i).

<sup>79</sup> New NEL, s.94(1)(a)(ii).

<sup>80</sup> New NEL, s.94(1)(b).

<sup>81</sup> New NEL, ss.94(2), and 94(3).

<sup>82</sup> See new NEL, s.92(1)(b).

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#### **Content of a Public Notice in Relation to a Rule Change Proposal**

The public notice (which will be via newspaper advertisement, South Australian Government *Gazette* and the AEMC website) in relation to a Rule change proposal will describe the Rule change proposal, invite submissions and provide AEMC contact details. The content of that public notice in relation to a Rule change proposal will be set out in the Regulations.<sup>83</sup>

It is proposed that the AEMC should post on its website the following information:

- (a) notice of the Rule change proposal;
- (b) the draft wording of the proposed Rule change;
- (c) the proposed consultation procedure and indicative timeframe;
- (d) the AEMC's Rule making test for assessing a Rule change proposal; and
- (e) whether the AEMC has determined to expedite a Rule change proposal (see below).

#### **Initial Involvement of the AER and ACCC in the Rule Change Process**

A Memorandum of Understanding between the AEMC, the AER and the ACCC will define the protocols for consultation between the AEMC and these bodies in relation to competition and access issues (in the case of the ACCC), and regulation and enforcement issues (in the case of the AER) with the aim being to facilitate early involvement and consultation thereby streamlining the Rule change process (see paras below). The ACCC and the AER will therefore be on early notice to determine the scope of their input, if any, into the broader Rule change consultation process.

#### **Process to make non-controversial and urgent Rules**

The AEMC will be able to expedite a Rule change proposal where the AEMC considers that the change to the Rules:

- is non-controversial – that is, the Rule is unlikely to have a significant effect on the administration or operation of the national electricity market;<sup>84</sup> or
- is urgent – that is, the Rule relates to any matter or thing that if the Rule is not made urgently would prejudice or threaten the effective operation or administration of the national electricity market.<sup>85</sup>

The capacity to expedite a Rule change process is a key component in achieving a more streamlined rule making regime. However, where the AEMC has determined to make a non-controversial or urgent Rule, a public notice process still applies to the Rule, albeit in a shortened form, in that the notice will still be published inviting submissions.<sup>86</sup>

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<sup>83</sup> New NEL, s.95.

<sup>84</sup> New NEL, ss.86, 96(1)(a), and 96(1)(b).

<sup>85</sup> New NEL, ss.86, and 96(1)(c).

<sup>86</sup> New NEL, s.96.

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Even where the AEMC regards a proposed Rule as non-controversial or urgent, it may still be required to undertake public consultation in accordance with the usual Rule change process if a legitimate objection to the Rule change proposal being expedited is made.<sup>87</sup>

**Working groups and public hearings**

The AEMC will have the ability to convene working groups to consider a Rule change proposal,<sup>88</sup> and have the discretion to decide whether to hold a public hearing in relation to a rule change proposal.<sup>89</sup>

**7.4.3 Stage 3 – Draft determination**

**Draft determination**

The AEMC will be required to publish a draft determination on a Rule change proposal.<sup>90</sup>

It is proposed that the draft determination by the AEMC must contain broadly:<sup>91</sup>

- the reasons of the AEMC as to whether or not it should make the proposed Rule;
- if the AEMC determines to make a Rule, a draft of the Rule to be made; and
- any other matters prescribed by the Regulations.

The AEMC must give public notice of a draft Rule determination and invite submissions on the draft.<sup>92</sup>

**Pre-determination Hearing**

Once a draft Rule determination has been made, the AEMC will have discretion as to whether to hold a pre-determination hearing.<sup>93</sup> Any “interested person” may request a pre-determination hearing.<sup>94</sup> A pre-determination hearing provides a final opportunity for the AEMC to explain the draft Rule determination and provides persons with an opportunity to ask questions before making submissions.

**7.4.4 Stage 4 – Final determination**

The AEMC will be required to publish a final determination on a Rule change proposal.<sup>95</sup>

A final determination by the AEMC will contain:<sup>96</sup>

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<sup>87</sup> New NEL, s.96(3).

<sup>88</sup> New NEL, ss.38, and 44(3).

<sup>89</sup> New NEL, s.98.

<sup>90</sup> New NEL, s.99(1).

<sup>91</sup> New NEL, s.99(2).

<sup>92</sup> New NEL, s.99(4).

<sup>93</sup> New NEL, s.101(2).

<sup>94</sup> New NEL, s.101(1).

<sup>95</sup> New NEL, s.102(1).

<sup>96</sup> New NEL, s.102(2).

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- the reasons of the AEMC as to whether or not it should make a Rule; and
  - any other matters prescribed by the Regulations.

The AEMC will be required to publish a notice of a change to the Rules in the South Australian Gazette.<sup>97</sup> The AEMC will also publish on its website any new Rule and make copies available at its office.<sup>98</sup>

### **7.5 The initial Rules**

The initial Rules will largely consist of the provisions of the current Code, with significant changes only being made to implement the reforms described in this paper.<sup>99</sup> The principal changes proposed in the Rules are:

- the abolition of NECA and the reallocation of NECA's functions between the AEMC and the AER;
- the abolition of the NET and the associated removal of "reviewable decisions";
- the replacement of the Code change procedure in the current Code with a new Rule change procedure which is to be contained in the new NEL;
- the conversion of the current Code (a quasi-consensual document) into Rules that mandate compliance because they have the force of law;<sup>100</sup>
- the removal of some provisions which are in the current Code, because of changes to the NEL (eg. the "protected provisions" which define the market objectives, and describe NEMMCO's functions, will now be included in the new NEL);
- changes relating to the transition of the current Code to Rules that are made under the new NEL; and
- other, more minor changes, including changes of a drafting nature (eg to correct cross-referencing errors or to clarify the operation of certain provisions).

SCO will provide a fully marked-up version of the new Rules as well as a detailed table setting out the main transitional changes that are being made to the current Code to give effect to the new governance model.

The initial Rules will be made by a Ministerial notice but these Rules will become subject to change in accordance with the new Rule change process, including through the application of the Rule making test and the public consultation arrangements. This initial Rule making power can only be exercised once.<sup>101</sup>

### **7.6 Authorisation and the *Trade Practices Act 1974 (Cth)***

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<sup>97</sup> New NEL, s.103(1).

<sup>98</sup> New NEL, s.105.

<sup>99</sup> The initial Rules will be made under the new NEL, s.89.

<sup>100</sup> See section 7.6 of this paper.

<sup>101</sup> New NEL, s.89(4).

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The current Code has been authorised by the ACCC under Part VII of the TPA and contemplates that any proposed Code changes that may materially affect the authorisation granted by the ACCC, or otherwise require authorisation by the ACCC, must be submitted to the ACCC.<sup>102</sup> As discussed in previous consultation papers,<sup>103</sup> the new NEL and Rules will mandate compliance by market participants because the Rules have the force of law. Accordingly, the transition of provisions of the current Code to the Rules will obviate the need for those Rules to be authorised by the ACCC under Part VII of the TPA. The provisions in the current Code requiring authorisation by the ACCC have therefore been removed.

## **8 – Participation in the national electricity market**

The main provisions relating to registration for participants in the national electricity market will continue to be located in the new NEL.<sup>104</sup> The Rules will set out the details for registration, and may also deal with registration of additional classes of people.<sup>105</sup> These provisions will be substantially the same as those which apply under the current NEL.<sup>106</sup>

Owners, controllers or operators of generating systems, transmission systems, and distribution systems, must generally register with NEMMCO.<sup>107</sup> Also, purchasers of electricity directly through a wholesale exchange must generally register with NEMMCO.<sup>108</sup> Only NEMMCO may administer a wholesale exchange for electricity.<sup>109</sup>

Exemptions from the requirements to register may be granted by NEMMCO for generators and purchasers of electricity directly through a wholesale exchange.<sup>110</sup> The AER will grant exemptions for transmission and distribution systems.<sup>111</sup> The exemption powers have been uplifted from the current Code to the new NEL.

## **9 – Rights of review**

Under the new NEL, provision is made for judicial review (but not merits review) of decisions of the AEMC and NEMMCO under the new NEL, the Regulations or the Rules. Any “person aggrieved” by a particular decision of those bodies may be able to apply to a court for judicial review of the decision.<sup>112</sup>

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<sup>102</sup> Current Code, cl. 8.3.7 and 8.3.9.

<sup>103</sup> See SCO Information Paper, “Legislative and Regulatory Framework”, August 2004. See also Noel Hutley SC and Sarah Pritchard, Memorandum of Advice dated 5 August 2004 (available on the MCE website).

<sup>104</sup> New NEL, Part 2.

<sup>105</sup> New NEL, s.2, definition of ‘Registered participant’.

<sup>106</sup> Current NEL, s.9.

<sup>107</sup> New NEL, ss.10(1) and (2), and 11(1).

<sup>108</sup> New NEL, s.10(4) and s.11(1).

<sup>109</sup> New NEL, s.10(3).

<sup>110</sup> New NEL, s.11(2).

<sup>111</sup> New NEL, s.12.

<sup>112</sup> New NEL, s.68.

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As stated above, SCO confirms that the outcomes in the new NEL and Rules in relation to merits review will not preclude further consideration of merits review issues for both electricity and gas when the MCE makes its response to the Productivity Commission's *Review of the Gas Access Regime*.

### **9.1 Review of AER decisions**

In the case of the AER, the availability of judicial review but not merits review is consistent with the position under the current Code where merits review of the ACCC's electricity transmission revenue determinations is not available. Such decisions will remain subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the Constitution, and the *Judiciary Act 1903* (Cth). The only appeal rights which have been removed under the new NEL are a result of the abolition of the NET<sup>113</sup> and the merits review functions it exercised.

### **9.2 Review of AEMC decisions**

In the case of the AEMC, the availability of judicial review but not merits review is consistent with the performance of AEMC's statutory function as a Rule-maker, akin to the maker of general delegated legislation. Moreover, the fact that the AEMC, in its Rule making and market development activities, is subject to substantial consultation obligations and accountability requirements means that the merits of its decisions will be subject to public and transparent debate.

### **9.3 Review of NEMMCO decisions**

Consistently with the streamlining which is proposed in relation to the process for changing the Rules, the classification of certain decisions as "reviewable decisions" in the current Code will also be removed. However, judicial review will be available for decisions of NEMMCO.<sup>114</sup>

## **10 – Enforcement**

### **10.1 AER and court orders**

The abolition of the NET under the new NEL means changes to the legislative and regulatory regime that applies in relation to the enforcement of the new NEL. However, generally only persons who are currently bound by the current Code will be subject to enforcement action for breach of the Rules.<sup>115</sup>

Under the new regime, the AER will be empowered to enforce the new NEL, Regulations and the Rules through applying to a Court<sup>116</sup> for an order declaring that a Registered Participant, NEMMCO or a person prescribed by the Regulations, is in breach of the NEL, the Regulations, or the Rules.<sup>117</sup> If the Court makes such a declaration the Court may also order the person to pay a civil

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<sup>113</sup> The proposal to abolish the NET was announced by the MCE in August 2003.

<sup>114</sup> New NEL, s.68.

<sup>115</sup> See definition of "relevant participant" in new NEL, s.2.

<sup>116</sup> Either the Federal Court or a Supreme Court of a participating jurisdiction (see s.44AAG of the TPA (enacted but not yet commenced); new NEL, s.60).

<sup>117</sup> New NEL, s.60(1), the definition of "relevant participant" in s.2, and s.14(c).

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penalty (for civil penalty provisions)<sup>118</sup>, to desist from the breach, to remedy the breach or to implement a compliance program.<sup>119</sup> The AER may also apply to the Court for an injunction where a person has engaged in, is engaging in or is proposing to engage in conduct in breach of the new NEL, the Regulations, or the Rules.<sup>120</sup>

Also, if the Court declares a person to be in breach of the new NEL, Regulations or Rules, the Court may direct the disconnection of a Registered participant's distribution, transmission or generating system, or other facilities or loads, or direct that a Registered participant be suspended from purchasing or supplying electricity through the wholesale exchange.<sup>121</sup>

Generally the AER will be able to seek these remedies in the State or Territory Supreme Court of the relevant jurisdiction,<sup>122</sup> or the Federal Court.<sup>123</sup>

## **10.2 Infringement notices**

Also, the AER will be able to issue an infringement notice for breach of any civil penalty provision (other than a rebidding civil penalty provision)<sup>124</sup> by a Registered participant, NEMMCO, or a person prescribed by the regulations. A person who receives a notice may either pay the infringement penalty, or defend, in court, any formal proceedings in respect of the breach. The amount of an infringement penalty will be \$20,000, or a lower amount prescribed for the particular civil penalty provision.<sup>125</sup>

## **10.3 AER to enforce the Law**

Only the AER will enforce the Law, Regulations and Rules. A person other than the AER (including a Registered participant) will not be able to bring proceedings against another person for a breach of the Law, Regulations or Rules.<sup>126</sup>

If a registered participant has a dispute with another Registered participant, that dispute can be addressed via the dispute resolution process under the Rules. There will be an appeal to a Court on a question of law against a decision of a dispute resolution panel.<sup>127</sup>

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<sup>118</sup> The civil penalty provisions will be the NEL provisions requiring registration (s.10), and Rules provisions that are prescribed in the Regulations as civil penalty provisions (see new NEL, s.57). It is envisaged that the initial Rules provisions to be prescribed as civil penalty provisions will be those Code provisions that are currently prescribed as class A, B, C or D civil penalty provisions.

<sup>119</sup> New NEL, s.60(2), and s.44AAG(2) of the TPA (enacted but not yet commenced).

<sup>120</sup> New NEL, s.60(3), and s.44AAG(3) of the TPA (enacted but not yet commenced).

<sup>121</sup> New NEL, s.61.

<sup>122</sup> New NEL, s.60, and the definition of "Court" in s.2. Section 60 relates to the State or Territory Supreme Courts of a participating jurisdiction and the Federal Court in the offshore area.

<sup>123</sup> See s.44AAG of the TPA (enacted but not yet commenced). Section 44AAG relates to the Federal Court generally, including within the participating jurisdictions.

<sup>124</sup> New NEL, Division 5 of Part 6, especially s.73.

<sup>125</sup> New NEL, s.75.

<sup>126</sup> New NEL, s.58.

<sup>127</sup> New NEL, s.70.

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Also, payments between Registered participants (or NEMMCO and Registered participants) under the Rules may be enforced in a court.<sup>128</sup>

#### **10.4 Criminal offences**

Criminal offences in the current NEL and Code will generally be carried over into the new NEL and Rules. For example, it will remain an offence for a person to obstruct a person exercising certain powers relating to the safety and security of the national electricity system as directed by NEMMCO or a person authorised by NEMMCO.<sup>129</sup> Similarly, it will remain an offence to, without reasonable excuse, obstruct or hinder a person in the exercise of a power under a search warrant.<sup>130</sup> In addition, a new offence of failure to comply with a notice to provide information or documents to the AER will be inserted into the new NEL.<sup>131</sup>

The prosecution of these offences will be within the general prosecution regimes of the Commonwealth, States and Territories.<sup>132</sup>

### **11 – Sharing and gathering information**

#### **11.1 Sharing of information**

Each of the AEMC, AER and ACCC is (or will be) empowered to share information that it obtains with each of the other bodies where that information is relevant to the functions of those other bodies.<sup>133</sup>

Any information provided on a confidential basis to one regulatory body (including information provided on a “commercial-in-confidence” basis) may only be provided to the other regulatory body if the receiving body similarly protects that information from unauthorised use or disclosure.

#### **11.2 Information gathering powers of AEMC and AER**

The AEMC may request Registered participants to provide it with such information as it needs for the purpose of its Rule making function or for the purpose of monitoring and reporting on the effectiveness or operation of any Rule. However, the AEMC will not have the power to compulsorily acquire information, even for reviews. In carrying out its reviews, the AEMC is expected to rely on voluntary participation by interested parties, information sharing and established industry relationships. This is consistent with its role as a Rule making and market development body.

The AER will have power under the new NEL:

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<sup>128</sup> New NEL, s.71.

<sup>129</sup> New NEL, s.117. For the equivalent provision of the current NEL, see s.77(b).

<sup>130</sup> New NEL, s.28. For the equivalent provision of the current NEL, see s.77(a).

<sup>131</sup> New NEL, s.29(3) and section 11 below.

<sup>132</sup> Typically this will involve the Director of Public Prosecutions of the relevant jurisdiction.

<sup>133</sup> See *Australian Energy Market Commission Establishment Act 2004* (SA), s.24 and ss.44AAF, and 157A of the TPA (enacted but not yet commenced).

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- to apply for, and execute, a search warrant where there are reasonable grounds for believing that there is, has been or will be a breach or possible breach of the new NEL or the Rules;<sup>134</sup> and
  - to require the provision to it of information or documents where such information or documents are relevant to the performance of the AER's functions.<sup>135</sup> Persons are not required to provide information where they have a "reasonable excuse" for not doing so (for example, the person is not capable of complying with a relevant request)<sup>136</sup> or if the information is subject to legal professional privilege.<sup>137</sup>

## 12 – Derogations

### 12.1 Jurisdictional derogations

Jurisdictional derogations under Chapter 9 of the current Code exempt participants in a participating jurisdiction of the national electricity market from having to comply with specified provisions in the current Code. Jurisdictional derogations allow a participating jurisdiction to substitute different jurisdictionally based provisions for those stipulated in the current Code.

The original purpose of jurisdictional derogations was two-fold:

- (a) they allowed a participating jurisdiction to have an orderly transition from the application of State or Territory based arrangements to the current Code provisions; and
- (b) they allowed pre-existing arrangements of a participating jurisdiction to be maintained if these arrangements were deemed necessary or beneficial.

A change to a jurisdictional derogation under Chapter 9 required the authorisation of the ACCC.

Under the new NEL, the Minister of a participating jurisdiction that seeks to change its jurisdictional derogations must give notice and consult with the corresponding Minister of each other participating jurisdiction in the national electricity market about the proposed change.<sup>138</sup> However, the formal consent of the other participating jurisdictions is not required.

In addition, under the new NEL:

- Existing jurisdictional derogations, and the ability to modify them or extend their expiration date, will be retained.<sup>139</sup>
- The ability of the participating jurisdictions to initiate new jurisdictional derogations from the Rules will also be retained.<sup>140</sup>

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<sup>134</sup> New NEL, ss.19-28.

<sup>135</sup> New NEL, s.29.

<sup>136</sup> New NEL, ss.29(3), and 29(4).

<sup>137</sup> New NEL, s.29(6).

<sup>138</sup> New NEL, s.90(3).

<sup>139</sup> New NEL, s.88.

<sup>140</sup> New NEL, s.90(3) and the definition of 'jurisdictional derogation' in s.2.

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- The AEMC will apply the usual Rule change process in determining whether jurisdictional Rule derogations should be allowed, extended or rejected.
  - When considering a jurisdictional Rule derogation, the AEMC (in conjunction with the usual Rule change process), must consider the need for an orderly transition from the application of existing State or Territory based arrangements to the Rules.<sup>141</sup>
  - Jurisdictional Rule derogations may be applied either for a fixed or indeterminate period, depending on their nature.<sup>142</sup>

## 12.2 Participant Derogations

Applications for participant derogations (as per Chapter 8 of the current Code) will be processed in accordance with the usual Rule change process. Applications for participant derogations can be made by Registered participants, NEMMCO, or any other person on whom the Rules confer a right or impose an obligation.<sup>143</sup> Participant derogations may only be given for a fixed period.<sup>144</sup>

## 13 – Immunities

The new NEL and Rules provides for three types of immunities:

- Unless an agreement provides otherwise, NEMMCO and network service providers do not incur any “civil monetary liability” (which means liability for damages ordered in a civil proceedings but does not include liability to pay a civil penalty under the new NEL or an infringement notice) for the performance of their functions under the new NEL or Rules, unless an act or omission is done in bad faith or through negligence.<sup>145</sup> The maximum civil monetary liability that can be recovered for acts of negligence by NEMMCO and network service providers will be limited to an amount prescribed in the Regulations.<sup>146</sup>
- Unless an agreement provides otherwise, a Registered participant or NEMMCO does not incur any civil monetary liability for a failure to supply electricity unless the failure is due to an act or omission made by the Registered participant or NEMMCO in bad faith or through negligence.<sup>147</sup>
- No personal liability attaches to an AEMC official for an act or omission in good faith in the performance of a function under the new NEL or Rules. Liability in such circumstances lies against the AEMC.<sup>148</sup>

The Rules will also be able to confer immunities on people or bodies acting under the Rules.<sup>149</sup>

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<sup>141</sup> New NEL, s.88.

<sup>142</sup> New NEL, ss.92(3), and 103(4).

<sup>143</sup> New NEL, ss.90(5), and 90(6).

<sup>144</sup> New NEL, ss 92(2), and 103(4).

<sup>145</sup> New NEL, ss.118(1) and 118(2).

<sup>146</sup> New NEL, ss.118(3) and 118(4).

<sup>147</sup> New NEL, s.119.

<sup>148</sup> New NEL, s.120.

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The immunities described above are substantively the same as the immunities which apply for market participants under the current NEL and Code.

## 14 – Savings and transitionals

To ensure a smooth, efficient and equitable transition to the new NEL and Rules, savings and transitional provisions will be included in the new NEL and Regulations. Savings and transitional provisions have not been included in the exposure draft of the new NEL, however, the following is a list of some of the key matters which will be addressed in the final version of the new NEL and Regulations:

- ***Current Code change and derogation proposals will continue under the Rules:*** Provision will be made to allow current Code change and derogation proposals to be taken to be Rule change proposals and applications for derogations under the new NEL and the Rules. In relation to such proposals, the AEMC may decide to dispense with a relevant Rule making step if it is of the opinion that the relevant Rule making step duplicates or is consistent with a relevant Code change step that has already been taken under the current Code.
- ***Current jurisdictional derogation proposals continue under the Rules:*** Jurisdictional derogation change proposals which have been commenced under the current Code will be taken to be a request for the making of a jurisdictional derogation under the new NEL and Rules. In relation to such proposals, the AEMC may dispense with a relevant Rule making step if it is of the opinion that the relevant Rule making step duplicates or is consistent with a relevant jurisdictional derogation change step that has already been undertaken under the current Code.
- ***Code Participants deemed to be Registered participants:*** Code Participants registered under the current Code will be deemed to be Registered participants under the new NEL and the Rules in the same category of registration as the Code participant was registered under the current Code. Similarly, existing exemptions from registration will be continued.
- ***References in documents to current Code:*** Unless the context provides otherwise, every reference in a document (however described):
  - to the current Code will be deemed to be a reference to the Rules;
  - to a Code Participant under the current Code will be deemed to be a reference to a Registered participant under the Rules; and
  - to a Code Participant that is NEMMCO will be deemed to be a reference to NEMMCO.
- ***Continuation of investigations by NECA:*** Any investigations into a possible breach of the current Code which have been commenced by NECA but not completed, will be able to

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<sup>149</sup> New NEL, s.35(3)(n).

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be conducted and completed by the AER in accordance with the new NEL, the Regulations and the Rules as if that investigation had been commenced by the AER.

- **Continuation of Code funds:** The Code funds established by NEMMCO under the current NEL will be deemed to be Rule funds established under the new NEL.
- **Continuation of Civil penalties fund:** All money in the “civil penalties fund” under the current NEL will be vested in the AEMC.
- **Jurisdictional derogations relating to Tasmania’s entry into the national electricity market:** Despite anything to the contrary in the new NEL, the Regulations, the Rules or the *Australian Energy Market Commission Establishment Act 2004 (SA)*, Tasmania may direct the AEMC to make a jurisdictional derogation that is substantially the same as the changes to the current Code authorised by the ACCC under Part VII of the TPA in the ACCC’s determination entitled “Tasmanian Derogations and Vesting Contract – Tasmania’s NEM entry”, dated 14 November 2001. On being given such a direction, the AEMC will have to make that jurisdictional derogation.
- **Continuation of panels and committees:** The following panels and committees (and the persons comprising those panels and committees) under the current Code will be deemed to the panels and committees (and the persons comprising those panels and committees) bearing the same name under the Rules:
  - Reliability Panel;
  - Advocacy Panel;
  - Inter-regional Planning Committee; and
  - settlement residue committee.
- **Continuation of dispute resolution adviser:** The person or persons appointed to perform the functions of the dispute resolution adviser (**DRA**) under the current Code will be deemed to be appointed to perform the functions of the DRA under the Rules. The pool of persons established and maintained by the DRA under the current Code will be deemed to be the persons established and maintained by the DRA under the Rules.
- **Decisions or determinations under the current Code:** Any decision or determination under the current Code by the ACCC, NECA, NEMMCO or a jurisdictional regulator will be deemed to be a decision or determination in the same terms under the corresponding provision of the Rules.
- **Revenue cap determinations of the ACCC:** Any revenue cap determination by the ACCC under Chapter 6 of the current Code will continue in effect and be deemed to be a determination of the AER under the Rules. Similarly, a determination of the ACCC under clause 9.8.4C of the current Code will be deemed to be a determination made by the AER under the corresponding provision of the Rules.

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- ***Pending revenue cap determinations of the ACCC:*** Any action taken by the ACCC on a revenue cap determination under Chapter 6 of the current Code will be deemed to have been taken by the AER for the purpose of making a determination under the Rules.
  - ***Revenue cap determinations of jurisdictional regulators:*** Any revenue cap determination by a jurisdictional regulator under Chapter 6 of the Code will continue in effect and be deemed to be a determination under the Rules.
  - ***Pending revenue cap determinations of jurisdictional regulators:*** Any action taken by a jurisdictional regulator on a revenue cap determination under Chapter 6 of the current Code will be deemed to have been taken by that regulator for the purpose of making a determination under the Rules.
  - ***Accreditation and registration of metering providers:*** A person who was accredited and registered as a metering provider under the current Code will be deemed to be accredited and registered under the Rules.
  - ***Continuations of disputes under the dispute resolution regime:*** Every dispute commenced in accordance with the dispute resolution regime set out in the current Code but not completed may be conducted and completed under the Rules as if it were a dispute commenced in accordance with the dispute resolution regime under the Rules.
  - ***Documents issued or published under the current Code:*** Any document issued or published under a provision of the current Code will be deemed to be a document issued or published under the corresponding provision of the Rules.
  - ***Repeal of the initial NEL is not a change of law:*** The repeal of the initial NEL is not to be regarded as a change of law (however defined) under any agreement or deed.
  - ***Incomplete reviews under the current Code:*** Any relevant review commenced under a provision of the current Code but not completed may be completed under the corresponding provision of the Rules (if any).
  - ***Chapter 2 undertakings:*** Existing undertakings given by Code participants to all other Code participants in accordance with Chapter 2 of the current Code to comply with and perform any duties and obligations imposed by the Code will be revoked by operation of law. These Chapter 2 undertakings are no longer necessary because the Rules will mandate compliance because they will have the force of law.
  - ***General provisions:*** There will be general provisions saving rights and liabilities accrued under the old NEL and Code, and generally ensuring that things done under or for the old NEL and Code are taken to continue for the new NEL and Rules.