



National Stakeholder Steering Committee

12 February 2009

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NSSC Submission on Proposed Amendment to the National Electricity Law in Relation to the Mandated Roll-out of Smart Meters

1. The National Stakeholder Steering Committee (NSSC) welcomes the opportunity to comment on the Ministerial Council on Energy (MCE) Standing Committee of Officials (SCO) Exposure Draft of legislative amendments to the National Electricity Law (NEL) and accompanying Explanatory Note released for public comment on 23 December 2008.
2. The NSSC has been established by the MCE to recommend a national framework for the roll-out of smart metering infrastructure (SMI) including technical and operational requirements and changes to regulatory rules and procedures in the National Electricity Market, Western Australia and the Northern Territory.
3. As a newly established expert industry/consumer body, the NSSC is well positioned to provide expert advice that reflects a common view of distributors, retailers and consumers in relation to the SMI roll-out and related trials¹.
4. In responding to the proposed legislative amendments and review of the economic regulatory aspects of the National Electricity Rules (NER), the NSSC has been assisted by the forum conducted on 5 February 2009. Through the issued papers and that forum, the NSSC and its members understand the policy and implementation objectives of the MCE and join with it in seeking an efficient, workable and nationally consistent legislative framework for the SMI roll-out. The NSSC makes this submission to apply its expertise and promote that outcome.

¹ In this submission we use "trials" to refer to pilots, trials and assessments.



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5. The NSSC has identified aspects of the proposal which present risks to achieving a workable framework and which may hinder achievement of the MCE's policy objectives. A major concern is the risk to national consistency, manifested in the scope for Ministers to apply different smart metering services and related standards and potential disharmony with the national consumer principles developed through the National Energy Customer Framework process. Effective cost recovery frameworks for distributors and retailers are important and an overarching concern of consumers is that there be adequate and transparent public information and independent decision making in those cost recovery frameworks.
6. In particular, the NSSC has four main concerns with the Exposure Draft:
 - lack of transparency in the making of Ministerial metering determinations for both trials and roll-out;
 - the nature and breadth of the powers that may be conferred on the Australian Energy Regulator (AER) in relation to trials;
 - the proposed cost recovery mechanisms, including cost recovery for retailers; and
 - the ability of Ministers to determine which of a national set of smart metering services will apply in their jurisdiction as part of a roll-out and to apply standards different to those that apply nationally.
7. These concerns and other issues identified by the NSSC are discussed in the first part of this submission and solutions proposed. Suggested solutions to these matters include:
 - enhancements to the trials framework which preserve the fundamental framework of the Exposure Draft but allocate functions to the party properly responsible for those functions (the Minister for accessing the information required for policy decisions; industry and consumers for commercial, risk and consumer impacts; and the AER for economic regulation of distributors). The trials framework needs also to provide a mechanism to facilitate retailer cost recovery; and
 - deferral of the roll-out framework to allow a full consideration of the identified issues which include transparency, retailer cost recovery, national consistency, cross border application and contractual matters. The NSSC understands legislative support for trials is pressing, however those conditions do not apply to the roll-out.
8. The second part of this submission presents the NSSC's response to the proposed AEMC review of the economic regulatory framework.



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Response to the NEL Exposure Draft

Issues relevant to the exposure draft framework common to both trials and roll-out

Transparency and scrutiny

9. Under the proposed trials and roll-out frameworks, obligations that are broad reaching in their technical, commercial and regulatory scope, and which will impact not only distributors but retailers and consumers, will be defined not by legislation but by administrative instrument. The processes and protections of parliamentary scrutiny will not apply to the formulation of those obligations. Nor will the processes and scrutiny that would normally apply to the making of subordinate legislation. In particular, Ministerial metering determinations of the sort proposed may not fall within the Regulatory Impact Statement (RIS) processes that apply in the jurisdictions. If the legislation is to proceed in its current form, consultation and scrutiny should be required that adopts, at least, the frameworks that normally apply to the making of delegated legislation. The NSSC's proposed solution to this issue in relation to trials is discussed in paragraph 34 below.

Retailer cost recovery

10. Whilst it is understood one of the key reasons for Ministerial metering determinations is to trigger distributor cost recovery, the exposure draft does not address retailer cost recovery. As well as increased distributor charges, retailers will incur costs participating in trials², amending systems to accommodate SMI and in data processing³. Equity requires that the NEL framework also provide legislative support for the recovery by retailers of these costs and charges. In jurisdictions subject to retail price regulation, a Ministerial metering determination must allow for the revision of retail prices to recover costs incurred directly and indirectly (including through payments to distributors) by retailers during both trials and roll-out. This is a separate issue to distributor cost recovery and is likely to require a different mechanism to that implemented to allow distributors to recover their costs. In

² See further paragraph 17 below.

³ Other examples of retailer costs include (a) costs driven by the level of data errors/substitutions and the mismatch of billed consumption and the meter recorded consumption which will in turn lead to retailer risks and greater volumes and greater complexity of billing enquiries and greater investigation costs; (b) provision of information to consumers, revision of tariffs and revision of contracts; (c) costs arising from additional risks particularly if Governments (i) do not reflect changes in the regulated pricing allowance and (ii) do not allow automatic reassignment of consumers retail tariffs (from a general flat tariff to a time of use tariff for example) following meter replacement.



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addition, a different mechanism is likely to be required to allow retailer cost recovery for trials, to that implemented to allow retailer cost recovery for the roll-out.

11. Given the different frameworks that apply in the jurisdictions, the NSSC suggests that, in relation to trials at least, the NEL should provide for Ministerial pilot metering determinations to be taken into account by the Minister or responsible regulator for the purpose of retail price regulation (where it continues to apply). Determinations (by Ministers or regulators) should address current regulatory arrangements which are insufficiently flexible to enable retailers to manage cost increases of this sort, including allowing retailers to realign retail tariffs following the introduction of any new network tariffs⁴.

Application of consistent standards

12. To preserve the MCE objective of a consistent national framework for smart meters, once SMI standards have been defined in the NER a Ministerial metering determination must not be able to adopt different standards. While this may not have been the intent, section 118E is an empowering provision potentially allowing a Ministerial metering determination to apply standards in relation to SMI that are different from or in addition to those prescribed by the NER. A legislative provision is not needed to enliven the standards set out in the NER. Whilst it may be that preliminary standards are required for trials, for those trials to be of most value these standards should as far as possible be consistent with expectations for the national standards. The NSSC proposes that section 118E be limited in its application to Ministerial pilot metering determinations and that the section sunset upon required smart metering infrastructure and smart metering services being defined in the NER.

Cross border application

13. The provisions addressing cross border issues would benefit from drafting reconsideration. The NSSC endorses the intention that there be consistency of application within a network. However, the NSSC is concerned that the current drafting may allow the Minister of one jurisdiction to require a trial in that jurisdiction even though the part of the network in that jurisdiction was only an adjunct to the main network situated in the adjoining jurisdiction. Appropriate retail cost recovery arrangements would also need to be considered in this context (both direct retail costs and pass through of payments to distributors), given retailers may be subject to two different retail pricing jurisdictions.

⁴ Similar issues are discussed in the AEMC 1st Interim Report – Review of Energy Market Frameworks in light of Climate Change Policies.



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Publication (section 118G)

14. The requirement for Ministerial metering determinations to be published in the South Australian Government Gazette and provided to relevant operators, the AER and AEMC, does not promote consumer access to determinations. The NSSC suggests that Ministerial metering determinations also be required to be published in a jurisdiction in the same manner as retail prices for that jurisdiction.

Sunset date

15. These NEL provisions have a specific and limited purpose. There is no need for them to remain operative beyond the roll-out period, and the NSSC considers that there is no need for Ministers to continue to hold the powers conferred by these provisions beyond that period. The NSSC suggests that these NEL provisions for each of the trials and the roll-out be subject to either a sunset date or (as an alternative) to Ministerial review following expiry of the roll-out period.

Issues relevant to the exposure draft framework for trials (Ministerial pilot determinations)

16. Businesses are currently conducting or making provision for SMI trials in NSW, ACT and Queensland. Submissions have been or will be made to the AER to allow for the recovery of the costs of these trials as part of the regulated revenue requirement for these businesses. The AER's November 2008 draft determination for NSW and ACT businesses has accepted these costs as part of the prudent and efficient forecast expenditure required by these businesses over the 2009-14 period. The NSSC recognises that in addition to trials undertaken by distributors, to gain understanding of SMI, Ministers may wish to implement additional trials (which may require additional funding) or be apprised of the results of current trials to adduce information to assist in making policy decisions in relation the costs and benefits of SMI.
17. Accordingly, the NSSC supports in principle the need for a Ministerial determination in respect of SMI trials. The NSSC also recognises that legislation in this first half of 2009 is desirable to support such trials. However, the NSSC considers that further consideration is necessary regarding whether the Exposure Draft establishes an appropriate distribution cost recovery framework for trials. It considers the framework proposed (particularly via the cost pass through provisions in section 6.6.1 of the NER) may not be effective in any event and the timeframe for SMI policy decisions allows a deeper consideration of those cost recovery issues. Moreover, the Exposure Draft does not make provision for retailer cost recovery for trials arising



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from the retailer's direct relationship with the consumer⁵. These costs may include obtaining consumer lists, obtaining customer agreements, marketing material and data processing.

18. Trials are or soon will be underway. Ministerially directed trials may also be required but not in a timeframe that prohibits a thorough consideration of the scope of those trials and the related distributor cost recovery framework in the context of the NER and retailer cost recovery under jurisdictional arrangements.
19. Issues with the scope and nature of Ministerial pilot metering determinations arising from the Exposure Draft are now discussed. A refinement to the SCO proposal which addresses those issues is then presented for consideration.

Sharing of information (Section 118B(4)(c))

20. The requirement to share information derived from the trials requires further consideration. Firstly, any such requirement needs to be considered in the context of existing regulatory requirements on participants in relation to the protection and privacy of information. A Ministerial pilot metering determination should not require disclosure of information that is inconsistent with these other obligations or the NEL should otherwise provide a statutory excuse for non-compliance.
21. In addition, the prospect that commercially sensitive information may be shared with others may inhibit the effectiveness of the trials by creating a disincentive for participation. A commercial party will be hesitant to expose its technology and cost information in circumstances where that information may be seen by its competitors.
22. A Ministerial pilot metering determination should not require disclosure of commercially sensitive information. Alternatively, statutory protection is required if a relevant operator is to be required to disclose information that it may be contractually bound to keep confidential.

Role and powers of the AER (section 118B(5))

23. Over a considerable time and with the commitment of significant resources from many interested parties, a new governance framework for the national electricity market was developed culminating in the jurisdictions' agreement to the Australian Energy Market Agreement (AEMA) and the formal definition of responsibilities of the MCE, NEMMCO, AEMC and AER in the 2005 amendments to the National Electricity

⁵ Retailers have no obligation within this legislative framework to participate in trials and are therefore unlikely to agree to participate unless they have at a minimum a clear framework for recovering costs – behavioural trials cannot be conducted without agreement of retailers and the relevant consumers via their informed consent with their retailer.



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Law. Particularly, the AEMA provides that the AER is to be responsible for economic regulation.

24. The Exposure Draft blurs these responsibilities and weakens the structure for the further conferral of responsibilities by providing for the conferral of powers on the AER which are unlimited in scope. Further, from information provided in the stakeholders' forum it seems that the role of the AER will be directed towards functions which are not economic regulatory in nature but seem more akin to a contractual negotiation of scope in exchange for price. In addition, this conferral is by individual Ministers without the need for agreement of the MCE, an agreement which would otherwise be required under the AEMA.
25. That this model is limited to trials does not address the weakening of confidence that will inevitably follow from incremental departures from the carefully developed national governance arrangements.
26. Such concerns may be alleviated by implementation of the refinements proposed by the NSSC to the framework for implementation of trials, discussed below. These refinements do not envisage the further conferral of powers on the AER. As a general principle any conferral of powers on the AER should be by specific and limited provisions which address specific needs rather than broad legislative heads of power.

Cost recovery

27. Existing distribution price determinations (which may continue beyond the commencement of trials) may not contain appropriate provisions allowing for pass through of trial related costs.
28. It is said that the Ministerial pilot metering determination will give rise to a 'pass through event' (either a 'regulatory change event' or 'service standard event') under the NER pursuant to which distributors can recover the costs of trials. The AER in the ActewAGL draft determination (and the NSW draft distribution determination 2009-10 to 2013-14) has stated (in summary) that if the introduction of smart meters is legislated this is likely to be a regulatory change event.
29. However, the NSSC is concerned that Chapter 6 of the NER may not apply as envisaged, given the proposed trials framework. A 'regulatory change event' requires a 'change in a *regulatory obligation* or *requirement*'. Whilst a regulatory obligation or requirement includes an obligation or requirement under the NEL⁶, it is unclear if when construed in context this would extend to an obligation imposed by

⁶ Section 2D(1)(b).



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an instrument given authority by the NEL. The Explanatory Note recognises that the obligation arises under the determination rather than the NEL which simply allows for the obligation. If the obligation arises under the NEL then it would be a change to the NEL (as required under the definition of regulatory change event in the NER) but if the obligation arises under the determination it would be a new, rather than a changed, obligation.

30. Difficulty also arises from the lack of particularity around whether an increase in cost is material and whether the direct control services determined at the time of the distribution determination will be broad enough to cover the categories of costs that may arise under the trials. Clause 6.6.1(j)(2) of the NER may be construed to limit a pass through to services which have been determined to be standard control services.
31. Further, as noted in paragraph 10 above, the proposed trial framework does not allow for the recovery of retailer trial related costs.
32. Consumers are also concerned to ensure that the cost recovery framework is transparent, and subject to oversight by an independent authority.
33. Accordingly, as discussed in paragraph 36 below, the NSSC considers that further consideration is required in respect of the cost recovery framework for trials.

Presented refinement

34. Many of these issues, and the issues common to trials and roll-out in so far as they relate to trials, can be addressed through a refinement to the proposal. The NSSC suggests that the NEL provide for:
 - a Ministerial notice specifying the relevant operator and the broad objectives and timing of a proposed trial having had regard to the recommendations of the NSSC;
 - a requirement for the relevant operator to develop within a defined period a proposal to meet those objectives and detail the nature, circumstances and parameters of the trial;
 - the proposal to be endorsed by retailers and consumers as being effective prior to submission to the Minister;
 - the criteria according to which the Minister would approve the proposal;
 - a ministerial determination approving the proposal and obliging the trial;
 - an ability for the Minister to make a determination should a proposal not be put forward in the required time or not meet the statutory criteria;
 - the obligation to conduct the trial be conditional upon an AER final determination of distributor cost recovery and a jurisdictional decision on retailer cost recovery.



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35. The Minister being satisfied with the scope of the trial and the industry and consumers being satisfied with the workability of the arrangements, the AER can then be responsible for determining the related distributor cost recovery. This structure allocates functions to the party properly responsible for those functions; the Minister for accessing the information required for policy decisions, industry and consumers for commercial, risk and consumer impacts, and the AER for economic regulation. If the Minister considered it necessary, consultation could take place with the AER but functions of the AER are not confused.
36. The NSSC recognises that it is desirable that legislative support for trials be progressed quickly but the roll-out timeframe does not put the same pressure on the related cost recovery framework for trials. Accordingly, that framework could be properly considered under the NER through a review undertaken to determine whether existing Chapter 6 provisions address distributor cost recovery for trials. There would be time to process any required NER changes.
37. The Ministerial determination approving the trial proposal would be made only after any necessary changes to the NER had been made.
38. The retailer cost recovery issues and sharing of information issues would still need to be addressed as discussed above under this proposed refinement.

Issues particular to the exposure draft framework for roll-out (Ministerial smart meter roll-out determination)

Transparency/retailer cost recovery/application of standards/cross border application/publication/sunset date

39. The proposed roll-out framework should address the issues identified in paragraphs 9 to 15, common to both the trials and roll-out framework.

Impact of inconsistency in smart metering services across the NEM

40. Section 118C permits a Minister to “specify the smart metering services, or the class of smart metering services, that must or need to be provided by the relevant operator or relevant operators.” The Exposure Draft defines “smart metering services” as “services provided by means of required smart metering infrastructure that are specified as smart metering services under the Rules”.
41. This provision creates the potential for each jurisdiction to roll-out a different package of SMI functions potentially creating ‘rail gauge’ differences in regulatory obligations. This seems inconsistent with the concept of a ‘national minimum functionality’ and the principle of national consistency. It will also mean that retailers’ back end



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systems will have to cater for different SMI functions which will increase retailers' costs that are passed on to consumers.

42. While the NSSC can understand the value of flexibility (at least to a reasonable degree) on trials, the minimum smart metering services once prescribed in the NER should be accepted by all jurisdictions.

Difficulty in terminology around services and standards

43. The definition of "required smart metering infrastructure" refers to infrastructure that complies with a standard. The definition of "smart metering services" does not refer to standards yet section 118K refers to the provision of those services in accordance with applicable standards. Section 118E refers to a Ministerial metering determination adopting the provisions of a "document, standard, rule, specification or method". Section 118B(4)(a) refers to a Ministerial pilot determination specifying "minimum standards of performance and service". There is confusion about where in this range of provisions the functionality, performance and service levels will arise. The NSSC suspects this is because the work to sustain an understanding of the required regulatory framework, and to define the legislative support for the roll-out, has not yet been done.

Rule making power

44. The Exposure Draft does not amend the Rule making 'heads of power' provisions of the NEL (section 34 and Schedule 1) to provide for the roll-out. It may be that the existing provisions are broad enough to accommodate SMI. However, as noted above the necessary underlying regulatory framework has not yet been scoped, and it may be that the final framework does require expansion to these heads of power.

Impact on existing contractual arrangements (section 118C(5))

45. Further, the NSSC is concerned that the prospect that a Ministerial determination might have effect despite anything to the contrary in any agreement or contract, may lead to sovereign risk in a context where the benefit of doing so has not been established. The papers do not explain the benefit obtained that outweighs the harm done to confidence in contracting in relation to metering services. A provision of this sort needs to deal with the consequences to the contracting parties including who bears the financial loss arising. It is unlikely costs to distributors would be recoverable under current economic regulation and costs to retailers would likely be borne by them where subject to retail price regulation. In addition, downstream suppliers are also likely to incur costs (which may include break costs) and may be unwilling to enter into substantial contracts now if there is a risk their contracts will not be honoured. The NSSC regards the question of legislative impact on contracts to be a matter of important legal policy and considers that section 118C(5) is not appropriate.



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Suggested approach

46. In light of these issues, the NSSC considers legislative support for a roll-out is premature and submits that this aspect of the Exposure Draft be deferred to allow a full consideration of the issues. As noted above, the NSSC understands legislative support for trials is pressing; however those conditions do not apply to the roll-out which will not take place before 2012.
47. There can be no disadvantage from a deferral as a roll-out cannot commence in any event until the rest of the regulatory framework is in place. A deferral does not imply that there will be delay in any mandated roll-out.
48. Conversely, there is considerable advantage in deferral.
49. Deferral will allow a thorough discourse on the appropriate allocation of functions within the existing NEM governance framework.
50. Deferral will allow an integrated approach to the scope of roll-out activity and the development of the related cost recovery framework; it is likely that there may be judgements to be made about the balance between scope and cost that require such an approach.
51. Deferral will allow the scoping of functionality performance levels and standards to take place and inform the required legislative support.
52. Importantly from a consumer perspective, deferral will allow integration between the National Energy Customer Framework and the roll-out in circumstances where consumer groups are anxious that the SMI roll-out not result in any diminution of consumer protections arising from jurisdictional inconsistency.



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Response to the proposed AEMC review

53. The NSSC presents its credentials for conducting a review of the cost recovery framework. The NSSC is of the view that it is best placed to conduct this review, for the reasons set out below.
54. The NSSC is a stakeholder consultative body consisting of distributors, retailers, and consumers that has been established under a co-regulatory model. The NSSC has established an open and transparent process of extensive stakeholder consultation that will be followed by the NSMP Regulation Working Group and NSSC in developing any cost recovery proposals. An important component of this structure, unlike the formal processes for consultation in the NER, is that the interest groups can meet and discuss with each other their respective views and positions, in a facilitated forum. It is more likely a consensus will emerge and, if not, the breadth of controversy will be lessened. A more satisfactory outcome will result.
55. The NSSC has the technical and regulatory expertise and has an existing knowledge of the issues. It has resources which it can readily commit. Whilst the capability of the AEMC is not in question it would start from a lower base of knowledge of the SMI issues and its work program is already demanding. With those demands already upon it, it seems undesirable to divert its resources to in effect run a process twice (i.e. conducting the proposed review, which the NSSC expects would involve extensive public consultation and result in NER change recommendations, and then conducting the resulting NER change process) when the work can be performed by the NSSC under the co-regulatory model.
56. The NSSC believes it is appropriate that the SMI cost-recovery framework be developed in conjunction with the development of operational and technical requirements for SMI and with other required changes to the NER. Having the one body progress a complete package of NER related amendments will reduce duplication and reduce project implementation costs.
57. In any event, any Rule change proposals put forward by the NSSC would still be subject to a formal Rule change process under the NEL and subject to independent review and scrutiny by the AEMC.
58. The NSSC asks that the MCE reconsider tasking the AEMC with this review.
59. However, should the MCE proceed to issue a reference to the AEMC, there seems to be no reason why the proposed Terms of Reference cannot be the subject of consultation.⁷ There is certainly no timing imperative.

⁷ It was noted in the stakeholder forum that the AEMC Terms of Reference may *not* be the subject of public consultation.



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60. If given an opportunity to comment on the proposed Terms of Reference, the NSSC would seek to ensure there is a consideration of:

- the appropriate form of regulation to apply in the circumstances of the commercial, risk and regulatory features of the SMI roll-out; and
- the appropriate arrangements for retailers to recover direct and indirect costs in circumstances where the regulatory arrangements for retail pricing are inflexible.

Thank you again for the opportunity to provide comments on the Exposure Draft. If you have any questions on the points raised in our submission please do not hesitate to contact me on 0413-079-484 or via email on Harry.Koller@au.pwc.com. I can arrange for you to discuss any queries with the NSSC's Legal and Regulatory Advisors, Rohan Madders and Alex Badham.

Kind regards

A handwritten signature in black ink, appearing to read "Harry Koller". The signature is written in a cursive, flowing style.

Harry Koller
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NSSC Secretariat for the National Smart Metering Program