

# Final Submission on Exposure Draft National Electricity Law

## 1. Functions of the regulatory bodies

As detailed in Origin's initial submission, Origin prefers to see the functions of distribution and (non-price) retail regulation included as functions of the AER in the draft NEL rather than requiring an amendment for the AER to assume these functions by December 2006.

In addition, the draft NEL could include the capacity for the AER to assume retail price regulation if jurisdictions opt to transfer that function to the AER. Origin considers that continued regulation of the retail sector, particularly price regulation, where there is full retail contestability is unnecessary and counter productive to competition. However since there will be a transition phase until jurisdictions are comfortable to dismantle regulation in the retail sector, Origin considers that transferring the functions to the AER will provide the best opportunity for an objective consideration of the issues and a staged co-ordinated programme for removal of unnecessary regulation.

Origin considers that a principle of good governance entails separation of the bodies performing rule-making functions and the bodies granting exemptions from those rules, rather than the enforcing agency itself granting exemptions. Therefore NEMMCO or AEMC should have the power to grant exemptions from registration, rather than the AER. For the same reason, Origin does not support section 35 (3 c,h) which gives wide powers to AEMC to make rules that increase other regulators' functions beyond those already detailed in the draft NEL.

## 2. Monitoring and Enforcement

### *Confidentiality*

Origin considers that the disclosure of confidential and compulsorily acquired information between the AER, ACCC, AEMC, NEMMCO, the MCE and other bodies prescribed by regulation for the performance of any of their functions should not be permitted. Instead confidential information should only be used by the entity that has obtained the information ie. information should remain in confidence to the body originally obtaining the information and used only for performing the function for which that body obtained the information rather than used for any function of that body or any other bodies' functions. The owner of the confidential information should be allowed to formally agree to other specified uses that the purpose for which the information was obtained in the first instance.

Origin's concerns are that the:

- The confidentiality of material cannot be guaranteed. If the AER obtains confidential information it is not required to impose conditions on the use of that information by one of the other agencies or a body prescribed by regulation. In addition section 48 allows AEMC to decide whether or not information provided for a review is confidential and allows AEMC to share it with Ministers.
- The principles of good governance behind the separation of enforcement and rule-making powers between the AER and AEMC regulatory bodies may be compromised.
- There is an inconsistency between section 18 which gives the AEMC access to compulsorily acquired information obtained by the AER and the SCO's Information Paper which says that the AEMC will rely on voluntary participation, in line with its function as Rule maker and a market development body, when conducting its

reviews.<sup>1</sup> The provision allowing sharing of compulsorily acquired information between AER and AEMC is, in effect, equivalent to conferring on the AEMC powers to compulsorily acquire the information itself, which as the SCO paper suggests, is not appropriate for a rule making body like the AEMC. Therefore Origin does not believe that it is appropriate for the AEMC to have access to information compulsorily acquired by another body.

- Information collected by one regulator like the AER for its own purposes and provided to another regulator like the ACCC for different purposes may be misinterpreted since the information is taken out of its context. This could result in expensive and unfruitful litigation on market behaviour or market structure issues such as mergers and acquisitions.

Origin encourages the SCO to publish the Memorandum of Understanding as early as possible.

### *Obtaining Information*

The right of the AER to compulsorily obtain information does not add to existing rights of NECA. However, the code provision 8.5.4 prescribed a process for NECA to notify the Code Participant if there is a breach which is removed under the Rules. Under the new regime, the first that a registered participant may know about a breach is when it receives a Court order declaring a relevant participant to be in breach, which Origin considers to be a confrontational approach.

AER should be required to follow a prescribed process for obtaining information starting with a request for information from Registered Participants and for that request not to be complied with before a search warrant can be approved by the Court. This will give the Registered Participant an opportunity to provide the information before a search is required as in the current Code Section 8.5.1.

The combination of powers to search by warrant and the right to share information between ACCC, AER and AEMC represent an unacceptable extension of the rights of regulatory bodies to obtain information, particularly for the ACCC which could only obtain a search warrant if there was consumer protection issues of the risk of personal injury from the trade of a good or service.

### *Limitations on Provision of Information*

Origin supports the inclusion of Section 29 of the draft NEL which limits the requirement for a person to provide information to the AER if it may incriminate the person, lead to a criminal penalty, is subject to legal professional privilege or is a Cabinet document. This limitation should also apply to corporations so that corporations do not have to incriminate their own officers. Equally Section 29 should apply to information obtained by the ACCC, AEMC and NEMMCO since they are able to share the information so that if AER obtains information from other agencies Section 29 should apply.

### *Penalties and Breaches*

The draft NEL increases the potential size of penalties compared to the current NEL since the ceilings are lifted for minor breaches. Origin opposes increases in the size of fines for specific actions that previously incurred minor penalties.

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<sup>1</sup> National Electricity Law and National Electricity Rules: Information Paper, December 2004 p.25.

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Origin opposes Section 66 (2) which states that an attempt to breach a civil penalty provision should be treated as an actual breach since only actual breaches should be penalised and the current Code does not allow for this. In addition, Section 66 (1) and Schedule 2 clause 41 that allows any person that directly or indirectly knows about a breach (eg lawyer) to be liable is excessively wide.

Origin suggests that the draft NEL states that where infringement notices are concerned, a single event (or sequence of events) breaching the draft NEL or Rules can only attract a single infringement notice which aligns with section 65 (2) under proceedings for civil penalties where the same conduct can only lead to one civil penalty.

The draft NEL states that the regulations will determine whether a provision of the Rules or the NEL will be prescribed as a civil penalty provision. Until the new Regulations are published we cannot comment on other civil penalty provisions. Origin requests that SCO release the regulations as soon as possible for consultation.

*Use of Civil Penalties Fund*

Under the current NEL, the Civil Penalties Fund is used to fund the National Electricity Tribunal and the costs of NECA whereas the draft NEL states that the penalties should go to the Commonwealth via the AER. Origin suggests that the draft NEL should state that the funds generated from penalties are used to offset the industry levy to contribute to the costs of the operations of the AER and AEMC.

*Judicial Review and Merits Review*

Origin would prefer that the function of reviewing regulatory decisions that was performed by the National Electricity Tribunal should be transferred to the Courts.

Origin acknowledges that in the energy industry the opportunities for judicial and merits reviews of decisions vary in terms of the:

- grounds of review;
- industry of electricity or gas
- sector whether that be generation, retail, distribution or transmission;
- timing of when an appeal can be initiated;
- relevant appeal body; and
- scope of reviews.

Improving the commonality in the appeals' frameworks across the energy industry would provide greater certainty in the industries and a less litigious environment. However, the question of which review framework is most appropriate to apply to the whole energy industry is a difficult issue.

The views of John Tamblyn<sup>2</sup> expressed at the 2004 Administrative Law Conference appear to be a sound guide to balancing the detail contained in objectives against the rights for review. He considers that a regulatory framework which provides less detailed prescription of how regulatory decisions are to be reached by using a high-level, overarching objective, which expands the discretion of regulators, provides a stronger case for retaining merit review. In addition Mr Tamblyn considers that merits review should be limited to unreasonable decisions on important matters of principle. Retaining both merit and judicial reviews provides a framework that gives confidence to investors that there are appropriate checks and balances in place over the power of regulators.

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<sup>2</sup> John Tamblyn (2004) "Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible" 2004 Public Law Weekend Administrative Law Conference.

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Origin agrees with these views and therefore suggests that the draft NEL allows for merits review on important matters and decisions by AER to provide a good check to regulatory discretion. The AEMC decision-making process is already subject to open consultation and therefore does not require merits review.

### 3. Market objective, principles and definitions

#### *Market Objective and its Use*

Origin supports the use of a single market objective. The AEMC is required to make its decisions with regard to the national market objective however the economic regulatory powers of the AER are to be performed with regard to a different objective that, unlike the national market objective, gives no further detail to the meaning of 'long term interests' on consumers. It is Origin's view that it would be preferable to use one market objective for the two energy regulators to reduce complexity and uncertainty in the industry.

The market objective may be used for other purposes such as development of procedures. The market objective will need to be re-examined to assess its suitability for other functions such as regulation of gas markets, distribution and retail.

Origin suggests the NEL contain guidance for interpretation of the market objective. This guidance may state that the terms in the national market objective should be interpreted using their economic meanings to enable a rigorous analysis in measuring the long term interests of consumers. Secondly the concept of cost effective regulation should be included since regulation should only be implemented if the benefits to be derived outweigh the costs of imposing the regulation itself. This will ensure that under section 87 (3) AEMC is not required to implement inappropriate rule changes. Thirdly, the concept of promoting competition could be included since competitive markets themselves are preferable to regulation that is constructed in order to imitate the behaviour of competitive markets in terms of serving the long term interests of consumers.

#### *MCE Statement of Policy Principles*

It would be useful for an initial MCE statement of policy principles to be published as soon as possible. The AER should have regard to the MCE policy statement when performing its functions under section 14.

#### *Definition of National Energy Market*

The definition of the National Energy Market works well for the draft NEL. However, if the draft NEL was changed to include reference to the AER function of retail regulation, whether only non-price regulation or not, the definition of the National Energy Market may need to be adjusted to include reference to the retail sector.

### 4. Other Issues

#### *Rule Change Process and Rule Making*

Origin suggests that the draft NEL include a requirement that AEMC must consider submissions obtained through consultation in its deliberations.

Origin would like the draft rule determination in Section 99 and final Rule determination in Section 102 to include an explanation of how the rule meets the market objective rather than the reasons why the AEMC is satisfied the rule meets the market objective.

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The reasons for this is that as currently drafted the AEMC may state, for instance, that the AEMC is satisfied that the rule meets the market objective because the AEMC has thoroughly investigated the matter and is convinced that the rule improves reliability of electricity supply. By contrast an explanation of how the market objective is met would involve analysis about how each element of the market objective is impacted by a Rule change and show that the Rule change provides positive net benefits to the long term interests of consumers when the impact on each element is added together.

Origin supports the inclusion of an effective expedited rule making process.

The Schedule 1 list of issues about which Rules can be made should also cover issues that may be transferred from jurisdictions to national regulation such as a retailer of last resort scheme and a consumer protection code as well as settlement procedures for wholesale exchange. Item 36 appears to be excessively broad in allowing “any matter or thing relating to electricity prescribed by Regulation” to be included. Perhaps this item should be removed from Schedule 1.

Origin suggests that existing jurisdictional derogations are subjected to the Rule change process in the same way as the AEMC must subject requests for new jurisdictional derogations to the Rule change process. This will ensure that derogations already in force are in the long-term interests of consumers.

*Subordinate Jurisdictional Legislation*

It would be useful to clarify in the draft NEL if new rules and regulations need to be approved by Parliaments of participating jurisdictions due to jurisdictional specific legislation.