

## Response to Key Issues Raised by Stakeholders on the Exposure Draft of the National Electricity Law, Released on 1 December 2004

Issue	Response / Action by SCO
<b>1</b>	<b>Consultation Process</b>
1.1	<p>Concerns have been noted. The consultation process has largely been determined by Parliamentary drafting and sitting schedules and the overall Energy Market Reform timetable.</p>
1.2	<p>Draft NEL Regulations will be released for public consultation when the new NEL<sup>1</sup> is introduced into the South Australian Parliament in early February 2005.</p>
1.3	<p>The types of issues which will be covered by the savings and transitional provisions were set out in the SCO information paper on the new NEL which was released on 1 December 2004.</p> <p>The main savings and transitional provisions which relate specifically to the transition from the existing NEL to the new NEL will be located in Schedule 3 of the NEL<sup>2</sup> and will be publicly available when the NEL is introduced into the South Australian Parliament.</p> <p>The savings and transitional provisions which relate to the transition from the current Code to the Rules will be located in the Regulations and will be released for public comment along with the remainder of the Regulations when the NEL is introduced into the South Australian Parliament. The Regulations will also be able to deal with any additional NEL transitionals not dealt with in Schedule 3 of the new NEL.</p>
<b>2</b>	<b>National Electricity Market Objective</b>
2.1	<p>A reference will be made in the second reading speech to the new NEL that the NEM objective is to be given an economic interpretation.</p>

<sup>1</sup> The new NEL, which will replace the existing NEL, will be contained in the *National Electricity (South Australia) (New National Electricity Law) Amendment Bill 2005*. This Bill will amend the *National Electricity Law (South Australia) Act 1996*.

<sup>2</sup> The section and schedule numbers referred to in this document refer to the section and schedule numbers of the new NEL as contained in the *National Electricity (South Australia) (New National Electricity Law) Amendment Bill 2005*. Please note that these section and schedule numbers differ slightly from the section and schedule numbers of the exposure draft of the NEL released on 1 December 2004.

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<p>2.2 Some amendments should be made to the NEM objective to clarify its meaning.</p>	<p>The following amendments to the NEM objective have been made in the new NEL, compared to the exposure draft of the NEL:</p> <ul style="list-style-type: none"> <li>— The word 'efficient' will be inserted before the words 'use of'; and</li> <li>— The NEM objective will be amended to clarify that the objective of 'safety' relates to the safety of the national electricity system, not to public safety generally.</li> </ul>
<p>2.3 It is anomalous that the AEMC must have regard to the NEM objective when performing its functions (s.32), whereas the AER, when performing its economic regulatory functions, must promote the long term interests of consumers (s.16(1)(a)) without regard to the remainder of the NEM objective.</p>	<p>The new NEL has been amended since the exposure draft was released to require the AER to perform its economic regulatory functions in a manner which will or is likely to contribute to the achievement of the NEM objective.</p>
<p>2.4 'Environmental sustainability' should be part of the NEM objective.</p>	<p>Environmental objectives are more appropriately dealt with in other policy instruments.</p>
<p><b>3 Rule Making Criteria</b></p>	
<p>3.1 The Rule making test should be a 'net benefits test'.</p>	<p>No change to the Rule change test (s.88) in the new NEL is proposed. Use of a formal net benefits test risks requiring the AEMC to engage in quantitative analysis of the pros and cons of every Rule change it considers, when sometimes this will not be appropriate. The test adopted retains the advantages of a formal net benefits test but avoids this risk.</p>
<p><b>4 Investigation, Confidentiality and Information Sharing</b></p>	
<p>4.1 The AER's search warrant powers (ss.19 to 27) are heavy handed and, at the very least, should be powers of last resort.</p>	<p>The search warrant powers in the new NEL are based on ss.71 to 74 and 77 of the existing NEL. Sections 25 and 26 of the new NEL provide additional 'safeguards' for market participants that are not in the existing NEL by providing, for example, limits on the length of time the AER may retain seized documents.</p> <p>In practice, the use of search warrants will not be the routine mechanism to obtain information. The process for obtaining and executing a search warrant involves a number of restrictions (eg the need for a magistrate to grant the warrant) which make the use of other mechanisms the obvious choice for day to day operations.</p> <p>Therefore, no change to the search warrant powers in the new NEL is proposed in response to the submissions. Under the new NEL, the AER has taken over NECA's enforcement functions. It is appropriate that the AER be given similar search warrant powers to carry out its enforcement functions.</p>

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<p>4.2 Information given to the AER by a corporation under s.28 should not be admissible as evidence in proceedings against its officers.</p>	<p>No change to the new NEL is proposed.</p> <p>Unlike analogous provisions applying to the ACCC and ASIC, the new NEL already expressly provides that an individual may refuse to provide information if it might tend to incriminate the person (s.28(5)). Accordingly, to some extent, the new NEL provisions already provide greater protection than analogous provisions.</p>
<p>4.3 The AER, AEMC, ACCC and NEMMCO should not be able to share information which is gathered from market participants, especially where that information is provided to a body for a specific purpose on a confidential basis. Such sharing of information would infringe a common law principle that information is to be used only for the purpose it was given.</p>	<p>No change to the new NEL is proposed.</p> <p>The AER, AEMC, ACCC and NEMMCO need to be able to share information to effectively perform their functions and to avoid duplication of information gathering. The splitting of NECA's Code change and enforcement functions between the AEMC and AER should not result in the new bodies having to rely on different information. It is appropriate for reasons of transparency that the NEL indicate that information obtained by the AEMC, for example during the Rule change process, can be used by the AER when exercising its enforcement functions. Sections 18 and 31 of the new NEL reflect the agreed policy of jurisdictions as set out in s.44AAF of the <i>Trade Practices Act 1974</i> and s.24 of the <i>Australian Energy Market Commission Establishment Act 2004</i>.</p> <p>Furthermore, the information sharing provisions in the new NEL are a continuation of existing provisions, including provisions which allow for the disclosure of information by NECA to the ACCC or any other regulatory authority having jurisdiction over the participant (see current Code, cl.8.5.1, and 8.6 (especially cl.8.6.4 and 8.6.2(i)). Similar information sharing provisions apply in other sectors (see <i>Australian Securities and Investments Commission Act 2001</i>, <i>Australian Prudential Regulatory Authority Act 1998</i> and <i>Income Tax Assessment Act 1936</i>). These and many other similar provisions allow information obtained by one body to be disclosed to, and used by, other bodies in connection with their functions. Such provisions indicate that disclosure to another body is authorised; the common law recognises that statutes may set out the permitted uses and disclosures of information obtained under compulsory powers.</p> <p>It is also to be noted that while the information sharing provisions allow the AER and the AEMC to provide industry information to NEMMCO, no provisions have been inserted allowing NEMMCO to provide information to the AER, AEMC or other market bodies.</p>
<p><b>5 Enforcement</b></p>	
<p>5.1 The new civil penalties regime in the new NEL has resulted in market participants being exposed to higher penalties. The graduated classes of civil penalties in the existing NEL should be reinstated.</p>	<p>The new civil penalty regime in the new NEL, which replaces the existing system of graduated civil penalties classes A, B, C and D, with one main group of civil penalty provisions, will be retained because it results in a simpler, more transparent penalties regime.</p> <p>However, the retention of the new civil penalties regime does not necessarily mean</p>

Issue	Response / Action by SCO
	<p>market participants will incur higher penalties. The second reading speech to the new NEL will indicate that the simplification of the civil penalties regime should not be taken to indicate that higher penalties should be imposed for breaches of provisions that previously had a lower maximum penalty. Further, the new civil penalties regime requires the courts to take into account the circumstances of each case when determining a civil penalty (s.64).</p> <p>It is also to be noted that in the new civil penalties regime, the ability of the National Electricity Tribunal under s.44(2)(b) of the existing NEL to impose a civil penalty of up to \$20,000 for breach of <i>any</i> Code provision, has been removed. This benefits market participants by removing this indiscriminate penalty for every provision in the Code. Under the new system, civil penalties for breach of the Rules will only apply to the limited number of provisions prescribed as civil penalty provisions.</p>
<p>5.2 There should be a lower maximum penalty for individuals than for corporations.</p>	<p>In response to the submissions, it is agreed that a lesser maximum penalty should generally apply for individuals than for corporations (consistent with other penalties regimes in the <i>Corporations Act 2001</i> and the <i>Trade Practices Act 1974</i>). The maximum civil and criminal penalties for individuals under the NEL will now be one fifth the maximum penalty for corporations. The exception is the civil penalty for the rebidding civil penalty provision, which will remain at \$1 million for a corporation or an individual. It is considered that the importance of this provision means it is inappropriate to decrease the penalty in any way.</p>
<p>5.3 The court should not be given the power to direct the disconnection of a Registered participant's generating system, transmission system or distribution system.</p>	<p>The new NEL has been amended in response to the submissions.</p> <p>Section 62(a) of the new NEL now provides that a court may only order disconnection of a Registered participant's market loads. This position is consistent with the equivalent power given to the National Electricity Tribunal under s.44(1)(f) of the existing NEL.</p>
<p>5.4 There should not be concurrent liability for officers and corporations (ss.85 and 86), nor liability for any person aiding abetting, or involved in a contravention of a civil penalty provision (s.68).</p>	<p>Concurrent liability for officers who knowingly authorise or permit breaches by a corporation exists under the existing NEL (s.80), which prevails over any contrary provision in the current Code. New NEL s.85 reflects this position. New NEL s.86 makes explicit that also, where an officer or employee of a participant does an act in their official capacity that would amount to a breach by the participant, the participant is taken to have contravened the provision.</p> <p>It is appropriate to allow for civil penalties against individuals aiding, abetting, or otherwise knowingly concerned in contraventions by participants. Other comparable civil penalty regimes include such accessory liability for civil penalty provisions (eg under the <i>Trade Practices Act 1974</i>, and the <i>Environment Protection and Biodiversity Conservation Act 1999</i>).</p>

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<b>6</b>	<b>Regulations</b>	
6.1	The regulation-making powers in the NEL are too broad	<p>In response to the submissions, the ability to confer functions and powers of the AER (s.15(g)), the AEMC (s.29(1)(c)) and the reliability panel (s.38(2)(c)) by way of regulation will be removed.</p> <p>An important safeguard is that the <i>National Electricity (South Australia) Act 1996</i> will be amended to require that all regulations can only be made with the unanimous agreement of all relevant MCE Ministers. In addition, the second reading speech to the new NEL will indicate that all draft regulations will be released for consultation where timing permits and the subject matter warrants it.</p>
<b>7</b>	<b>Authorisation of Rules</b>	
7.1	Further Senior Counsel advice should be obtained to ensure that the Rules have been appropriately drafted to obviate the need for the Rules to be authorised by the ACCC.	<p>No further advice will be obtained by SCO on this matter.</p> <p>The advice obtained by SCO from Hutley SC that the Rules should be drafted so as to mandate compliance by market participants, was relied on when drafting the Rules.</p> <p>If participants are concerned about any possible liability they may have under the <i>Trade Practices Act 1974</i> in complying with the Rules, they should obtain their own independent legal advice. All market participants have been given the opportunity to indicate inconsistency of the Rules with the Hutley SC advice during the public consultation process for the Rules.</p>
<b>8</b>	<b>Transmission Pricing and Regulatory Principles</b>	
8.1	The factors the AER must consider when making a transmission determination are unclear.	Section 16(2) of the new NEL has been amended in response to the submissions. In particular, in making a transmission determination, the AER is now required to provide a <i>reasonable</i> opportunity to recover the efficient costs of complying with a regulatory obligation. Also, amendments have been made to clarify that the requirements in s.16(2) generally apply only to services the subject of a transmission determination.
8.2	The pricing and regulatory principles (s.16(2)) have been developed in isolation from existing access policy reviews such as the government's response to the Productivity Commission's <i>Review of the National Access Regime</i> and the pending MCE response to the <i>Review of the Gas Access Regime</i> . Further s.16(2) is inconsistent with proposed revisions to Part IIIA of the <i>Trade Practices Act 1974</i> .	<p>Part IIIA of the <i>Trade Practices Act 1974</i> is a generic access scheme for national infrastructure which does not already have its own access scheme. The electricity industry is a highly regulated industry with its own access scheme. Accordingly, the pricing principles being considered in reviews of Part IIIA of the <i>Trade Practices Act 1974</i> are not directly apposite to electricity.</p> <p>Similarly, whilst existing policy reviews have informed the development of the pricing and regulatory principles contained in s.16(2) of the new NEL, it is appropriate that s.16 has been drafted specifically in relation to the national electricity market.</p>

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<b>9</b>	<b>Renewable and Distributed Generation</b>
9.1 The removal of the 'technology neutrality clause' in the current Code (cl.1.3(b)(5)) will impede investment in renewable energy generation.	<p>The MCE remains strongly committed to renewable energy.</p> <p>However, the new NEL does not explicitly address environmental issues such as greenhouse. Further, the technology neutrality clause in the current Code is not appropriate given the move to a single NEM objective.</p> <p>The second reading speech to the new NEL will indicate that applying the single objective (essentially requiring economic efficiency) recognises that in a general sense particular energy sources or technologies should not be treated more nor less favourably than other energy sources. As a matter of practical reality, it is generally difficult to see how a Rule change which discriminated against particular energy sources would meet the Rule making test.</p> <p>Furthermore, an MCE statement of policy principles will be issued to clarify issues relating to the old objectives and the single new objective. The AEMC must have regard to MCE statements of policy principles when making Rules (ss. 33(a) and 88(2)). This will further strengthen the case for technology neutral Rules.</p>
9.2 An amnesty period should be given to market participants who are currently not complying with Code requirements to protect them from prosecution by the AER under the Rules.	<p>No general amnesty can be given for non-compliance with the Rules. Market participants should advise of any standards that they cannot comply with and appropriate derogations/Rule changes can be considered.</p>
<b>10.</b>	<b>Merits Review</b>
<p>The new NEL should make provision for the merits review of decisions, particularly in respect of revenue and price determinations by the AER.</p>	<p>At this stage, no change will be made to the new NEL.</p> <p>The new NEL, and related legislation, provides for judicial review of decisions of the AEMC, NEMMCO and the AER. The new regulatory arrangements do not provide for merits review of decisions of these bodies.</p> <p>In the case of the AEMC, this absence of merits review is because the AEMC is performing a statutory function as rule-maker, and the process that it must follow is transparent and entails considerable public consultation.</p> <p>Under the existing NEL, certain NEMMCO decisions are reviewable by the National Electricity Tribunal. However, the abolition of the Tribunal as part of the new regulatory arrangements means that there is now no scope for the merits review of such decisions.</p> <p>Decisions of the AER are subject to judicial review under the <i>Administrative Decisions (Judicial Review) Act 1977</i>. Merits review is not available for decisions of the AER under</p>

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	<p>the new NEL and Rules. This is consistent with the position under current arrangements, where merits review of the ACCC's electricity transmission review determinations is not available.</p> <p>Nonetheless, the MCE has undertaken to reconsider the issue of merits review for electricity when it makes its response to the Productivity Commission's <i>Review of the Gas Access Regime</i>.</p>
<b>11.</b>	
<b>Access</b>	
	<p>The new NEL does not deal with access to services regulated under the Rules, and Part IIIA of the <i>Trade Practices Act 1974</i>. Accordingly, it is feared that there will not be adequate consultation on the question of access.</p> <p>The MCE remains committed to a national approach to energy access, as indicated in its December 2003 report. However, the access arrangements for the NEM are yet to be settled by the MCE. Consequently,</p> <ul style="list-style-type: none"> <li>— the NEL is silent on the issue of access and the status quo will be maintained for the present time; and</li> <li>— until the MCE finalises its position on access, there is no intention to seek approval of the proposed Rules by the ACCC as an industry access code.</li> </ul> <p>It is intended that the MCE will decide this matter in the first half of 2005. Prior to implementation of the agreed approach on energy access issues for the future, appropriate opportunity for consultation with industry participants and other stakeholders will be made available.</p>