

**Response to Key Issues Raised at Briefings and in Submissions on
Proposed National Electricity Rule Change Process - Consultation Paper, 9 August 2004**

1	Statutory Rules and Part IV of the Trade Practices Act 1974 (TPA)	The positions outlined below reflect the Standing Committee of Official's (SCO) commissioned legal advice.
1.1	<p>Without authorisation of the National Electricity Rules (Rules), participants and their employees could, in merely complying with the Rules, be exposed to breaches of Part IV provisions of the TPA.</p> <p>Participants and their employees are entitled to a degree of legal certainty that is equivalent to that presently provided.</p>	<p>This position is that, by changing the National Electricity Code (Code) provisions into rules made under the National Electricity Law (and making certain other changes to the Code provisions), the Part IV TPA prohibitions (which were covered by the previous authorisations) will not apply to actions taken by Code Participants in compliance with those rules. This is because this conversion (and the associated Code provision changes) will result in the obligations and rights of Code Participants being imposed by statutory rules (ie. law), with which compliance is mandatory, rather than pursuant to any contract, arrangement or understanding between Code Participants. As a result, there is no basis on which the Part IV prohibitions will apply to Code Participants who act in accordance with the Rules because these prohibitions only apply where there is a contract, arrangement, understanding or other consensual transaction.</p> <p>On this basis, the conversion of the Code into mandatory rules will not increase the TPA risk for Code Participants. In addition, it will have the significant benefit of enabling the Rule change process to be streamlined by removing any basis for Australian Competition and Consumer Commission (ACCC) authorisation of the Rules or changes to the Rules.</p>
1.2	<p>If the current level of certainty is not provided (i.e. as provided with authorisation), individual participants may seek authorisation of the Rules. This could lead to conflicting positions being adopted by different regulators (ACCC and Australian Energy Market Commission (AEMC)).</p>	<p>Any party has the right to seek authorisation of arrangements they consider may breach Part IV of the TPA. However, for the reasons outlined above, where a Code Participant acts in compliance with the Rules there is no relevant contract, arrangement, understanding or conduct that can be the subject of any ACCC authorisation. Moreover, the Rules themselves do not constitute a contract, arrangement or understanding – compliance with them (as with any other law) is mandatory and does not depend upon Code Participants voluntarily assuming the obligations imposed by them under any contract, arrangement or understanding. There is no issue of the ACCC and the AEMC adopting conflicting positions.</p>
1.3	<p>All parts of the existing Code must be thoroughly examined and reviewed to ensure that any suggestion of a consensual arrangement between participants is removed from the</p>	<p>SCO has commissioned its legal advisors to undertake a thorough review of each Chapter of the existing Code based on the advice provided by Hutley SC and, together with the Energy Market Reform Working Group, to draft the proposed Rules.</p>

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<p>revised drafting into Rules.</p> <p>Participants should have the opportunity to review the proposed Rules before the Rules are made 'once-off' by Ministerial order.</p>	<p>SCO has committed to consult with stakeholders on the proposed Rules to enable stakeholders to have confidence that:</p> <ul style="list-style-type: none"> • the changes necessary to convert the Code provisions into a set of mandatory rules (as described above) have been made; and • those changes have not changed the substance of the Code provisions.
<p>1.4 The existing Code provides a number of areas of discretion for participants such as NEMMCO and Transmission Network Service Providers in relation to connection arrangements. If these areas of discretion are left within the Rules, such participants may need to seek individual authorisations which would place a time and cost burden on the market.</p>	<p>The mere fact that the Code confers discretions on Code Participants does not mean that the exercise of those discretions will breach Part IV of the TPA. For example, NEMMCO (as the market operator) currently has conferred on it numerous discretions in relation to the exercise of its powers to ensure the security of the power system. The exercise of these discretions is not something that would attract any of the Part IV prohibitions.</p> <p>The Code does, however, contemplate that Code Participants will or may enter into a range of agreements (eg. connection agreements, system operation agreements, agreements for the provision of non-market ancillary services, etc). Generally speaking, the Code does not specify the provisions that must be included in these agreements with any degree of particularity. Accordingly, under the current regime, if a Code Participant were to include a provision in these agreements that breached Part IV of the TPA, that Code Participant would be exposed to liability for a breach of Part IV. The ACCC's authorisation of the Code does not encompass the authorisation of these kinds of agreements (after all, the ACCC would hardly authorise an agreement where it has not had an opportunity to consider the actual terms for that agreement). Instead, if a Code Participant wished to enter into an agreement that contained a provision that might breach Part IV of the TPA, that Code Participant would need to obtain a separate authorisation from the ACCC. This position will not change under the proposed new Rules.</p> <p>To the extent that the Rules (in replicating the current Code provisions) specify certain terms and conditions on which Code Participants must deal with each other, and Code Participants enter into a contract on those terms and conditions, then those Code Participants will still not be exposed to liability for breach of Part IV of the TPA. The reason for this is that the contract will not have any effect or purpose which is prohibited by Part IV of the TPA (and which is generally a necessary element for there to be a Part IV breach). On the contrary, it will be the Rules that have any such prohibited purpose or effect – but the Rules are not a contract, arrangement or understanding and the Part IV prohibitions have no application to them.</p>

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2	Market Objectives	
2.1	<p>The Market Objectives as proposed in the Consultation Paper contain inherent conflicts with no clear indication of the weighting or treatment of each where conflicts arise. Concerns about weighting and hierarchy.</p> <p>There are potential conflicts of consumer interests for lower prices and economically efficient operation and investment. Consumer requirement for a 'very reliable supply at a reasonable cost' should be reflected in the Objectives.</p> <p>It is not clear as to whether all of the objectives need to be considered or satisfied in the AEMC's assessment of a Rule change.</p> <p>There are differing views on extent and scope of the Objectives covering:</p> <ul style="list-style-type: none"> • inclusion and/or strengthening of the objective for 'economically efficient investment and innovation'; • overly narrow and exclude public benefits; • single objective related to economic efficiency; and • competition aspects should only be applied where competition is the means for provision of the service (competitive approaches may not be appropriate for provision of network services which are currently regulated). 	<p>SCO is reconsidering the National Electricity Market Objectives (NEM Objectives).</p> <p>SCO agrees that the NEM Objectives should provide clear guidance to the AEMC as Rule maker and to the Ministerial Council on Energy (MCE) for the preparation of a Statement of Policy Principles (to be consistent with the NEM Objectives). SCO is working to clarify the scope, hierarchy and applicability of the Objectives.</p> <p>SCO believes that the objective to promote the long term interests of consumers with respect to price, quality and reliability of supply is consistent with an objective to achieve economic efficiency. The 'long term interests of consumers' objective should not imply 'lower cost', rather it is an appropriate price (quality and reliability) consistent with achieving economic efficiency (productive, dynamic and allocative efficiency)</p> <p>MCE Report in December 2003 was clear on the inclusion of 'long term interests of consumers' in the NEM Objectives.</p> <p>Consideration has also been given to including the safe and secure and reliable operation of the electricity system as an objective.</p> <p>The legislation will allow the AEMC to give the various objectives such weight as is appropriate to the decision in question, bearing in mind that some objectives might be irrelevant for a particular decision.</p> <p>A revised draft of the NEM Objectives will be released shortly.</p>
2.2	The primary objective should include reference to long-term environmental outcomes.	Objectives in relation to environmental outcomes are addressed under other policy measures.
2.3	The objectives may not work for all the different purposes (such as for AEMC in Rule making and for Australian Energy Regulator (AER) in economic regulation).	SCO considers that the NEM Objectives should govern the AEMC's Rule making function. However, the NEM Objectives should not be a basis for decisions of the AER. Decisions on enforcement do not need to be referenced to the NEM Objectives. For decisions of the AER in respect of economic regulation, the AER will have specific powers and objectives as specified in the National Electricity Law or the Rules.

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3	MCE Statements and Policy Directions	
3.1	<p>Statements of Policy Principles will provide a mechanism for setting and giving effect to policy for the National Electricity Market. Such statements will have a direct influence on the development of the Rules and will have significant implications for all stakeholders.</p> <p>Such statements should be developed using a formal consultation process. The MCE should be required to explain how the Statement is consistent with the NEM Objectives and how it will impact on the development of, and outcomes for, the market.</p>	Being considered by SCO.
4	Rule Making Criteria	
4.1	<p>Comments varied:</p> <ul style="list-style-type: none"> • there should be less discretion for AEMC with more guidance and detail on criteria for the AEMC to apply in considering to approve or reject a Rule change proposal; • concerns about 'with or without' analysis when debate could be about various options; • support for leaving the discretion and method of calculation of the net benefit test to the AEMC. The criteria should not be so prescriptive or detailed that the task of the AEMC is made unworkable'. Flexibility is needed; • should be a broader public benefit test; • the ACCC s. 88 of TPA test is clearer and the suggested test is not clear; • test for Rule making should be based on achieving economically efficient investment rather than interests of consumers; • need greater clarity and detail. This relates to the need 	<p>SCO is reviewing the Rule making criteria to be applied by the AEMC.</p> <p>Rather than the specification of a 'Net Benefits Test', consideration is being given to specifying a 'Rulemaking Test' along the lines of:</p> <p><i>In considering to approve a Rule change proposal, the AEMC is to be satisfied that the making or amendment of the NE Rules is, or is likely to, contribute to the achievement of the NEM Objectives, or to the extent they conflict, such of the objectives as the AEMC determines in any particular case should prevail.</i></p>

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	<p>for different objectives for various parts of the Rules; and</p> <ul style="list-style-type: none"> • support for a net benefit test based on NEM Objectives. 	
5	AEMC Gatekeeper Role	
5.1	<p>Requirement for the AEMC to report to the MCE and publicly on the Rule change proposals it receives and how it has dealt with them.</p>	<p>Under the Rule change provisions in the NEL, the AEMC will be required to report publicly on how it has dealt with them (rejected, approved or not approved) as part of the steps in the Rule change process.</p> <p>As far as reporting statistically on proposals received and how they are dealt with, such requirements will not be specified in the NEL. Consistent with good administrative practice, it is expected that the AEMC would include such reporting in its Annual Report.</p>
5.2	<p>AEMC should be obliged to consult with a proponent of a Rule change on the wording of that change which the AEMC puts forward for public consultation.</p>	<p>Consistent with good administrative practice, the AEMC would be expected to consult with a proponent on the wording of a Rule change proposal. This would not be specified in the NEL. Under the process provided for in the NEL, the AEMC would be required to provide wording that is consistent with the substance of the Rule change proposal.</p>
6	Standing to Initiate a Rule Change Proposal	
6.1	<p>Responses varied:</p> <ul style="list-style-type: none"> • support for ‘any person’ (consumer groups); • concern at ‘any person’ initiation. Ability to initiate a Rule change (which will be legally binding on participants) should be restricted to participants and policy and regulatory bodies; • requirement for a minimum number of participants. Where six participants support a Rule change proposal, AEMC must progress the Rule change proposal; and • concern about the AEMC using its gatekeeper role to implement its own policy objectives. 	<p>The ‘any person’ concept is consistent with the MCE decision in December 2003.</p> <p>The thresholds established for the AEMC to either reject or accept a proposal for further consideration should ensure that only proposals that are consistent with the NEM Objectives and the Statement of Policy Principles ‘get through’.</p> <p>Any requirement to force the AEMC to progress a Rule change proposal based solely on there being a number of participants (or a particular class of participants) that support the proposal fails to understand the Rulemaking function of the AEMC as opposed to NECA’s administration role. Irrespective of how many participants support a proposal, the grounds for rejection by the AEMC should still apply (i.e. application is misconceived or lacking in substance or where the proposal is not adequately developed). If one or a number of participants disagree with the AEMC’s rejection of a proposal, then such a decision is open to judicial review.</p> <p>The AEMC’s gatekeeper role in rejecting proposed Rule changes that are underdeveloped, misconceived or lacking in substance is important for the integrity of the Rules. However, this does not allow the AEMC to implement its own policy preferences on which Rule changes should be made. If the AEMC did so, it would be subject to</p>

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		judicial review for acting with improper purpose.
6.2	AEMC should have power to initiate a Rule change proposal (presumably arising from an AEMC review) after 14 days of notifying the MCE of its review.	Not considered appropriate. If any party is concerned about a lack of progress on the part of the MCE, then that party may initiate the proposal.
6.3	NEMMCO should be consulted before public notification of a Rule change proposal	We agree – NEMMCO should be consulted to identify potential operational or implementation issues, and any NEMMCO response should be included in the notification.
7	Rule Change Process Steps	
7.1	Include the outcomes of initial consultations with ACCC and AER in the notification of the proposed Rule where it is appropriate to do so.	Consistent with good administrative practice, the AEMC would identify any competition, enforcement or economic regulation issues arising from discussions with the ACCC and AER. Also, the AEMC would consult with NEMMCO on any operational or implementation issues that may arise in relation to a Rule change proposal.
7.2	Provide for a fast track temporary Rule change procedure for emergencies.	Issue being further considered.
7.3	Scope for the AEMC during the process to change/enhance the proposed Rule change in the light of consultation, without the need to recommence the process.	Agreed - being addressed.
7.4	Scope for the AEMC to consolidate Rule change proposals.	Agreed - being addressed and similar Rule changes will be able to be consolidated before one of them is notified.
8	Information Sharing	
8.1	Concerns about breaking confidentiality. Information provided in confidence can only be used for the purpose it was provided. The outcome of legislating the uncontrolled flow of information between regulatory bodies may mean that participants will be loath to provide information.	Submissions appear to have misunderstood the legal effect of information sharing provisions. Provisions are to provide for sharing of information between the regulatory bodies (AEMC, AER and ACCC) in the interests of regulatory efficiency. Any information provided on a confidential basis to one regulatory body will only be able to be provided to the other regulatory body if the confidentiality provisions are maintained, such as not releasing such information to an external party (other than AEMC, AER and

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		ACCC).
8.2	Concerns about the AEMC having compulsory information acquisition powers.	The AEMC will not have any power of compulsion to request information. The AER will have information powers appropriate to its functions, but only where it has reason to believe that a person actually has relevant information which is not exempt on the usual grounds (i.e. legal professional privilege etc).
9	Merits Review	
9.1	Provisions under current arrangements have provided effective regime for merits review which should be retained: <ul style="list-style-type: none"> existing Code provides for merits review of ‘reviewable decisions’ by the National Electricity Tribunal (NET); ACCC consideration of merits of NECA decision in authorisation and approvals process. Appropriate process to review decisions of AEMC on Rules; and Australian Competition Tribunal review of ACCC decisions. 	<p>Whilst provisions for review applied to ‘reviewable decisions’, except for a review of NEMMCO’s SNI decision (which is now not covered under the current Code), no decision has been referred to the NET. Removal of ‘reviewable decisions’ is not seen as material particularly given the scope for judicial review.</p> <p>A system which has one regulatory body reviewing decisions of another regulatory body is not considered to be efficient or a sound governance arrangement.</p>
9.2	Scope for merits review has the potential to increase the discipline of the AEMC in arriving at a decision.	The process for the AEMC to make decisions under the proposed Rule change process to be included in the NEL (or regulations) is currently considered to provide a robust process and an appropriate discipline on the AEMC without needing the potential threat of recourse to merits review.
9.3	Implications on Gas regime of removal of merits review in electricity.	No precedents in relation to the availability of merits review in electricity are to be extended to gas. As stated previously, the issue of merits review for both electricity and gas regulatory decisions will be considered as part of the MCE response to the PC review of the Gas Access Regime.
9.4	Concern about who would have standing to challenge decisions in court.	<p>In the new legislative scheme for electricity, standing for judicial review will be given to any ‘person aggrieved’ by a decision of the AEMC, AER and NEMMCO. Since the ‘long term interests of consumers’ will be the central market objective of the legislative package, consumer groups should be able to get standing in cases which affect them.</p> <p>The question of standing will remain an issue for the courts to decide in each particular case. This is because the issue of standing and the scope of a ‘person aggrieved’ is</p>

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		determined by reference to the subject, scope and purpose of the legislation in question. A 'person aggrieved' includes a person whose interests are adversely affected by the decision. The courts have generally declined to give standing merely to persons with an intellectual or emotional attachment to an issue, or a mere desire to right a wrong.
10	Reliability Panel	
10.1	Broad support for the retention of the Reliability Panel, but concern it will just be an advisory panel to the AEMC with the AEMC having the decision making power.	Shift of role of the Reliability Panel to that of an advisory panel is consistent with the AEMC being the Rulemaker.
10.2	Rules should ensure that the membership of the Reliability Panel is representative.	Being addressed in the formulation of the NEL amendments and the Rules.
11	Access Arrangements and Rule Changes	
11.1	Current requirements to submit all Code (or Rule) changes (for all chapters except chapter 3) to the ACCC for approval under the access arrangements will significantly compromise the streamlining proposed with removal of the authorisation step.	Management of the access arrangements in view of the Code being changed into mandatory Rules is being addressed.
12	Other matters	
12.1	Key Provisions of Rules to not to be changed within a 5 year regulatory period.	Requirement for regulatory certainty understood. This matter is being addressed in the work on transmission arrangements.
12.2	Levy - Deferring discussion on the levy is of concern since costs are now being incurred by participants. SCO should determine and publish budgets for AER and AEMC and how costs will be shared.	Levy arrangements are to be given full consideration in the remainder of 2004 and early 2005.
12.3	The Code (and thus the first Rules) should be substantially simplified.	Insufficient time to progress this matter given the agreed milestones to implement the new regulatory arrangements. This is a matter for the AEMC to progress.

13 September 2004