

**NATIONAL ELECTRICITY RULES**

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**CONSULTATION PAPER**

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

**DECEMBER 2004**

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**Energy Market Reform**  
**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 conversion of the provisions of the National Electricity Code into rules made under the National Electricity Law. An exposure draft of these rules (the **National Electricity Rules** or **Rules**) has been released with this paper. SCO is interested in obtaining the views of all stakeholders on these draft rules.

The consultation process on the National Electricity Rules will comprise a consultation session on 10 December 2004, as advised in Bulletin 28. Written comments on the Rules must be provided to the SCO by 28 January 2005. Additionally, on 1 February 2005, all submitters will be given an opportunity to present their views at a consultation hearing, as advised in Bulletin 28.

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.

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 Rules to Alison Wiltshire, on (02) 6213 7484.

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## ENERGY MARKET REFORM

### NATIONAL ELECTRICITY RULES

#### Overview and Consultation

##### Overview

This paper describes the main features of the proposal to convert the provisions of the National Electricity Code (**NEC**) into statutory rules (**National Electricity Rules** or **Rules**) made under the new National Electricity Law (**new NEL**). An exposure draft of the National Electricity Rules has been released with this paper. This exposure draft is accompanied by a marked up version of the draft National Electricity Rules against the NEC and a table that identifies the amendments made and the reasons for them. The exposure draft has been endorsed for public consultation by the Ministerial Council on Energy Standing Committee of Officials (**SCO**).

##### The National Electricity Rules

An important element of the reforms announced by the Ministerial Council on Energy (**MCE**) in December 2003 was a streamlined process for changing the rules that govern the national electricity market (currently contained in the NEC) so as to remove the existing duplication as between the processes of the National Electricity Code Administrator Limited (**NECA**) and the Australian Competition and Consumer Commission (**ACCC**). The conversion of the NEC into a set of rules made under the new NEL is one of the ways by which this duplication has been minimised as this conversion obviates the need for those rules to be authorised by the ACCC under Part VII of the *Trade Practices Act 1974 (Cth)* (**TPA**).<sup>1</sup> The result of this is that the initial National Electricity Rules can be made by Ministerial notice<sup>2</sup>, and subsequent changes to the National Electricity Rules can be made by the Australian Energy Market Commission (**AEMC**) in accordance with the new NEL<sup>3</sup>, without the need for those rules and amendments to be authorised by the ACCC.

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

The proposed conversion of the NEC into the National Electricity Rules is the result of a lengthy consultation process. This process has included:

- the issue of the SCO Information Paper, "Legislative and Regulatory Framework", August 2004 (available on the MCE website);
- the issue of the SCO Consultation Paper, "Proposed National Electricity Rule Change Process", August 2004 (available on the MCE website); and
- public information sessions held from 16 to 20 August 2004 in Brisbane, Sydney, Melbourne, Adelaide and Hobart.

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<sup>1</sup> See Noel Hutley SC and Sarah Pritchard, Memorandum of Advice dated 5 August 2004 (available on the MCE website).

<sup>2</sup> See new NEL, s.89.

<sup>3</sup> See Part 7 of the new NEL.

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Since August 2004 work has progressed on the conversion of the NEC into the National Electricity Rules.

### **Future consultation**

The consultation process on the exposure draft of the National Electricity 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 facilitate an understanding of the content of the draft Rules and the changes made to the NEC in the drafting of the Rules. Written comments on the Rules must be provided to the SCO by 28 January 2005. Additionally, on 1 February 2005, all submitters will be given an opportunity to present their views at a consultation hearing, as advised in Bulletin 28.

## **1. Background**

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### **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 NEC is "in force" under the current NEL<sup>4</sup>. The current NEL is "picked up" and applied by Application Acts in each of the other participating jurisdictions - New South Wales, Victoria, Queensland and the Australian Capital Territory. The current NEL and NEC 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 National Electricity 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>5</sup>. This reform program, which was subsequently endorsed by the Council of Australian Governments in June 2004 in the Australian Energy Market Agreement, is intended to strengthen competition and encourage investment in the Australian energy market<sup>6</sup>.

One of the important features 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 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 National Electricity Rules, which are proposed to replace the NEC, have been drafted in the context of this policy decision to implement a new governance structure and streamlined rule-making process. In particular, it is consistent with the establishment of a statutory body as the rule-

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<sup>4</sup> The NEC is available at <http://www.neca.com.au/TheCode>.

<sup>5</sup> See Ministerial Council on Energy, "Report to the Council of Australian Governments – Reform of Energy Markets", 11 December 2003.

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maker, and a statutorily enshrined rule-making procedure, that the rules themselves should unambiguously be statutory rules.

The provisions of the new NEL are described in the SCO Information Paper, "National Electricity Law and National Electricity Rules", December 2004 (available on the MCE website). One of the matters described in this paper is the new rule-making procedure under the new NEL.

### **1.3 The scope of the National Electricity Rules**

It is important to note that the changes proposed in the National Electricity Rules are not aimed at changing the regulatory obligations that are currently placed on participants in the national electricity market. Rather, the changes accommodate the new institutional arrangements implemented through the new NEL (including the establishment of the new national electricity market institutions, the AEMC as the new rule-making body, and the Australian Energy Regulator (**AER**), as the new regulator for the national electricity market) and give effect to the conversion of the NEC into rules made under the new NEL. Accordingly, the substantive rights and obligations of participants in the market under the current NEL and the NEC will remain the same under the new NEL and the National Electricity Rules.

Under the reforms endorsed by the MCE, the AEMC will be empowered to make rules under the new NEL and those rules will be applied as rules in each of the participating jurisdictions (including the Commonwealth) by virtue of the operation of Application Acts passed in those jurisdictions. As rules made under a law, these rules will be binding on any persons to whom they are expressed to apply (including electricity industry participants and NEMMCO).

This paper describes the changes that have been made to the NEC provisions to convert them into the initial National Electricity Rules, which will be made by way of a Ministerial notice.

## **2. Change in juridical basis**

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The NEC is currently authorised by the ACCC under Part VII of the TPA. The reason for this is that, at least as originally conceived, the NEC was seen as a code of conduct – ie. a set of "arrangements" – between electricity industry participants.<sup>7</sup> As a set of arrangements, certain provisions of the NEC potentially gave rise to breaches of Part IV of the TPA in relation to anti-competitive arrangements, price-fixing, exclusionary arrangements and exclusive dealing. It was in order to avoid contravening these prohibitions that the ACCC was requested to authorise the NEC and any subsequent

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<sup>6</sup> Ministerial Council on Energy Communiqué, 11 December 2003.

<sup>7</sup> Having said this, it is recognised that the fact that the NEC receives some statutory support under the current NEL (eg. in terms of its enforcement) has given rise to the argument that the NEC is not merely a set of arrangements between electricity industry participants but has some of the characteristics of a statutory instrument.

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amendments to it. However, this has given rise to duplication as between the processes of the existing rule-maker (NECA) and the ACCC (as the body responsible for granting authorisation of the NEC and changes to it).

The SCO has received advice from Senior Counsel<sup>8</sup> that, if the obligations of Code participants under the NEC are drafted as mandatory rules made under the National Electricity Law, then the principal prohibitions contained in Part IV of the TPA will not apply to actions taken by a Code participant in compliance with those rules.

The reason for this is that the prohibitions contained in Part IV depend on there being a contract, arrangement, understanding or transaction – ie. they depend on the existence of consensual arrangements between Code participants. By converting the NEC into a set of rules made under the National Electricity Law, the obligations previously imposed on Code participants under the arrangements constituted by the NEC will now be imposed by force of law, and so Code participants will be required to comply with them as a matter of law. By removing any underlying consensual basis of the arrangements contained in the NEC, there is no contract, arrangement, understanding or transaction which attracts the operation of the Part IV prohibitions. A consequence of this is that there is no need to have the rules or amendments to them authorised by the ACCC.

A number of the changes that have been made to the NEC for the purposes of converting them into the National Electricity Rules are directed at supporting the removal of any underlying consensual basis of the arrangements contained in the NEC. These changes include the following:

- Clause 1.1.1 has been amended to remove the reference to the Rules as constituting a code of conduct because the National Electricity Rules apply as law rather than pursuant to any arrangement between industry participants.<sup>9</sup>
- Clause 1.2, which describes the genesis of the NEC and its development as a code of conduct that is subject to authorisation under the TPA, has been amended to simply state that the Rules are made under the new NEL and may be amended in accordance with the new NEL.
- Clause 2.8.2, which provides that upon registration under the NEC an industry participant binds itself to comply with and perform any duties and obligations imposed by the NEC, and that the NEC does not of itself constitute a contract between two or more such persons, has been deleted because the Rules bind those persons to whom they purport to apply (including industry participants and NEMMCO) by virtue of them applying as law and not because the obligations under them are voluntarily assumed by those persons through becoming registered or otherwise agreeing to be bound by the Rules (see also deleted clauses 1.6.4 and 2.1.2(a)).

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<sup>8</sup> Noel Hutley SC and Sarah Pritchard, Memorandum of Advice dated 5 August 2004 (available on the MCE website).

<sup>9</sup> See new NEL, s.8.

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- "Application" provisions (eg. see clauses 2.1.1, 3.1.3, 4.1.1(a), 5.1.1, 7.1.1 and 8.1.2) have been modified for similar reasons.
  - The manner in which persons other than Code participants become bound by the Rules has been modified from the manner that applied under the NEC – because the Rules apply as law, there is no need to require persons who are not registered under Chapter 2 to agree to comply with the provisions of the Rules by way of contract. Instead, such persons are bound directly by the Rules applying to them as law. So, for example, it is no longer necessary for the Rules to impose an obligation on applicants to agree to be jointly and severally liable with intermediaries (see previous clause 2.9.3(b)(3)) or for Metering Providers to enter into a deed with NEMMCO agreeing to be bound by the Rules (see previous clause S7.4.1(c)). Such persons can instead be bound directly by the Rules applying to them as law (this is the effect of clause 2.9.3(d)(5), which applies to applicants, and new clause 7.4.2(bb), which applies to Metering Providers).

However, merely because the National Electricity Rules purport, in accordance with their terms, to bind all persons to whom they apply does not mean that anyone can enforce the Rules against such persons or, indeed, that the Rules are enforceable against all such persons. Instead, the new NEL provides that only the AER may bring proceedings in a relevant court in respect of a breach of a provision of the Rules that is not an offence provision, and that such proceedings may only be brought against "relevant participants".<sup>10</sup> For these purposes, a "relevant participant" is defined to mean a Registered Participant, NEMMCO or a person prescribed by regulations made under the new NEL to be a relevant participant.<sup>11</sup> The effect of this is that the National Electricity Rules will only be able to be enforced against Registered Participants and NEMMCO (ie. persons who constituted Code participants under the NEC), as well as against categories of persons prescribed by regulation. In so far as Code participants are concerned, this is simply a continuation of the position under the NEC. However, consideration is being given to the appropriate treatment of certain other electricity industry participants (such as Metering Providers, Connection Applicants and applicants in the "intermediary" context) who will now be directly bound by the Rules. It may be that these participants will need to be prescribed by regulation as "relevant participants" so that the Rules can be enforced against them (at least in some respects).

### **3. Registered Participants and NEMMCO**

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The new NEL defines "Registered Participants" as persons who are registered as such by NEMMCO under the new NEL and the Rules (eg. as is the case with Generators, Network Service Providers and Market Customers) or who are registered as such by NEMMCO otherwise in accordance with the Rules (eg. as is the case with First-Tier and Second-Tier

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<sup>10</sup> See new NEL, ss.58(1), 60(1).

<sup>11</sup> New NEL, s.2.

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Customers).<sup>12</sup> NEMMCO is not a Registered Participant for these purposes and is therefore specifically referred to in the Rules where the Rules are intended to confer rights or impose obligations on it.

In addition, the registration provisions in Chapter 2 and the associated definitions in Chapter 10 have been amended:

- to provide for consistency with the prohibitions on conducting specified activities without being registered (see clauses 2.2.1(a), 2.3.1(c) and 2.5.1(a), and sections 10(1), (2) and (4) of the new NEL); and
- for the purposes of internal consistency.

The functions of NEMMCO and the manner in which those functions are to be performed (previously contained in clause 1.6) have been uplifted into the new NEL (see sections 49 and 50). In addition, section 51 of the new NEL provides that NEMMCO is not to be taken as controlling or operating a generating, transmission or distribution system by reason only of it performing its functions under the new NEL and the Rules. Accordingly, clause 2.5.1(c), which exempted NEMMCO from the requirement to be registered as a Network Service Provider, has been deleted.

#### **4. Reallocation of functions**

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The new governance arrangements for the national electricity market have resulted in the establishment of two new national electricity market institutions (the AEMC and the AER) which are to assume many of the functions currently performed by NECA and the ACCC. NECA will ultimately be wound up, and has no functions to perform under the National Electricity Rules. In addition, the National Electricity Tribunal is being abolished.

These new arrangements have necessitated a number of changes in relation to the bodies to which functions under the National Electricity Rules are allocated. Broadly speaking:

- The AER will take over the ACCC's responsibility for:
  - the economic regulation of transmission (Chapter 6);
  - the development, promulgation, maintenance and application of the regulatory test (clauses 5.6.5A, 5.6.6, 5.6.6A); and
  - the development and amendment of transmission ring-fencing guidelines (clause 6.20.2(a)).
- The AER will take over NECA's responsibility for:
  - developing and issuing exemptions from the requirement to register as a Network Service Provider (clause 2.5.1(d)-(f));

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<sup>12</sup> New NEL, s.2.

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- monitoring activities by participants in the national electricity market, such as inflexibility nominations (clause 3.8.19(b)(2)), rebidding behaviour (clause 3.8.22(c)(3)), failure to conform with dispatch instructions (clause 3.8.23(d), (h)) and significant variations between forecast and actual spot prices (clause 3.13.7)<sup>13</sup>;
  - enforcing the new NEL and the Rules generally (see clause 8.2.1(d)) and in specific instances, eg. on the request of NEMMCO the AER is required to seek a court order to physically disconnect loads for which a defaulting Market Participant is financially responsible (clause 3.15.21(j)); and
  - the dispute resolution process (see section 12 below).
- The AEMC will take over NECA's responsibility for:
    - rule making – the new rule making procedure is now contained in the new NEL (see below);
    - incidental spot market functions, eg. approval of the operational timetable (clause 3.4.3(a)), the development of the administered price cap schedule (clause 3.14.1(a)), and the determination of compensation in relation to the application of administered prices (clause 3.14.6(b)-(d));
    - the approval of market regions<sup>14</sup> (clause 3.5);
    - undertaking certain reviews (eg. the mandatory restrictions review referred to in clause 3.12A.9); and
    - the Advocacy Panel (see section 15 below).

The courts will also assume some of the functions previously performed by the National Electricity Tribunal, eg. in relation to disconnection orders (clause 3.15.21(j), 5.9.3-5.9.4A) and intervention settlements (clause 3.15.10C(c)).

## 5. Rule making

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As stated above, the AEMC will be the rule-maker under the new NEL and will take over NECA's functions in this regard. Because the new rule change procedure is now set out in Part 7 of the new NEL, the whole of clause 8.3 has been deleted.

The rule-making function of the AEMC extends to the making of derogations, which will go through the same rule change process as other Rule changes. There are two types of derogations:

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<sup>13</sup> See also clauses 3.19, 4.8.9(e), (i), 4.8.15(b), 4.15(k), 5.9.3(b), 7.2.8(f) and 8.7.2.

<sup>14</sup> The process of determining regional boundaries and the location of regional reference nodes is currently being reconsidered as a policy matter and reviews of these matters have been suspended pending the determination of the policy position: see clause 3.5.4.

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- Participant derogations – these are now included in the new Chapter 8A and comprise the derogations relating to the provision of non-scheduled reserves by NEMMCO (this derogation has been extended to 30 June 2006 to conform with the extended reliability safety net termination date), the formulation of network constraint (this derogation has been extended to 31 December 2005) and metering for Hydro Tasmania.<sup>15</sup> Because the rule-making procedure in the new NEL extends to the making of participant derogations, the whole of clause 8.4 has been deleted.
  - Jurisdictional derogations, which are contained in Chapter 9 - clauses 9.1.1(c) to (h) have been deleted because jurisdictional derogations are rules which are subject to the new rule-making procedure in the new NEL, and so changes to existing jurisdictional derogations or the introduction of new jurisdictional derogations will be undertaken in accordance with that procedure. In addition, the new NEL defines the concept of a jurisdictional derogation, provides that only the relevant Minister can apply for a jurisdictional derogation, and specifies certain matters that must be taken into account by the AEMC in deciding whether or not to approve a jurisdictional derogation or a change to a jurisdictional derogation.<sup>16</sup> A new Part F of Chapter 9, which contains the Tasmanian derogations, has been inserted because Tasmania will join the national electricity market in mid-2005.

In so far as the jurisdictional derogations are concerned, the following principal changes have been made to them:

- the objectives clauses for each set of jurisdictional derogations have been deleted because (due to the passage of time) these clauses now contain a description of only some of the jurisdictional derogations – they are no longer an exhaustive list and they are not required in any event because subsequent provisions set out the actual terms of the relevant derogations;
- all derogations which have expired or which have ceased to have any practical operation have been deleted (as a consequence, many definitions contained in the derogations have also become redundant and have been deleted);
- some derogations will have expired by the time the National Electricity Rules come into force (eg. those derogations which are currently expressed to expire on 31 December 2004) – these have also been deleted;
- the metering derogations for some jurisdictions have been extended in anticipation of the ACCC granting final authorisation to these extensions – both the Victorian and New South Wales metering derogations have been extended to 31 December 2006 (clauses 9.9A.2 and 9.17A.O);

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<sup>15</sup> The derogations contained in Parts 1-6 have been deleted as they have expired.

<sup>16</sup> New NEL, s.88.

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- the derogations have been amended to accommodate changed circumstances – for example, the introduction of full retail contestability (eg. see clauses 9.12.2, 9.26.2(b)), the development of new regulatory arrangements (eg. see clause 9.14.1), the construction of the Armidale-Tarong interconnector (clauses 9.16.4, 9.38.4), and the making of new regulatory determinations (eg. see clauses 9.17A.1, 9.17A.2); and
  - some derogations have been amended to accommodate changes to other provisions of the rules – for example, the Victorian and Queensland derogations have been amended to properly accommodate the changes that were made to the provisions of Schedule 5.2 as part of the technical standards that took effect on 16 November 2003 (Victoria: Schedule 9A3, pars 4, 5, 7, 8, 13, 14, 15, 16; Queensland: cl. 9.37.10, 9.37.12, 9.37.21).

Schedule 9G1 now sets out the metering transitional arrangements that were previously contained in Schedule 9F1. Clauses 1(b), 2, 4, 5.2 and 6-10 of that Schedule are no longer relevant or have ceased to have operation because the transitional period to which they relate has expired. Accordingly, they have been deleted.

In addition, the ancillary service provisions (previously contained in Part 9G) have expired and so have been deleted.

## **6. Reliability Panel**

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The new NEL will impose an obligation on the AEMC to establish a Reliability Panel.<sup>17</sup> Under new provisions contained in the Rules, an AEMC commissioner is to be the chairperson of the Reliability Panel. The other members are to comprise a NEMMCO representative and a minimum of five "sectoral" representatives (with there being at least one representative of each of Generators, Market Customers, Transmission Network Service Providers, Distribution Network Service Providers and end-use customers) (see clause 8.8.2(a)). The sectoral representatives no longer need to be independent of system operators because system operators are network operators and will be represented on the Reliability Panel as such (see clause 8.8.2(c)).

New clause 8.8.2(c1) deals with the appointment and removal by the AEMC of the industry sector representatives on the Reliability Panel. It requires consultation with members of the relevant industry sector, and the agreement of at least one-third in their number, in relation to the appointment and removal of their representatives. Independence from NEMMCO (rather than independence from the regulator, rule-maker or Registered Participants) has been included as a ground for removing an industry sector representative from the Reliability Panel (see clause 8.8.2(d)). This is because, given the intended representative nature of the Reliability Panel, independence from Registered Participants is

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<sup>17</sup> New NEL, s.37 (this has resulted in a modification of clause 8.8.1(a)).

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no longer appropriate. A new clause 8.8.2(g) also requires the Reliability Panel to make its decisions by majority, with the chairperson having a casting vote.

As a result of the inclusion of the new rule change procedure in Part 7 of the new NEL, the Reliability Panel has standing to request that rule changes be made to the extent the rule change relates to its functions.<sup>18</sup> However, any rule changes recommended by the Reliability Panel must go through this rule change procedure and the making by the Reliability Panel of recommendations in relation to rule changes will no longer, of itself, initiate a rule change.

## **7. Market and Code objectives**

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The market objectives and Code objectives (previously contained in clauses 1.3 and 1.4) have been deleted. The new NEL<sup>19</sup> now includes a "national electricity market objective", which is to apply in place of these objectives. The national electricity market objective 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".

This composite definition encapsulates all of the components of the more detailed market objectives previously contained in clause 1.3 of the NEC. In addition, it effectively subsumes the Code objectives (to the extent relevant) (see clauses 2.2.1(c), 2.1.5(d), 8.2.1(e)(1)).<sup>20</sup> As a result of the introduction of this overriding statutory objective, it is no longer appropriate to specify more specific objectives in some chapters of the Rules (this is the reason for the deletion, for example, of clause 3.1.2).

## **8. Protected provisions**

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The concept of protected provisions is no longer relevant. Any provisions of the NEC that, under the new regime, are not to be subject to alteration through the rule change procedure have instead been included as provisions of the new NEL. Examples include NEMMCO's functions and the system security provisions referred to in section 3 above and section 9 below, respectively.

## **9. System security and reliability**

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The new NEL provides for the Minister of a participating jurisdiction to appoint a jurisdictional system security coordinator (previously called a Jurisdictional Co-ordinator).<sup>21</sup>

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<sup>18</sup> New NEL, s.90(4) (see also s.37).

<sup>19</sup> See new NEL, s.6.

<sup>20</sup> In fact, in a number of cases, the provisions of the NEC that referred to the Code objectives have been deleted.

<sup>21</sup> New NEL, s. 109. This has necessitated the amendment of clause 4.3.2(e).

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Part 8 of the new NEL includes a number of provisions that are intended to enable power system security to be maintained through load shedding. These provisions impose an obligation on the jurisdictional system security coordinator for a participating jurisdiction to provide load shedding schedules (and any updates to them) to NEMMCO and an obligation on NEMMCO to provide the jurisdictional system security coordinator with the load shedding procedures (as updated from time to time) for its jurisdiction. They also require NEMMCO to liaise with Ministers (as well as jurisdictional system security coordinators) in the management of a declared emergency supply situation. These new provisions have been included in the NEL so as to entrench them and not subject them to change through the rule change procedure. This is consistent with their previous status as "protected provisions" under the NEC. It has therefore been necessary to amend clauses 4.3.2(f) to (l) (and delete clauses 4.3.2(m) and 4.8.9(m)) so as to render the provisions in the Rules consistent with these new provisions in the new NEL.

In addition, the date after which NEMMCO may not enter into further reserve contracts has been extended from 1 July 2005 to 1 July 2006 (see clause 3.12.1(a), (b)). Because NEMMCO's reserve trading role has been extended, the relevant NEMMCO obligations and powers under clause 4.8.9(h) now cease when its right to enter reserve contracts ceases (ie 1 July 2006).

## **10. Specific TPA-related amendments**

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Advice provided to the SCO by Senior Counsel<sup>22</sup> states that if the mandatory rules made under the National Electricity Law specify the terms (including price) on which electricity, ancillary services or other goods or services are to be supplied or acquired, then any contract (or transaction) that may arise as a result of those rules will not have a proscribed purpose or effect for the purposes of the TPA prohibitions in Part IV (and so will not result in a breach of those prohibitions) because it is the mandatory rules, and not any such contract (or transaction), which would have that purpose or effect.

As a result:

- clause 3.18.2(g) has been redrafted to require (as opposed to permit) NEMMCO to exclude certain persons from participating in settlements residue auctions – the conversion of the exclusion of the nominated persons from a discretionary requirement under the NEC to a mandatory requirement under the Rules removes any potential concern that the arrangements under which such persons are excluded may constitute exclusionary provisions for the purposes of the TPA; and
- new clause 7.2.8(d)(1) requires NEMMCO to provide and operate a B2B e-Hub and requires Registered Participants to use this Hub as required in the Market Settlement and Transfer Solution Procedures – the inclusion of this mandatory requirement in the Rules removes any potential concern that the current

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<sup>22</sup> Noel Hutley SC and Sarah Pritchard, Memorandum of Advice dated 5 August 2004 (available on the MCE website).

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requirement to use NEMMCO's B2B e-Hub may constitute exclusive dealing for the purposes of the TPA.

## **11. Reviewable decisions**

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The concept of reviewable decisions is no longer relevant. Instead, decisions of NEMMCO, the AER and AEMC will be subject to judicial review.<sup>23</sup> However, the Rules have been drafted on the basis that decisions which were previously NEMMCO reviewable decisions should continue to be excluded from the dispute resolution process in clause 8.2 (see clause 8.2.1(a), (h)). The reason for this is that such decisions are not amenable for dispute resolution, as opposed to judicial review.

## **12. Dispute resolution**

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Because NECA is being wound up, its function of appointing a Dispute Resolution Adviser has been allocated to the AER (see clause 8.2.2(a)). The Rules also reflect the position that the Dispute Resolution Adviser should be independent of the regulator (the AER) (see clause 8.2.2(b)(4)). This is a departure from the position under the NEC where the Dispute Resolution Adviser did not need to be independent of NECA. Because the regulator (now the AER rather than NECA) will no longer be party to a dispute under the dispute resolution procedure<sup>24</sup>, there is no need to provide for the Dispute Resolution Adviser to engage an independent third party (the "Alternate") to take over the Adviser's function of establishing the necessary dispute resolution panel in respect of disputes to which the regulator is a party (accordingly, clause 8.2.6A(b) has been deleted).

## **13. Enforcement**

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The AER is responsible for enforcing compliance with the National Electricity Rules under the new NEL by way of application to the courts.<sup>25</sup>

Under the new NEL a court may direct that a Registered Participant who is in breach of the National Electricity Rules must be disconnected.<sup>26</sup> This has resulted in some amendments being made to Chapter 5.<sup>27</sup>

Under the new NEL a court may also direct that a Registered Participant who is in breach of the National Electricity Rules be suspended from purchasing or supplying electricity

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<sup>23</sup> See new NEL, s. 68.

<sup>24</sup> See clauses 8.2.1(a), (a1). This is because decisions of the AER are to be subject to judicial review: see section 11 above.

<sup>25</sup> New NEL, s. 60; see also TPA, s.44AAG.

<sup>26</sup> New NEL, s. 61(a).

<sup>27</sup> See clauses 5.9.3(a)(1), 5.9.4(a), (d) and new clause 5.9.4A (which is substantially the same as previous clause 8.5.4(f)(1)).

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through the wholesale exchange.<sup>28</sup> Clause 3.15.21(j) has therefore been amended to include a requirement for the AER to seek an order from a court to physically disconnect market loads for which a defaulting Market Participant is financially responsible when requested to do so by NEMMCO.<sup>29</sup>

## **14. Transmission-related changes**

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The Rules contain the following new provisions which result from reforms developed by the MCE working group on transmission:

- the statement of opportunities is now to be published by 31 October each year (rather than 31 July) (see clause 3.13.3(o)); and
- an annual national transmission review is required to be conducted by NEMMCO each year and the results of this review are required to be published in an Annual National Transmission Statement by 31 October each year – this review replaces the annual interconnector review previously undertaken by the Inter-regional Planning Committee (see clause 5.6.5).

## **15. Advocacy Panel**

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NECA's functions in relation to the Advocacy Panel have been allocated to the AEMC (see clause 8.10). The Advocacy Panel has already been established under the NEC and will be continued in existence through a transitional provision made under the new NEL. The funding arrangements for end-user advocacy are currently the subject of separate consideration by the MCE. However, the AEMC will be responsible for funding the expenditure requirements of the Advocacy Panel until 30 June 2006.

## **16. Indemnities**

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The indemnities that currently exist in the NEC have largely been retained. The exception is clause 3.2.7 which has been deleted because it conflicts with the statutory indemnities in the new NEL.<sup>30</sup> In addition, other indemnities currently contained in the NEC have been "broadened", for the purposes of the Rules, to apply in respect of "all persons". An example is clause 4.9.1(g) which now excludes the liability of NEMMCO to "any person" (not just Registered Participants) for differences between load forecasts and actual load. This "broadening" is necessary because the National Electricity Rules apply as law and (unlike the NEC) potentially confer rights on persons other than Registered Participants.

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<sup>28</sup> New NEL, s. 61(b).

<sup>29</sup> A new clause 3.15.21(k) has been inserted which declares a default event to be a breach of the Rules, thereby giving rise to the jurisdiction of the court under section 61 of the new NEL.

<sup>30</sup> See new NEL, ss.115, 118.

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## 17. Other changes for conformity with, or because they are now provided for in, the new NEL

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The table below sets out other provisions of the National Electricity Rules that have been modified from the corresponding provisions in the NEC in order to conform with, or because they are now provided for in, the new NEL:

Rule Provision	New NEL Provision
1.10	Deleted because the civil penalties fund is being wound up and a transitional provision under the new NEL will provide that all moneys standing to the credit of that fund will vest in the AEMC.
1.11(b), (b)(2)	References to amounts credited to the relevant Rule funds have been replaced by references to amounts paid into the relevant Rule funds (see section 54 of the new NEL: Payments into Rule funds).
8.2.1(b), (c)	Deleted because their subject matter is dealt with in section 71 of the new NEL (Obligations under Rules to make payments).
8.2.1(g)	Modified to accommodate section 58(2) of the new NEL (right of a party to a Rules dispute to bring court proceedings if the Rules so provide).
8.2.11	Deleted because its subject matter is dealt with in section 70(1) (Appeals on questions of law).
8.5.1	Deleted because the investigatory and information gathering powers of the AER are dealt with in Division 2 of Part 3 of the new NEL. In addition, the National Electricity Tribunal is being abolished and the courts have such information requisitioning powers as are conferred on them under the applicable rules of court.
8.5.4	Deleted because the new NEL provides for the manner in which the AER is to enforce alleged breaches of the Rules (clause 8.5.4(f)(1) has been relocated to become clause 5.9.4A).
8.5.7	Deleted because its subject matter (attribution of actions of officers and employees) is dealt with in section 85 of the new NEL (in the context of a breach of a civil penalty provision).
8.7.3	Deleted because the AER and the AEMC are subject to provisions regarding confidential information under the TPA (s. 44AAF) and the Australian Energy Market Commission Establishment Act (s. 24), respectively.

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## 18. Miscellaneous changes

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A number of miscellaneous changes have also been made in the process of converting the NEC into the National Electricity Rules. These include:

- The replacement of "contractual" type language with language that is more appropriate to a statutory instrument - the spot market transactions arising out of Chapter 3 of the Rules create obligations binding on Market Participants and NEMMCO by virtue of the terms of the Rules and the enforcement provisions contained in the Rules themselves and in the new NEL. These transactions are not contractual in nature, contrary to what might otherwise be implied when the NEC refers to matters such as "bids", "offers" and their "acceptance". The consequence of bids and offers being made under the NEC is that they are included in the central dispatch process by NEMMCO – the bids and offers do not constitute offers in a contractual sense. In order to reflect this a number of amendments have been made for the purposes of the Rules to the provisions of Chapter 3<sup>31</sup> and the associated definitions in Chapter 10.<sup>32</sup>
- Various reporting requirements have been deleted (eg. see previous clauses 4.8.9(g), 8.5.8, 8.7.4) because it is proposed, in the case of the AEMC, that regulations will be made under the Australian Energy Market Commission Establishment Act 2004 (SA) requiring such matters to be reported on in the AEMC's annual report and because, in the case of the AER, it is expected that similar matters will be included in the AER's annual report.
- Clarification of references to transmission and distribution - some provisions of the NEC were only intended to refer to transmission (as opposed to distribution) (eg. see clauses 5.6.2A(5), 5.6.3(a)(5), 5.6.3(l), (m), 5.6.6, 5.6.6A) whereas others were intended to refer to both transmission and distribution but were inadvertently confined to transmission (see, eg., the definitions of "entry costs" and "exit costs" in Chapter 10) (the definitions of "new distribution network investment", "new large distribution network asset", "new large network asset", "new large transmission network asset", "new network investment", "new small distribution network asset", "new small network asset", and "new small transmission network asset" have also all been amended to properly reflect the distinction between distribution and transmission assets as appropriate).
- Throughout the Rules the terms "Transmission Network Service Provider" and "Distribution Network Service Provider" are used instead of the terms "Transmission Network Owner" and "Distribution Network Owner" because the former encapsulate the latter.

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<sup>31</sup> Eg. See clauses 3.8.2(d), 3.8.5(a), 3.8.6, 3.8.6A, 3.8.7, 3.8.7A, 3.8.9(c), 3.15.11.

<sup>32</sup> Eg. See the revised definition of "dispatch", "dispatch bid", "enablement limit", "generation dispatch offer", "market ancillary service offer", "network dispatch offer", "response break point" and "response capability" in Chapter 10.

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- A number of provisions have been deleted or modified on the basis that they have ceased to have any application or, at least, the full application originally attributed to them – for example, because the period of time to which they relate has expired (eg. see clause 3.6.2B – pre 1 July 2003 inter-regional loss factors), because the relevant obligations imposed by them have been fulfilled (eg. see clause 3.12A.1(a) – development of a mandatory restrictions trading system) or because the arrangements to which they relate have expired (eg. see clause 6.2.1(a), (c), (e) and (f) – interim transmission regulatory arrangements).
  - Provisions of a transitional nature (eg. which relate either to actions taken prior to the commencement of the NEC or to actions taken prior to subsequent amendments to the NEC) have been deleted (eg. see clause 1.13(a), 3.9.3(c)), but the validity of such actions will be preserved through transitional provisions made under the new NEL.
  - The requirements on NECA to undertake various (typically once-off) reviews have been deleted on the basis that the new NEL provides the appropriate structure for the conduct of such reviews. Under the new NEL, the MCE may direct the AEMC to conduct a review into any matter relating to the national electricity market, the operation and effectiveness of the Rules or any matter relating to the Rules.<sup>33</sup> Alternatively, the AEMC is empowered on its own motion to conduct a review into the operation and effectiveness of the Rules or any matter relating to the Rules.<sup>34</sup> Reviews that have been deleted on this basis in the process of converting the NEC into the National Electricity Rules include the review of the market information provisions (previous clause 3.13.9), the review of market ancillary services (previous clause 3.13.11), the review of the administered price cap provisions (previous clause 3.14.2(g)) and the review of Market Network Service Provider financial risk (previous clause 5.2.3(h)). To the extent that such matters are reviewed by the AEMC (whether or not at the direction of MCE) and the review results in the AEMC recommending a possible rule change, that rule change could be initiated by any person other than the AEMC. For example, the MCE or an industry participant could decide to initiate the recommended rule change. In addition, the subject matter of some of the reviews (eg. the review of the network planning and development provisions of the NEC referred to in previous clause 5.6.6C) is the subject of separate MCE work streams.
  - A number of terms previously defined in the NEC are not used in the National Electricity Rules and so have been deleted - this has occurred because some of these terms were not actually used in the NEC or because the process of converting NEC into the National Electricity Rules has resulted in the deletion of the provisions of the NEC that used those terms. In addition, some new definitions

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<sup>33</sup> New NEL, s.40.

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

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have been included either to accommodate the introduction of new concepts (such as the AER, the AEMC and the B2B e-Hub) or to define terms that are used in the NEC and continue to be of relevance to the National Electricity Rules (eg. "market generating unit", "negotiated use of system charges", "reallocated quantity", "trading margin" and "typical accrual").

- The correction of manifest errors and cross-referencing errors.

## **19. Drafting changes**

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A number of drafting changes have also been made. These include the following:

- references to Code concepts have been replaced by references to Rules concepts eg. references to "Code" have been changed to references to "Rules", references to "Code Participant" have been changed to references to "Registered Participant", references to "Code funds" have been changed to references to "Rule funds" and references to "Code consultation procedures" have been changed to references to "Rules consultation procedures";
- the Rules have been drafted so as to clearly identify when they are conferring rights or imposing obligations (eg. "must" has frequently been substituted for "should" or "will");
- amendments have been made for consistency between provisions of the Rules and with the definitions of terms contained in Chapter 10; and
- amendments have been made for the purposes of clarifying the operation of certain provisions of the Rules.

## **20. Access**

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The MCE is currently reviewing the access arrangements that are to apply to the national electricity market (as well as to gas). These arrangements will be settled by the time the National Electricity Rules commence and (to the extent necessary) will be reflected in the National Electricity Rules. Accordingly, except for the deletion of clause 1.12 which is largely descriptive, the other provisions of the NEC relating to access<sup>35</sup> have been retained in the draft Rules until the access arrangements have been finalised.

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<sup>35</sup> See clauses 2.5.1(b), 2.5.1(d), 2.5.2(a)(ii), 5.2.3(a), 5.2.3(a1) and 5.2.3(a2), Schedules 5.8 and 5.9.