



Manager – Energy Market Reform Team
National Energy Market Branch
Department of Industry, Tourism and Resources
GPO Box 9839
Canberra ACT 2601

23 December 2004

Dear Energy Market Reform Team,

Please find following the combined environment groups' submission to the Draft National Electricity Law. You will note our concerns regarding the artificially accelerated schedule for consultation.

In particular, we note the hurried explanation of the proposed new National Electricity Law objective distributed today via email, the day before the deadline for submissions on this important matter.

I wish to make a presentation on this submission at the pre-finalisation hearing on January 7.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Jeff Angel".

Jeff Angel
Executive Director
Total Environment Centre

On behalf of:

Alternative Technology Association
Australian Conservation Foundation

Climate Action Network Australia
WWF Australia



SUBMISSION TO DRAFT NATIONAL ELECTRICITY LAW

December 23 2004

For further information contact:

Total Environment Centre
2/362 Kent St,
Sydney, 2000
Ph: 02 9299 5680
F: 02 9299 4411
www.tec.org.au

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SUBMISSION TO DRAFT NATIONAL ELECTRICITY LAW

1. Introduction

The proposed amendments to the National Electricity Law (NEL) constitute significant changes to the architecture of the National Electricity Market (NEM). They also provide a timely opportunity for the public to reflect on the record of the NEM to date and whether it is delivering the promise of benefits electricity consumers and the public.

The proposals for the new NEL go well beyond the mere transfer of rule making and regulatory functions to the new Australian Energy Market Commission and the Australian Energy Regulator. They fundamentally change the structure and accountability of the market. The relocation of the National Electricity Code (Code) into the NEL as Rules would circumvent the Trade Practices Act (TPA) and the role of the Australian Competition and Consumer Commission (ACCC) as 'competition watchdog'. The removal of any merits review would give *carte blanche* to a wide array of practices prejudicial to the public interest and allow system operators virtual unaccountability. The absence of any reference to the public benefit in the proposed NEL objective circumvents the core principle and driver for economic reform.

On the record of the NEM to date, heavy doubts hang over the legitimacy, authority and competency of the NEM authorities. Regulatory debacles such as the SNI/Murraylink affair confirm that the NEM lacks basic economic formulas and that regulators lack a basic understanding of a Code which is proposed to become law under the NEL. The Ministerial Council on Energy's (MCE's) ongoing 'reform' program is losing its social licence to operate. Poor consultation processes and timetables, and the sweeping disregard of consumer, community and environment group concerns is symptomatic of a deteriorating process. Twenty national and state environment, consumer and social welfare groups have proposed a reform package.

In this context, the suspension of the reform program pending a COAG audit requires consideration. This could provide the basis for the effort to be salvaged. COAG and the MCE would provide for the national importance of ensuring the success, now endangered, of this reform initiative if it arranged for the Productivity Commission or a similar authoritative and appropriately resourced agency or panel to complete a full and urgent review of the NEM, of the electricity access regime, and of options for development. The MCE would then have at its disposal the results of a formal, well-conducted public investigation before finalising decisions which will otherwise be piecemeal, heavily compromised, constitutionally doubtful.

2. The short-circuiting of public participation

The current schedule for ‘consultation’ on immensely significant changes to the National Electricity Market (NEM) is clearly designed to elide public comment and participation. The current timetable allows a mere 3 week period for responses to the new National Electricity Law (new NEL). This is highly irregular, considering the magnitude of the changes proposed.

It seems timely to remind the bureaucrats and politicians driving this process that *end-users pay all the costs of electricity supply*. The power reform initiative, however, is being pursued in effective isolation from public participation, independent review and organized scientific research.

It has been recognised by the Ministerial Council on Energy (MCE) that the design and development of the NEM has suffered enormously from the lack of adequate participation by end-users. Rather than improving on these poor practices, however, the process continues to be ‘black-boxed’ to the detriment of MCE’s credibility and the public good. This leaves the NEM open to doubts as to its social legitimacy.

A moratorium on the proposed new NEL and Rules should be put in place until key issues are resolved through a Productivity Commission or Senate Inquiry. The proposed new NEL and National Electricity Market Rules (Rules) should not be presented to the South Australian Parliament until appropriate consultation procedures are in place to ensure proper public scrutiny of the proposed changes.

3. The new NEM objective excludes public benefits

New NEM objective inappropriately excludes public benefits

The new NEM objective inappropriately excludes the consideration of public benefits.

The National Electricity Code was authorised under section 88(1) of the Trade Practices Act (TPA) which required the ACCC to be satisfied that the benefits to the public outweighed the detriments to the lessening of competition that would flow from such an arrangement under section 90(6). The new NEL effectively protects this market arrangement from TPA risk and, as currently proposed, subverts the need for the market arrangement to be of public benefit. This is highly inappropriate particularly as such a market arrangement will be enshrined in law under the new NEL. It is necessary that public benefits are considered as a highest order objective under the NEL.

The lack of mention of public benefits in the NEM objective would flow down to the Rule making process and erode confidence in the AEMC’s ability to effectively consider Code Change Proposals. If the ACCC is to rely on the AEMC to undertake consultation

processes, the Rule Making Criteria must be widened to include public benefits, including environmental and social benefits, to reflect current jurisprudence.

It is noted that the Courts have, in past cases, taken a very broad view of what constitutes a public benefit and that the ACCC considers all benefits, be they economic, financial or environmental, in determining to authorise arrangements. The new NEM objective should reflect this position by including the mention of public benefits.

New NEM objective should include environment and sustainability

The new NEM objective should include environmental and sustainability goals as a core requirement of the efficient investment in and use of electricity services. The following amended NEM objective is therefore recommended to replace Section 6:

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 **and the public** with respect to price, quality, reliability, **environment, sustainability**, safety and security.

Ecologically sustainable development (ESD) should be a specific NEM objective¹

Ecologically sustainable development should be a core objective of the NEM within the meaning of the principles of ESD as set out in Section 3a of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. It is common to incorporate principles of ESD into legislation. For example, see section 3 objects of the Native Vegetation Act 2003 which lists 5 objects bound by ESD. In NSW alone there are over 50 legislative instruments incorporating ESD principles.

AER is not bound to have regard to the new NEM objective

The proposed amendments do not provide to the new national regulator, the AER, with the duty to have regard to the market objective in performing its enforcement functions. This is a bizarre omission which reflects the failure of the market players to embrace accountability.

AEMC can choose not to have regard to market objective in making of rules

While the AEMC is broadly bound to have regard to the NEM objective², this obligation is eschewed in the test to be applied by the AEMC in the making of Rules.³ The new Law tells us that the AEMC can:

¹ For further explanation of this objective, see the National Electricity Law Amendment Package at Appendix A.

² Section 33.

³ Section 87 (2).

‘...give such weight to any aspect of the national electricity market objective as it considers appropriate in all the circumstances, having regard to any relevant MCE statement of policy principles.’

This represents a virtual *carte blanche* for the AEMC to make any rule that it sees fit, in line with principles that may be developed by the MCE. It provides the AEMC with the ability to circumvent the entire objective of the NEM at the expense of the public.

The new NEM objective should include reference to the satisfaction of the public benefit.

The new NEM objective should include environmental and sustainability objectives.

The NEM should have regard for the need to maintain an environmentally sustainable electricity market.

The AER should be bound to have regard to the NEM objective in the regulation of the NEM.

The AEMC should be specifically bound to have regard to the NEM objective in the making of Rules.

4. Removal of merits review allows virtual unaccountability

The removal of merits review from the NEM regulation is one of the most serious and dangerous proposals currently at hand, particularly in light of the SNI/Murraylink affair. That removal of merits review should be contemplated for such a vast, sprawling, market-based power system of such intricacy is astounding. It would mean that the multitude of assessments, judgments, implementation of protocols, economic and technical tests required to order, operate and develop this huge and complex system could be conducted without any independent examination and validation of the ‘facts’. It would give *carte blanche* to a wide array of practices prejudicial to the public interest and allow system operators virtual unaccountability. As seen with the economic/regulatory/legal controversy over SNI/Murraylink, neither jurisdictions nor regulators understood the most important safeguard in their own Code against strategic uneconomic investment. In this case, it was only the existence of merits review that brought to light key flaws in the Regulatory Test, NEMMCO’s incompetence and the need for an overhaul of economic regulation within the NEM.

The proposal to remove merits review will make the operators of the vast Australian power system virtually unaccountable. It should not be countenanced.

5. Serious flaws remain unaddressed

The blueprint for the NEM was written by a 1991 Industry Commission review. This had serious gaps, notably regarding the economic principles for the design of the market, the regulation of the monopoly transmission/distribution networks and the requirements of the essential hedge contracts financial markets. These gaps have left their mark on subsequent developments and remain unaddressed, including:

- The slight and conventional treatment of the problems of regulating the natural monopoly networks - high voltage transmission and low voltage distribution - which comprise about half of all investment in the sector.
- Failure to deal with the design and specifics of the market's centrepiece, the pool.
- Failure to deal with the economic issue of externalities.
- Failure to provide discussion and guidance on the necessity, function and needs of the financial derivatives market in hedge contracts.
- The inappropriateness for complex network industries of relying on a single 'light handed' regulator.
- Failure to recognise the need for and to recommend upon, a well funded basic research program.

These and other issues have not been addressed satisfactorily, or at all, by the NEM authorities since 1991. They are not addressed in the proposed new NEL. What is proposed, on the contrary, is the affirmation of key structural flaws. It is, therefore, inappropriate for new NEL to proceed as currently proposed.

A moratorium on the proposed new NEL and Rules should be put in place until key market flaws are resolved. Consideration should be given to an early audit by COAG and the setting up of an authoritative review of the NEM by the Productivity Commission or other body

6. Misunderstanding of the Code/Rules

The SNI/Murraylink episode displayed the telling inability of the key NEM bodies and participants to understand and apply the intent of their own National Electricity Code (Code) in regard to what jurisdictions, regulators and industry had accepted as the most important safeguard against uneconomic investments in the regulated monopoly networks. The merits review of the matter involving TransGrid and Murraylink showed that NEMMCO's processes were deeply flawed and, incredibly, were never questioned by the jurisdictions or the regulators.

The final legal outcome revealed that the test applied by NEMMCO was *economically meaningless* and, on its face, *encouraged 'gold plating'* - that is, investment in uneconomic regulated assets, in strict contravention of the Code. It showed that the jurisdictions, regulators and much of the industry did not understand the economic and welfare meanings of their own Code in regard to one of its most important safeguards. While the ACCC has subsequently accepted the arising criticisms by making changes to the Regulatory Test, NEMMCO has never notified the public or industry of the results. Neither the jurisdictions nor the MCE have commented on them.

In this context, it is extraordinary that the very Code that is so misunderstood by the NEM authorities is proposed to be cemented within the new NEL as Rules, and therefore, as law. The integrity of NEM networks regulation, already compromised as a defence against uneconomic monopoly infrastructure, will have minimal credibility if the Code is transferred into Rules under the new NEL. It remains a critical public issue.

The Code should not become Rules under the new NEL until key issues regarding the inability of the authorities to understand the Code are addressed.

7. Lack of valid economic models for assessment

At various places, notably in the proposed Rule changes, there is discussion of new market objectives, and of the role of tests under the new arrangements. Lacking, however, is any awareness of the immense lack of valid economic methods for assessment. Without methods to assess market performance, the new tests based on new market objectives will inevitably become rigmaroles of ritual, recalling the SNI/Murraylink episode. As if aware that this will be the case, the proposed amendments on this point do not provide to the new national regulator, the Australian Energy Regulator (AER), the duty to have regard to them in performing its enforcement functions.

Valid economic models must be developed in an open and transparent way to avoid the untested, misunderstood Rules creating later legal havoc and uncertainty. The AER must have regard to the market objective in the regulation of the NEM.

8. Circumventing the Trade Practices Act and the ACCC

A central feature of the MCE's proposals for institutional change involves the transferring of the existing Code into new NEL as Rules. Because the Rules would be mandatory, Market Participants following them would not generally be at risk of prosecution for anti-competitive trading or access breaches under the TPA for following them.

Presumably, it is to be expected that, in general, the MCE would seek to ensure that amendments to the National Electricity Law (NEL) and that changes to the Code/Rules are consistent with the Competition provisions. *But, since the NEL is State legislation, there will be no necessity for this.* Real possibilities exist of Rules being established of an anti-competitive, anti-economic and anti-environmental nature under the State legislation, with the ACCC, the ‘competition watchdog’, being bypassed.

Even without explicit decision by the MCE, such outcomes are especially likely considering:

- the complex history of amendments to the Code to date;
- the instances of misunderstanding and misapplication of the Code, such as in the SNI/Murraylink case;
- the misinterpretation or absence of appropriate economic principles being used in the construction of the Rules;
- the language in decisions reflecting intra-Council disputes and least-common-denominator resolutions; and
- the continuation of Code provisions that permit discrimination against Energy Efficiency, Demand Management and Distributed Generation and in favour of fossil fuels.

Loopholes that allow the Trade Practices Act and the ACCC to be side-lined must be closed before the transfer of the Code into Rules under the new NEL is considered.

9. Constitutional doubts remain unaddressed

Legal staff of the Australian Parliament have expressed serious doubts about the Constitutionality of the enabling legislation, the Australian Energy Market Commission Act 2004 and the Trade Practices Amendment (Australian Energy Markets) Act 2004. Two Australian Parliament Bills Digests for the guidance of members outlined deep and cogent reservations about this legislation and about the possibility of the High Court vacating it on appeal. The Digests recommended further advice, however, this advice has not been sought. Legal doubts of this sort will threaten public, industry and investor confidence in the NEM and its institutions.

In this context, the MCE’s decision-making process raises serious questions regarding the emerging ability of jurisdictions to decide on national policy for which they might not have an electoral mandate. There are political and legal concerns as to the MCE’s status when it defines new national policies.

Further advice on the doubtful Constitutionality of the Australian Energy Market Commission Act 2004 and the Trade Practices Amendment (Australian Energy Markets) Act 2004 must be sought, as recommended by Australian Parliament legal staff, before the continuation of NEM reforms.

10. Exclusion of externalities an economic fault in market design

Despite the repeated exclamation by SCO officials that the New NEL and the Rules do not concern environmental issues, the exclusion of environmental externalities is a core economic defect. This is an *economic* fault in the market design. This economic defect is resulting in a market which subsidises fossil fuels, and thus greenhouse emissions, at the expense of cleaner technologies and energy efficiency. The practice of ‘gold-plating’, revealed in the SNI/Murraylink affair provides an example of one of the many ways in which the NEM favours supply-side augmentation at the expense of efficiencies that would also reduce environmental externalities.

The exclusion of externalities is a major NEM shortcoming that has been recently recognised and criticised by the Productivity Commission. Despite this, the key forums of the NEM, including the proposed new NEL and the accompanying National Electricity Rules (Rules) have ignored the issue of how the present market arrangements are to be redesigned to *include* externalities. This is in contradiction to established Federal, State and Territory economic, resource and environmental policies.

Market design should be reconsidered to address the exclusion of externalities as a core economic fault in the NEM.

11. The National Electricity Law Amendment Package

A historic coalition of 20 of Australia’s leading consumer, community and environment groups has prepared the National Electricity Law Amendment Package.⁴ The Amendment Package is designed to deliver urgently needed improvements to the NEM and deliver greater efficiency, equity and sustainability to the market and to consumers. The package targets demand management, ecologically sustainable development, protections for low-income consumers and improved consultative process within the NEM.

The Council of Australian Governments (COAG) has recognised the necessity for the NEM to deliver these goals for many years. To date, however, they have largely failed to materialise within the NEL, the Code, the NEM regulatory bodies and the electricity supply industry as a whole.

⁴ See Appendix A.

The broad symptoms are massive supply-dominance, spiralling demand and the lock out of sustainable energy solutions such as demand management and renewables. The promised efficiency has failed to materialise as the energy supply industry encourages excessive consumption and hidden subsidies for incumbent, fossil fuel infrastructure. At the same time, there has been a failure to recognise the need for a basic level of essential energy supply for all consumers and a safety net to protect vulnerable consumers.

These amendments have been developed with extensive consultation with the end-users, *who pay all the costs of electricity supply* and for whom *the market is supposed to benefit*. Their dismissal by the government/industry club without explanation reveals the extent to which the public has been side-lined in the major decisions which affect them.

The MCE should immediately direct the SCO to enter into negotiations with Australia's leading consumer, community and environment groups to incorporate the recommendations of the National Electricity Law Amendment Package as developed by these groups.

12. Conclusion

Heavy doubts now hang over the legitimacy, authority and validity of the MCE and ongoing 'reform' processes. Their suspension pending a COAG audit requires consideration. This could provide the basis for the effort to be salvaged. COAG has not considered electricity reform since its meeting in 2002 when it endorsed the MCE program, and prior to that in 1995. An urgent meeting of COAG could establish interim arrangements for a review of any urgent action necessary for the EMRP initiative, pending the set-up of an authoritative enquiry.

Public involvement in the process is essential if the whole reform is to have an enduring foundation. To this end, a member of COAG without major portfolio conflicts of interest should be appointed by COAG as the point of reference for all community concerns and submissions about the MCE/EMRP process prior to this meeting. In conjunction with this, COAG should appoint an independent panel to screen on behalf of the MCE the submissions made by SCO and from the public and the industry and to make recommendations as to any immediate and/or high priority actions MCE needs to take.

Finally, COAG and the MCE would provide for the national importance of ensuring the success, now endangered, of this reform initiative if it arranged for the Productivity Commission or a similar authoritative and appropriately resourced agency or panel to complete a full and urgent review of the NEM, of the electricity access regime, and of options for development. This should include at least the legal, economic and environmental policy questions noted here, and also of electricity/gas convergence, a complex economic and environmental issue now almost unnoticed. The MCE would then have at its disposal the results of a formal, well-conducted public investigation

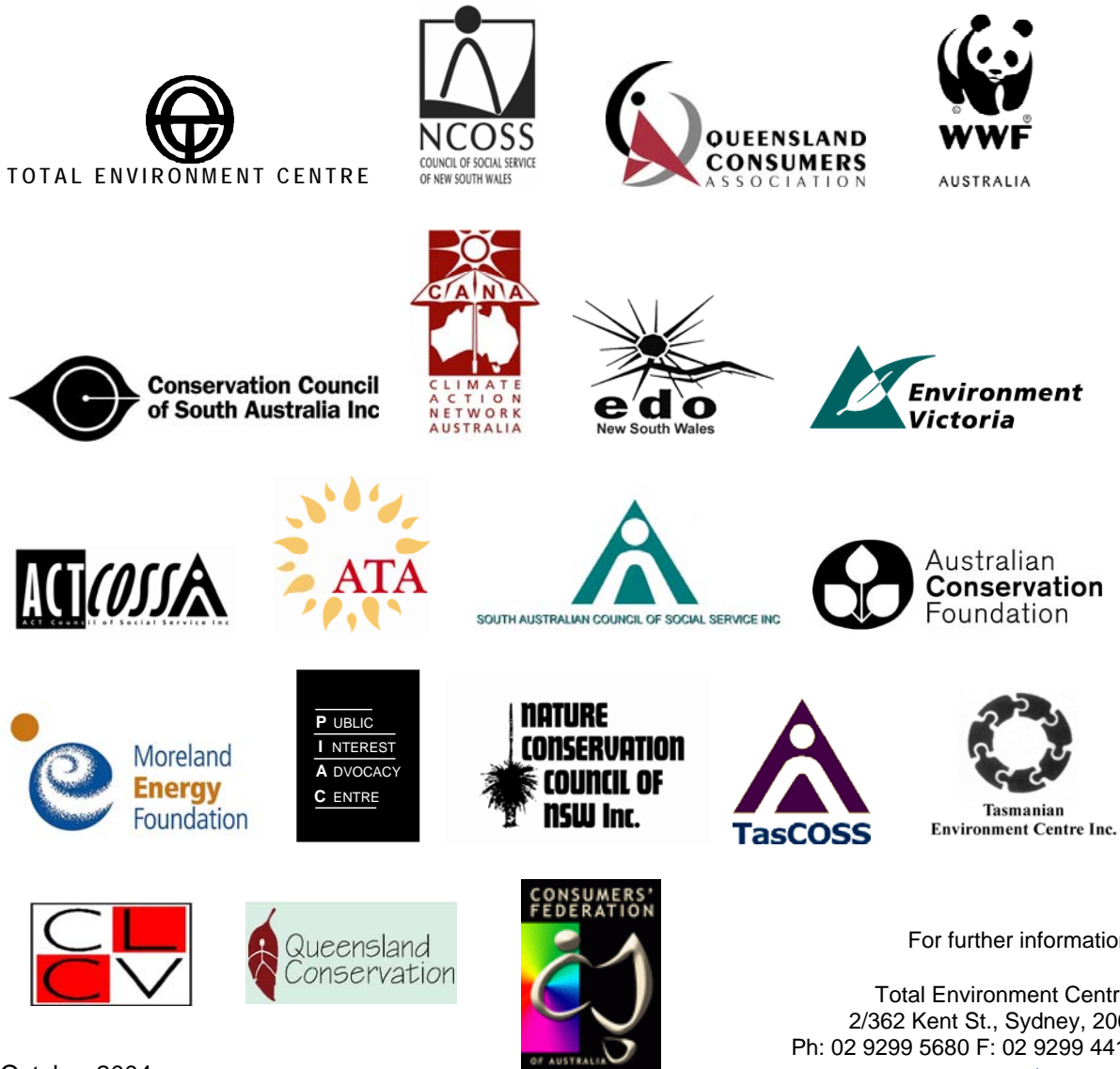
before finalising decisions which will otherwise be piecemeal, heavily compromised, constitutionally doubtful and difficult, if not impossible, to implement or correct.

There are now substantial industry and public doubts over the EMRP and consideration should be given to its early audit by COAG and the setting up of an authoritative review of the NEM by the Productivity Commission or other body.

Appendix A

THE NATIONAL ELECTRICITY LAW AMENDMENT PACKAGE

An initiative of the environment, social community and consumer groups of Australia



1 October 2004

For further information:

Total Environment Centre
2/362 Kent St., Sydney, 2000
Ph: 02 9299 5680 F: 02 9299 4411
www.tec.org.au

This project has been supported in part by funding from the National Electricity Code Administrator's Advocacy Panel.

TO ALL PREMIERS AND ENERGY MINISTERS

Amendments to the National Electricity Law, in accordance with the Australian Energy Market Agreement, are currently being drafted for sign-off by all NEM Governments in the next few months. Before finalising those important changes, we urge Ministers to consider this package of amendments.

This Amendment Package is designed to deliver urgently needed improvements to the National Electricity Market (NEM). If accepted, the amendments will deliver far greater efficiency, equity and sustainability to the market and to consumers.

Developed by a broad-ranging coalition of environment, community and consumer advocacy groups, this package targets demand management, ecologically sustainable development, protections for low-income consumers and improved consultative process within the NEM.

The Council of Australian Governments (COAG) has recognised the necessity for the NEM to deliver these goals for many years. To date, however, they have largely failed to materialise in the National Electricity Law (NEL), the National Electricity Code (Code), the NEM regulatory bodies and the electricity supply industry as a whole.

The broad symptoms are massive supply-dominance, spiralling demand and the lock out of sustainable energy solutions such as demand management and renewables. The promised efficiency has failed to materialise as the energy supply industry encourages wasteful and excessive consumption. At the same time there has been a failure to recognise the need for a basic level of essential energy supply for all consumers and a safety net to protect vulnerable consumers.

These amendments seek to address these problems at their source. Coinciding with the ongoing energy market reform process, they are both timely and relevant.

We urge you to adopt these amendments and incorporate them in the set of amendments currently being developed by the Ministerial Council on Energy (MCE).

**ACT Council of Social Service
Alternative Technology Association
Australian Conservation Foundation
Climate Action Network Australia
Conservation Council of SA
Consumer Federation of Australia
Consumer Law Centre of Victoria
Environment Victoria
Environmental Defenders Office
Moreland Energy Foundation**

**Nature Conservation Council NSW
NSW Council of Social Service
Public Interest Advisory Centre
QLD Consumers Association
QLD Conservation Council
SA Council of Social Service
Tasmanian Environment Centre
Tasmanian Council of Social Service
Total Environment Centre
WWF**

Introduction

The *National Electricity (South Australia) Act 1996* contains the NEL as a Schedule. This Act is due to be amended to give effect to proposed Australian energy market reforms. Reciprocal legislation will be implemented in other participating states and territories.

The coalition of advocacy groups that has developed this Amendment Package has identified eight key issues that should be addressed in the NEL to adequately provide for environmental and social considerations in the NEM. The Amendment Package identifies where amendments need to be made to existing sections and where new clauses or Parts are required to be inserted into the NEL to address the eight issues.

1 Ecologically Sustainable Development (ESD)

The NEM should have regard for the need to maintain an environmentally sustainable electricity market.⁵

Currently, the NEM does not include consideration of any long-run environmental costs such as mining, land use, thermal pollution or climate change. In addition, the market does not provide adequate, long term price signals to foster research, development and commercialisation of renewable energy, energy efficiency or demand management. Policy instruments, such as emissions trading, that aim to introduce environmental externalities, and industry development policies like the Mandatory Renewable Energy Target, will not properly integrate into the energy market unless the market is designed to work with them.

Additionally, the NEM does not include consideration of the impacts of the market on consumers generally, in particular, low-income consumers. The principles of ESD include the requirement to take into account social considerations. The impact of the NEM on low-income consumers is discussed in point 4 below.

Amendments

- Insert into Part 1 and Objects clause as follows:

The objectives of the National Electricity Market are:

- a) to ensure that decisions will be made in accordance with the principles of ecologically sustainable development.⁶

⁵ Within the meaning of the principles of ESD as set out in Section 3a of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

⁶ It is common to incorporate principles of ESD into legislation. For example see section 3 objects of the Native Vegetation Act 2003 which lists 5 objects bound by ESD. In NSW alone there are over 50 legislative instruments incorporating ESD principles.

- A definition of ESD would need to be inserted into section 3 of the NEL. This definition could be taken from section 3a of the Commonwealth *Environment Protection and Biodiversity Conservation Act* and read as follows:

The following principles are [principles of ecologically sustainable development](#):

- (a) decision-making processes should effectively integrate both long-term and short-term economic, [environmental](#), social and equitable considerations;
- (b) if there are threats of serious or irreversible [environmental](#) damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent [environmental](#) degradation;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the [environment](#) is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

2 Demand Management (DM)

The NEM should facilitate demand-side participation by consumers to enable a balance between supply and demand in the market.

It is broadly accepted that the NEM is a supply-side dominated market at the expense of consumers, the environment and efficiency. Inefficiency by consumers increases consumption and therefore the income of energy providers. While the regulated networks are in a position to implement and benefit from DM, many barriers exist under the Code that prevent or fail to encourage DM initiatives. The NEL should make the development of DM an objective. Likewise, the immaturity of the DM provider market should be addressed.

Amendment

- Part 2 of the NEL should contain a new clause requiring that the Code include provisions for the development of DM.

3 Greenhouse Emissions

The NEM should recognise the impact of greenhouse gas emissions produced by the electricity sector.

At present, the NEM and the Code do not recognise the contribution that DM, embedded generation or renewable energy generation make to the reduction of greenhouse emissions. While strategies to address emissions may be implemented through policies outside the market, it is essential the NEM works with, rather than against these policies.

Amendment

- As noted in 1 above, an Objects clause needs to be inserted into Part 1 of the NEL. The Objects clause should continue:
 - b) ...to recognise the long-term environmental and economic cost of greenhouse emissions of the electricity market; and
 - c) to encourage the reduction of greenhouse gas emissions associated with the production and use of electricity.
- A new clause should be inserted into Part 2 requiring that the Code address the issue of greenhouse gas emissions associated with the production and use of electricity.

4 Impact of the NEM on Low-Income Consumers

NEM decision makers should have regard to impacts of the market on low-income consumers.

Vulnerable households are not always able to fully meet their needs in the NEM. They are often housed in below-standard accommodation with inadequate insulation and energy inefficient appliances. They are also more likely to be at home for a longer proportion of the day, missing out on the hidden subsidies that people in full time employment receive from energy provided at the work place. They often experience low-income or constrained cash flow that marginalises them from participating in the NEM.

Electricity is an essential service, i.e., a service (whether provided by a public or private undertaking) without which the safety, health or welfare of a community or a section of the community would be endangered or seriously prejudiced.⁷ Governments should recognise this fact by subsidising electricity through community service obligations imposed on corporations, concessions and a safety-net including supply and price obligations.

Amendment

- The new Objects clause should continue:
 - d) ...to ensure consumers have continuous access to the affordable, reliable and safe supply of electricity under the NEM, in recognition that electricity is an essential service in the community.
- Part 2 of the NEL should contain a new clause requiring regulators and market participants to consider the impact of their activities on low-income consumers.

5 Community Consultation

⁷ *Essential Services Act 1981* (SA)

The key NEM regulatory bodies should include representation that reflects the NEM goals of equity and access, with particular emphasis on the inclusion of environment, community and consumer advocacy groups. Further, these representatives should be resourced to ensure participation equal to that of industry participants.

The exclusion of environment, community and consumer sector stakeholders on critical decision-making bodies and committees has been chronic, with the make-up of these bodies routinely restricted to more powerful electricity industry stakeholders.⁸ Without effective representation from the community sector on the NEM's key institutions, it can be expected that social and environmental objectives will continue to remain unmet.

The legislation establishing the new regulatory bodies in the NEM, the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER)⁹ do not provide for community sector representatives. It is recognised that the content of the representation on these bodies cannot be altered through the NEL. Accordingly, it is essential to ensure that adequate, compulsory consultation processes are included in the NEL.

An advisory panel (Advisory Panel) should be established, consisting of environmental experts and representatives from consumer, community and environmental advocacy groups. The Advisory Panel should have both an environmental protection and consumer protection mandate, especially regarding low-income consumers. The Advisory Panel should be independent and provide advice to the AER, AEMC and any other relevant decision making body. Before decisions are made to amend the NEL or the Code, the decision maker must seek the views of the Advisory Panel.

Amendments

- Into Part 2 add:

- a) Clause X 'Consultation During Code Change'

- Extensive public consultation must be carried out during the Code change process. A reasonable length of time for submissions must be provided. Advertisement for submissions should not take place over the December-January period. The decision maker must take into account submissions received during the Code change process.

- b) Clause XX 'Code Changes to be Consistent with this law'

- Any Code changes are consistent with the Objects set out in the Objects clause of this law.

⁸ For example, see Alan Pears, 'Energy Reform and the Environment', in *Power Progress : An Audit Of Australia's Electricity Reform Experiment*, Graeme Hodge, Valarie Sands, David Hayward, David Scott (eds.), Australian Scholarly Publishing, Monash University, 2004, p. 176; and Gavan McDonell, 'NSW Government Ownership and Risk Management in a Mandatory Pool: 'Neither Fish nor Fowl nor ...' in Hodge et al., p. 96.

⁹ The AEMC was set up by the *Australian Energy Market Commission Establishment Act 2004*, and the AER was set up under the *Trade Practices Amendment (Australian Energy Market) Bill 2004*.

c) Clause XXX 'Community Representatives on Code Change Panel

The Code Change Panel should contain at least two community representatives.

▪ A new Part Z 'Advisory Panel':

a) Clause Z 'Establishment of Advisory Panel'

An independent Advisory Panel must be established and should consist of environmental experts and representatives from consumer and environmental advocacy groups. The Advisory Panel should have both an environmental protection and consumer protection mandate, especially regarding low-income consumers.

b) Clause ZZ 'Role of Advisory Panel'

The role of the Advisory Panel is to provide advice to the AER, AEMC, the Code Change Panel and any other relevant decision making body. In making any decision to amend the NEL or the Code, the decision maker must seek the views of the Advisory Panel, and is required to take into account the views of the Advisory Panel in making its decision.

6 Transparency and Access to Information

Individuals and environment, community and consumer advocacy groups should have appropriate access to key documents relevant to the NEM.

Current NEM regulatory bodies are not subject to FOI legislation in the various NEM jurisdictions. This prevents the community accessing key documents relevant to decisions relating to the development of the NEM and limits the community's ability to participate in the development of the NEM.

Amendment

- A new Part Y – Information and Standing should be added with the following clauses:

- a) Clause Y 'Freedom of Information'

All bodies administering the legislative instruments underpinning the NEM should be subject to FOI legislation, where appropriate.

- b) Clause YY 'Public Register'

There must be a public register of key decisions made under the NEL and the Code, as well as public submissions, reports and other documents. This register should be publicly available on a website.

7 Right of Review and Appeal of Decisions

It is essential that affected parties, or groups that represent affected parties such as environment, community and consumer interest groups, be afforded standing to challenge decisions under the NEL and the Code.

Environment and consumer advocacy groups are currently prohibited from seeking judicial review of decisions as they are excluded from the definition of an aggrieved person. The Standing Committee of Officials of the MCE has signalled that the National Electricity Tribunal will be abolished, eliminating the right to merits review of decisions. These barriers to judicial or merits-based redress constitute inappropriate exclusion of the community from critical decisions.

Amendment

- The following clauses should be added to the new Part Y:

- a) Clause YYY '*Standing*' Option 1

Any person shall have standing to seek changes to the Code.

- b) Alternatively Clause YYY '*Standing*' Option 2

For any decision made by any body under the NEL an aggrieved person is as defined.¹⁰

c) Clause YYY '*Merits Review*'

Merits review is available for decisions of the AEMC and the AER.

- Alternatively, the NEL should be amended to state that “for any decision made by any body under the NEL an aggrieved person is as defined”. The definition should be similar to section 487 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.¹¹
- Additionally, an expansion of the meaning of ‘aggrieved person’ would need to provide for groups working on consumer protection issues to be included in the definition in a similar way to environmental groups.
- The new legislation should explicitly provide that merits review is available for decisions of the AEMC and the AER.

8 Content of the Code/Rules¹²

While amendments to the Code can be made by way of the proposed Code Change Process it is preferable to include key objectives of the Code in the NEL to ensure that essential issues are not sidelined. In assessing changes to the Code, bodies under the NEL should determine whether changes would be likely to result in any public detriment or benefit.

The lack of recognition in the Code of ESD, DM, the impact of greenhouse emissions, the difficulties faced by low-income consumers and the fact that electricity is an essential service, is reflected in the electricity market as a whole. The result is an ongoing failure to consider environmental and social considerations throughout the NEM.

The ‘net benefits test’ currently proposed to assess Code changes is limited to a narrow set of Market Objectives.¹³ By excluding public benefits, the test conflicts with the broader interpretation of public benefit taken by the ACCC and supported by jurisprudence, which includes social and environmental considerations.

Amendment

- A new clause should be added to Part 2 of the NEL providing the following specific list of matters that must be covered by the Code:

¹⁰ The definition should be similar to section 487 of the *Environment Protection and Biodiversity Conservation Act 1999*¹⁰ with an expansion to provide for groups working on consumer protection issues

¹¹ See Appendix B for section 487 of the Commonwealth *Environment Protection and Biodiversity Conservation Act*.

¹² It is anticipated that the Code will become the National Electricity Rules under the amended National Electricity Law.

¹³ Ministerial Council on Energy, Standing Committee of Officials, *Proposed National Electricity Rule Change Process: Consultation Paper*, August 2004, p.12.

- a) Demand management
 - b) Greenhouse gas emissions reduction
 - c) Low-income consumers, including guarantee of supply
 - d) Recognition of electricity as an essential service
- A new clause should be added to Part 2 of the NEL requiring Code change determinations to consider whether the proposed Code change would be likely to result in any public detriment or benefit.

Summary of Amendments

1. In Part 1 add clause X 'Objectives':

The objectives of the National Electricity Market are:

- a) to ensure that decisions will be made in accordance with the principles of ecologically sustainable development.
- b) 'to recognise the long-term environmental and economic cost of greenhouse emissions of the electricity market; and
- c) to encourage the reduction of greenhouse gas emissions associated with the production and use of electricity.
- d) to ensure consumers have continuous access to the affordable, reliable and safe supply of electricity under the NEM, in recognition that electricity is an essential service in the community.

2. In Section 3 add 'ecologically sustainable development' means:

The following principles are [principles of ecologically sustainable development](#):

- (a) decision-making processes should effectively integrate both long-term and short-term economic, [environmental](#), social and equitable considerations;
- (b) if there are threats of serious or irreversible [environmental](#) damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent [environmental](#) degradation;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the [environment](#) is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

3. In Part 2 add:

- a) Clause X '*Development of DM*'

The Code must address the development of Demand Management.

b) Clause XX '*Greenhouse Gas*'

The Code must recognise the issue of greenhouse gas emissions associated in the production and use of electricity.

c) Clause XXX '*Low-Income Consumers*'

Regulators and market participants must consider the impact of their activities on low-income consumers.

d) Clause XXX '*Matters to be listed in the Code*'

The following matters must be covered by the Code:

- demand management;
- greenhouse gas emissions reduction;
- low-income consumers, including guarantee of supply; and
- recognition of electricity as an essential service.

e) Clause XXX '*Public Benefit*'

Code change determinations must consider whether proposed Code changes would be likely to result in any benefit or detriment to the public.

4. Add new Part Y – Information and Standing

a) Clause Y '*Freedom of Information*'

All bodies administering the legislative instruments underpinning the NEM should be subject to FOI legislation, where appropriate.

b) Clause YY '*Public Register*'

There must be a public register of key decisions made under the NEL and the Code, as well as public submissions, reports and other documents. This register should be publicly available on a website.

c) Clause YYY '*Standing*' Option 1

Any person shall have standing to seek changes to the Code.

d) Alternatively Clause YYY '*Standing*' Option 2

For any decision made by any body under the NEL an aggrieved person is as defined. (The definition should be similar to section 487 of the *Environment*

*Protection and Biodiversity Conservation Act 1999*¹⁴ with an expansion to provide for groups working on consumer protection issues).

e) Clause YYY ‘ Merits Review’

Merits review is available for decisions of the AEMC and the AER.

¹⁴ See Appendix B for the definition of an aggrieved person in section 487 of the Environment Protection and Biodiversity Conservation Act.

5. Into a new Part Z 'Advisory Panel' add:

a) Clause Z 'Establishment of Advisory Panel'

An independent Advisory Panel must be established and should consist of environmental experts and representatives from consumer or environmental advocacy groups. The Advisory Panel should have both an environmental protection and consumer protection mandate, especially regarding low-income consumers.

b) Clause ZZ 'Role of Advisory Panel'

The role of the Advisory Panel is to provide advice to the AER, AEMC, the Code Change Panel and any other relevant decision making body. In making any decision to amend the NEL or the Code, the decision maker must seek the views of the Advisory Panel, and is required to take into account the views of the Advisory Panel in making its decision.

Appendix A

Extended Standing for Judicial Review

From section 487 of the Environment Protection and Biodiversity Conservation Act 1999):

- (1) This section extends (and does not limit) the meaning of the term person aggrieved in the [Administrative Decisions \(Judicial Review\) Act 1977](#) for the purposes of the application of that Act in relation to:
 - (a) a decision made under [this Act](#) or the regulations; or
 - (b) a failure to make a decision under [this Act](#) or the regulations; or
 - (c) conduct engaged in for the purpose of making a decision under [this Act](#) or the regulations.
- (2) An individual is [taken](#) to be a person aggrieved by the decision, failure or conduct if:
 - (a) the individual is an Australian citizen or ordinarily resident in Australia or an external Territory; and
 - (b) at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of [activities](#) in Australia or an external Territory for protection or conservation of, or research into, the [environment](#).
- (3) An organisation or association (whether incorporated or not) is [taken](#) to be a person aggrieved by the decision, failure or conduct if:
 - (a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and
 - (b) at any time in the 2 years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of [activities](#) in Australia or an external Territory for protection or conservation of, or research into, the [environment](#); and
 - (c) at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the [environment](#).
- (4) A term (except person aggrieved) used in this section and in the [Administrative Decisions \(Judicial Review\) Act 1977](#) has the same meaning in this section as it has in that Act.

