

Electricity Transmission Network Owners

**Response to the Exposure Draft
of the National Electricity Law**

**Submission to the Ministerial Council on Energy
Standing Committee of Officials**

7 January 2005

ElectraNet ♦ *Powerlink* ♦ *SPI PowerNet* ♦ *Transend* ♦ *TransGrid*

Further TNSP Submission on Exposure Draft of the National Electricity Law

1. Executive Summary

Further to the submission filed on 24 December 2004, Electranet Pty Limited, Powerlink Queensland, SPI Powernet Pty Limited, Transend Networks Pty Limited and TransGrid ("the TNSPs") have had further opportunity to review the exposure draft of the National Electricity Law ("NEL").

This further submission should be read together with the TNSPs' initial submission. For ease of reference the initial submission is included as Attachment 1 to this submission.

This submission is set out in 3 main parts, which address:

- the rationale for the TNSPs' suggested amendments to the provisions of the draft NEL relating to transmission pricing and regulation;
- suggestions to overcome a number of the difficulties identified in the TNSPs' initial submission; and
- a number of other material matters.

As well as Attachment 1 (being the TNSPs' initial submission), this submission also contains two further attachments being:

- Attachment 2 - the TNSPs' suggestions clarify and address a number of the difficulties with the drafting of the proposed provisions relating to transmission pricing and regulation; and
- Attachment 3 - a number of more minor matters which have become apparent to the TNSPs in conducting a detailed review of the draft NEL.

2. Rationale for the proposed changes to Provisions of the Draft NEL relating to Transmission Regulation

In the development of the provisions of the draft NEL relating to the regulation of transmission revenue, the TNSPs note that care has been taken to ensure that the draft NEL provisions contain sufficient flexibility so that future developments in regulatory practice do not require changes to be made to the NEL.

The TNSPs support this approach but consider that this flexibility must be balanced against the aim of the current reforms of improving the governance arrangements in the NEM.

The TNSPs are concerned that the provisions of the draft NEL relating to the regulation of transmission revenue require additional clarification and certainty in order to provide a robust governance framework. In particular, the TNSPs believe that the matters set out in the proposed sections 15 and 91 do not provide a sound basis for ensuring regulatory accountability as the nature of the matters included means that it would be very hard to review any regulatory decision taken by the AER or AEMC under these provisions.

To address this, Attachment 2 sets out some suggested amendments to the relevant provisions of the draft NEL. In developing these suggestions, the TNSPs have endeavoured to retain the level of flexibility in the exposure draft while at the same time providing a more certain set of principles against which decisions by the AEMC and the AER can be judged.

The TNSPs consider that providing more certainty in this regard is in the interests of all NEM stakeholders it will enable not only TNSPs, but also the users of their services, to have some certainty as to the basis on which regulatory decisions will be made.

In terms of the amendments proposed by the TNSPs, the TNSPs specifically note the following:

- while the definition of "transmission determination" has been amended by deleting the reference to the regulation of the prices charged by the relevant transmission entity, the TNSPs consider that the reference to the regulation of transmission revenue would enable a wide range of revenue regulation to be adopted, including approaches such as price capping, so long as these did not directly set the actual price charged by the relevant transmission entity (which the TNSPs understand is to be addressed in the Rules);
- the TNSPs have endeavoured to ensure that the test as to whether a transmission determination complies with section 15 (and whether the Rules made under section 91 comply with that section) is whether that determination (or those Rules) provide, on a prospective basis, for the matters set out in the section as at the time a determination is made (with allowance for the ability to pass through changes in regulatory obligations during the period a determination has effect);
- many of the costs which they incur in providing services are not clearly incurred to comply with regulatory obligations and the TNSPs proposed amendments are designed to ensure that all of the costs of providing regulated services are recovered where prudently and efficiently incurred- for example, the TNSPs note that while a prudent transmission entity would insure its network assets, such insurance is not required to comply with a regulatory obligation;
- while the amendments proposed to section 15 and section 91 include matters which resemble a traditional "building block" approach, the amendments do not prescribe this approach but rather require that the approach adopted results in the recovery of the specified costs; and
- the proposed amendments clarify what is meant by a transmission system and that a transmission determination need only recover the costs of providing regulated services.

3. Matters Arising from Earlier Submission

As discussed in the TNSPs' earlier submission, the TNSPs are concerned that the discretions granted under a number of provisions of the draft NEL means that it will be extremely difficult to judicially review the exercise of power under those provisions. This section of the TNSPs' submission discusses those sections and suggests how these issues could be overcome.

(a) Section 34

Under section 34, the AEMC is required to "have regard" to any statement of policy principles made by the MCE under section 7.

The requirement that the AEMC only have "regard" to the relevant statement leaves it to the AEMC to determine what weight is to be given to the relevant statement.

The TNSPs consider that rather than the AEMC having regard to the relevant statement the AEMC should be required to give effect to the relevant MCE statement provided that it is consistent with the promotion of the national electricity market objective. This would give greater certainty to the participating jurisdictions and participants that MCE policy initiatives will be implemented.

(b) **Section 87(2)**

Under section 87(2) the AEMC is given the ability to determine the weight given to particular aspects of the national electricity market objective. This ability for the AEMC to determine the weight given to particular aspects of the national electricity market objective means that it will be very difficult to judicially review a decision taken by the AEMC regarding a Rule change.

To provide effective guidance to the AEMC and ensure that the AEMC is accountable for the manner in which it exercises its powers under section 87, the TNSPs consider that section 87(2) should require the AEMC to give equal weight to the various aspects of the national electricity market objective. This would assist in the development of the market and give greater certainty to participants as to the making and operation of the Rules - thereby strengthening confidence in the governance of the market.

(c) **Sections 94 and 96**

Under sections 94 and 96, the AEMC is entitled to disregard a request for a Rule change (under section 94) or a request for it not to make a non-controversial Rule or urgent Rule if the matters raised by the relevant person or body are "misconceived or lacking in substance". In both cases, it is clear that this requirement is subjective and that to exercise the relevant power, the AEMC is only required to be of the opinion that the test is satisfied.

Given that this requirement is subjective and that no criteria are given as to what is meant by "misconceived or lacking in substance", the TNSPs consider that, based on the current wording, it would be extremely difficult to review a decision by the AEMC that if matters raised are misconceived or lacking in substance.

The TNSPs consider that (and subject to the matters discussed in Attachment 3 regarding the ability of a participant to delay urgent Rule changes) the test as to whether matters by a participant raised can be disregarded by the AEMC should be an objective one and that criteria should be given as to the basis on which matters can be disregarded.

(d) **Section 99(3) and 103(3)**

As discussed in the TNSPs' earlier submission, under these sections there is no requirement that a proposed Rule, in respect of which a draft Rule determination is made (in the case of section 99) or in respect of which a final Rule determination is made (in the case of section 103), be the same as the Rule proposed or in respect of which the draft Rule determination was made (as the case may be).

The TNSPs consider that, to ensure that adequate consultation occurs, the AEMC should be under a duty to consult further if the Rule it proposes to make is materially different from that which was the subject of the draft Rule determination.

This could be achieved through the amendment of section 103 to provide that, if the Rule which the AEMC proposes to make under section 103 is materially different from that in respect of which the draft Rule of determination was made, then the AEMC must issue a fresh draft Rule determination in respect of that rule.

4. Additional Material Matters

(a) **Treatment of System Operators**

One of the impacts of the move to a statutory rule based system is that NEMMCO's functions will now be statutory in nature. While the Rules will set out these functions in detail, section 49 of the draft NEL is the ultimate conferral of these functions on NEMMCO.

Generally, it is not possible for a person on whom a statutory function is conferred to appoint an "agent", in the ordinary sense of the word, to perform that function. Rather, the function must be delegated by the person on whom it is conferred.

At present, NEMMCO has no general ability under the draft NEL to delegate any of its functions (although it can authorise a person to carry out particular actions under section 115(1)). This can be contrasted with the AEMC and AER where section 31 refers to the ability of the AEMC to delegate particular functions under section 20 of its constituent act and section 17 which refers to the ability of the AER to delegate particular functions under section 44 AAH of its constituent act.

Given the general presumption that there is no power to delegate functions in the absence of an express power of delegation and the express power of delegation granted to the AER and AEMC (together with the limited power of delegation granted under section 115), the TNSPs consider it is extremely doubtful that NEMMCO has any ability to delegate its functions under the draft NEL.

For completeness the TNSPs note that while there is a general power to confer functions under the Rules on persons and bodies under section 35(3)(c), the TNSPs do not consider that this could be said to provide a basis for the delegation of NEMMCO's functions as opposed to the conferral of other functions on the relevant person or body.

This potentially causes substantial difficulty in the context of System Operators. At present, the exposure draft of the Rules retains clause 4.3.3(a)(1) of the Code in its current form. This provides for NEMMCO to appoint agents to carry out certain of its functions. However, as discussed above, it is generally the case that statutory functions cannot be made the subject of an agency as opposed to delegation.

The TNSPs consider there is substantial doubt as to whether the regime provided for under the proposed clause 4.3.3(a)(1) of the draft Rules is legally effective. Rather, they believe the draft NEL should be amended to provide an ability for NEMMCO to delegate its functions (either generally or more narrowly in respect of system security) and that clause 4.3.3(a)(1) be amended to reflect the fact that System Operators will be appointed by way of delegation as opposed to agency.

The TNSPs note in passing that they do not believe these concerns extend to matters in respect of which parties are appointed as service providers to NEMMCO under clause 4.3.3(a)(ii).

(b) Definition of "interconnected transmission and distribution system"

A key term in the draft NEL is "interconnected transmission and distribution system".

Not only is this term the central feature of the definition of "national electricity system" and as a result of definition of "national electricity market", but the obligation to register under section 10 in respect of various activities arises in respect of activities carried on by facilities connected to that system.

At present the term is not defined. Given the importance of the term, the TNSPs consider that it is important that it be clear what is meant by that term and suggest that a definition of a term be included in the draft NEL.

Further, the TNSPs note that the definition of "national electricity system" refers to the interconnected transmission and distribution system "in the participating jurisdiction" but these words of limitation are not used elsewhere in the NEL. While the extraterritorial application of the NEL is limited by the legislative competence of the participating jurisdictions, the TNSPs consider that this difference gives rise to a degree of uncertainty as to the operation of the terms and suggest this be clarified.

(c) **Section 6 - Definition of "national electricity market objective"**

The national electricity market objective is defined in section 6 as:

"the national electricity market objective is to promote efficient investment, and use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability, safety and security" (emphasis added).

Section 2 of the draft NEL defines "electricity services" as:

"services that are necessary or incidental to the supply of electricity to consumers of electricity including -

- (a) the generation of electricity;
- (b) the services provided by means of, or in connection with, a transmission system or distribution system;
- (c) the sale of electricity".

(In passing, the TNSPs note that they assume there should be an "and" appearing after each sub-paragraph in this definition.)

The manner in which the objective is drafted currently refers to investment in "electricity services". The TNSPs note that rather than investment being made in those services, investment is made in the infrastructure necessary to provide those services. For this reason, the TNSPs suggest that the national electricity market objective would be better expressed as follows:

"the national electricity market objective is to promote efficient use of electricity services, and efficient investment in the facilities necessary to provide electricity services, for the long term interest of consumers of electricity with respect to price, quality, reliability, safety and security."

The TNSPs note that the manner in which the definition is drafted could be argued to mean that the terms "price, quality, safety and security" are to be interpreted from the perspective of the interests of consumers (given that the terms are used with respect to the interests of consumers). As a result, the TNSPs believe that the terms "price, quality, reliability, safety and security" could be given their ordinary meaning rather than the technical meaning which terms such as security and reliability have come to have in the electricity industry.

From the perspective of consumers, a reference to "reliability" would arguably seem not only to encompass the matters which are normally thought of, from a technical perspective, as falling within the definition of "reliability" but would also encompass the matters which are normally seen as being part of system "security". If looked at in this light, in both a long and a short term sense providing a "reliable" supply of electricity to consumers, that is one which can be depended upon or is always available, requires not only that "system reliability" be maintained but also that "system security" be maintained. If this interpretation were adopted, the reference to "security" in the national electricity market objective could lead to uncertainty as to the meaning of the objective.

The TNSPs consider that if the intention was that " security" and reliability" bear a technical meaning, the draft NEL should be amended to state these meanings - particularly as the TNSPs consider there is some doubt as to whether the interpretation of the terms will be sufficiently unclear to allow regard to be had to extrinsic material.

(d) **Section 29**

Under Section 29, the AER has the ability to require any person to produce information or a document that the AER requires for the purposes of performing a function or power under the Law, the Regulations or the Rules.

Under Section 44AAF of the *Trade Practices Act*, the AER will be required to take all reasonable measures to maintain the confidentiality of that information.

The TNSPs note that the regime provided for under section 44AAF provides substantially less assurance as to the manner in which information they are compelled to provide will be treated than is currently provided under clause 6.2.5(e) and clause 6.2.6 of the Code.

The TNSPs believe that, while they accept that the AER should be able to disclose information gained under section 29 where this is necessary to discharge the function in relation to which the information was gained, there should not be an unfettered right to disclose information to code bodies and that disclosure of confidential information should only take place on a confidential basis.

(e) **Section 35**

Under section 35, the AEMC is empowered to make Rules for or with respect to:

- "(a) the regulation of operation of the national electricity market; and
- (b) the operation of the national electricity system for the purposes of the safety and security and reliability of that system; and
- (c) the regulation of the activities of persons (including Registered Participants) participating in the national electricity market or involved in the operation of the national electricity system."

(The TNSPs note in passing that, in sub-section (b), the "and" between "safely" and "security" could be replaced with a comma.)

Sub-sections (a) and (b) refer to the "operation" of the national electricity market and national electricity system respectively (with the national electricity market including the national electricity system). Further, the power granted under sub-section (b) is restricted to matters related to the "safety, security and reliability" of the national electricity system.

It is not clear to the TNSPs that referring to the "operation" of the national electricity system will encompass all of the activities currently governed by the Code and which are to be governed by the Rules (and which are listed in Schedule 1). In particular, the TNSPs consider that there is substantial doubt as to whether "operation" would include the regulation of access to transmission and distribution systems or the regulation of network revenue or the prices charged for network services.

The TNSPs suggest that a specific reference to the regulation of access and network revenue and pricing is included in section 35.

(f) **Section 49(1)(e)**

Sub-section 49(1)(e) gives NEMMCO the function of not only maintaining but also "improving" power system security. The TNSPs note that this would appear to require that NEMMCO, on a continuing basis, take steps to ensure that the level of power system security increases. This can be contrasted with clause 4.3.1(a) of the Code which provides that one of NEMMCO's power system security responsibilities is to "maintain" power system security.

Further, the TNSPs note that there is a tension between NEMMCO's functions in this regard and the national electricity market objective in that the national electricity market objective recognizes the balancing of consumers interests with respect to system security and reliability with their interests in respect of price whereas section 49(1)(e) does not appear to recognize this balance.

Given that improvements in power system security may have significant cost consequences and that these costs would need to be balanced against the benefit from the improved security, the TNSPs question whether it is appropriate for NEMMCO to have this function of "improving" power system security.

Attachment 1

Initial Transmission Network Services Provider Submission on Draft National Electricity Law (submitted 24 December 2004)

This is a submission made on behalf of Electranet Pty Limited, Powerlink Queensland, SPI Powernet Pty Limited, Transend Networks Pty Ltd and TransGrid (the "TNSPs").

The TNSPs are the owners and operators of the high voltage transmission networks in the National Electricity Market or, in the case of Transend, will be the owner and operator of such a network once Tasmania joins the National Electricity Market.

In the time available, the TNSPs have not had an opportunity to fully analyse the exposure draft of the new National Electricity Law (the "draft NEL") and, as a result, this submission sets out their initial views only.

The TNSPs acknowledge that a key driver to the reforms is the separation of the "rule-making" function in the National Electricity Market from the enforcement of those rules. The TNSPs understand and support the rationale for this approach and recognise the progress made by jurisdictions in achieving that structure. However, the TNSPs believe that, as discussed below, the structure adopted for the draft NEL requires further clarity to clearly and consistently achieve that objective.

The TNSPs have a number of concerns regarding the draft NEL which are discussed in more detail below. In broad terms, major areas of concern for the TNSPs are:

- (a) the broad discretions granted to the AEMC, the AER and NEMMCO in the context of a move from merits based review rights to traditional judicial review;
- (b) the breadth of services potentially subject to access regulation under the proposed NEL and the lack of certainty as to the access framework;
- (c) the broad discretions granted to the AEMC in making Rules concerning transmission revenues and pricing and the similar lack of certainty concerning the manner in which the AER performs economic regulatory functions and powers;
- (d) uncertainties in the rule-making process; and
- (e) a number of more minor matters of a drafting nature.

1. Discretions and Judicial Review

The effect of the draft NEL is to replace a number of rights under the Code, the existing NEL and related legislation, such as the *Trade Practices Act*, to seek merits review of decisions taken under the Code with rights of judicial review.

At present, these rights arise in a number of ways:

- (a) through the relevant decision being a "reviewable decision" with recourse to the National Electricity Tribunal; and
- (b) through the ability to dispute the decision under chapter 8 of the Code (such as occurred in the context of the "Participant Fees Dispute").

The TNSPs understand that under the revised regulatory structure documented in the draft NEL, the initial approach will be that existing merits review rights will be replaced with rights to seek judicial review of decisions taken by the AER, the AEMC and NEMMCO. The TNSPs understand that this approach will be reviewed as part of the formulation of a response by the MCE to the Productivity Commission's "Review of the Gas Access Regime". Given this, the TNSPs have prepared this

submission on the basis that the appropriateness of merits or judicial review is outside the framework of this consultation.

However, the TNSPs note that the comments set out below should not be taken as indicating that they support the removal of the right to seek a merits review of particular decisions. The TNSPs in general support the availability of a right of merits review, particularly in the context of transmission determinations. In the proposed interim framework, where judicial review is the only review option, the TNSPs wish to ensure that the right of judicial review granted is not abrogated through a series of extremely broad discretions being allowed to decision makers. Such broad discretions have the effect that review of any decision becomes very difficult.

On a general level, the TNSPs are concerned that the manner in which various provisions of the draft NEL have been formulated means that it will be extremely difficult to review decisions taken under it. Examples of this include:

- (a) the provisions relating to transmission revenue and pricing rules in section 91 and the similar provisions relating to the functions and powers of the AER under section 15;
- (b) the ability of the AEMC to determine the weight it gives particular aspects of the national electricity market objective under section 87(2); and
- (c) the lack of any requirement on the AEMC to have regard to submissions received in relation to rule change and proposals under part 7.

While each of these matters is discussed below, at a general level, the TNSPs note that the discretions granted are extremely broad. Vesting a broad or wide discretion in decision making bodies may, from a policy point of view, be able to be justified as being appropriate if there is an associated safeguard of a related merit review process. In these circumstances, in any specific case, the body undertaking the merits review can scrutinise with an appropriate level of accountability the exercise of any broad or wide discretion at first instance.

However, where the basis for appeal or review is restricted to judicial review then, to ensure that there is appropriate accountability and transparency, greater care must be taken in drafting the relevant discretionary provisions. This means that general or wide discretions should be avoided in favour of statutory provisions which identify relevant considerations against which the exercise of the particular discretion can be assessed.

Such an approach is necessarily the counterpoint to the adoption of an approach which abandons merits review in favour of only judicial review. In essence, there is then a greater need to ensure that specific discretions contain sufficient detail in terms of identifying relevant considerations. Otherwise, the judicial review processes in practice may provide only a limited check on the broad discretionary powers. This would appear inconsistent with one of the stated aims of the reform process, namely, the achievement of greater accountability and transparency in the regulatory process.

The TNSPs note that similar issues arise in relation to the discretions granted to the AEMC under sections 34, 35(3)(c), 35(3)(1), 35(3)(n), 94 and 96 of the draft NEL. This is expected to be addressed in the TNSPs' more comprehensive submission.

2. Services for Which Access can be Sought

At the consultation forum held in Sydney on 10 December 2004, it was noted that the provisions of the Rules relating to access were not in a final form as a number of policy decisions relating to access regulation had yet to be taken.

The TNSPs are concerned that, while significant aspects of the policy framework remain outstanding, the legislative basis for the regulation of access pricing are being finalised through the NEL amendments.

The TNSPs consider that it is difficult to comment meaningfully on the draft NEL provisions until it is clear how access will be regulated under the Rules. For example, if the policy decision is taken that the

Rules will not be approved as an effective access regime or accepted by the ACCC as an industry access code (assuming that this were possible in respect of the Rules) under Part IIIA of the *Trade Practices Act* then, in the absence of further legislative change, the services provided by the TNSPs would potentially remain subject to declaration under Part IIIA of the *Trade Practices Act*. If such a declaration were to occur, the TNSPs would potentially be subject to conflicting legal duties under Part IIIA and the Rules and NEL.

In these circumstances, the TNSPs consider that the need to finalise the NEL should not outweigh the need to develop a complete and coherent regulatory structure prior to legislating for part of that structure.

The TNSPs consider that the lack of a finalised regulatory structure creates significant uncertainty as to the application of the draft NEL. A major example of this are the services in respect of which the Rules will set out the basis on which access can be sought. At present, Item 13 of Schedule 1 of the NEL provides that Rules can be made in relation to:

"access to services provided by means of transmission systems and distribution systems".

From the manner in which the Rule is drafted, it appears that this would allow Rules to be made in relation to access to any service provided by a transmission or distribution system. This is a fundamental change from the regime currently provided for under the Code where the access undertaking given by Network Service Providers as set out in Schedule 5.8 of the Code relates to "network services". Chapter 10 of the Code defines a "network service" as a:

"transmission service or distribution service associated with the conveyance, and controlling the conveyance, of electricity through the network".

Item 13 is not restricted to services the pricing of which is regulated by the AER nor even to network services. For example, it would appear that a Rule could be made requiring access to telecommunications services which a network service provider's network may be capable of providing.

The TNSPs consider that Item 13 should be amended such that it only applies to services which are regulated by the AER or to which access can otherwise be gained under any relevant jurisdictional legislation. These services should be clearly defined in the draft NEL.

The TNSPs also note that section 91(3) which sets out the basis on which the AEMC is required to make Rules for the pricing of transmission revenues does not refer to Item 13 of Schedule 1 but only to Items 15 to 24. The TNSPs consider that the Rules relating to access to the services provided by transmission networks must be consistent with the basis on which those services are priced.

As a result, the TNSPs consider that section 91(3) should, in the context of the making of Rules concerning access to transmission networks, refer to Item 13 of Schedule 1.

3. The Regulation of Transmission Pricing

The TNSPs also have a number of concerns relating to the manner in which the draft NEL provides for the AEMC to make Rules in respect of transmission regulation and the functions of the AER in respect of economic regulation.

These concerns fall into 2 main categories, namely:

- (a) the difficulty of ensuring accountability of the AEMC and AER given the range of the discretions granted to them; and
- (b) the lack of clarity as to the relationship between the provisions of Schedule 1 and the provisions of the main body of the draft NEL.

Section 91 of the draft NEL sets out the matters the AEMC must take into account in making Rules for transmission regulation. These are in substance the same as the matters which the AER must have regard to in performing economic regulatory functions or powers under section 15(2). The TNSPs consider that the broad discretions granted to the AEMC and the AER will make it extremely difficult to successfully

review any decision of the AEMC and AER for the reasons set out in section 1 above. The TNSPs wish to have clarified whether the draft NEL is intended to allow for a move to price regulation in addition to or in place of the current revenue cap approach.

For example, section 91(3)(a) and section 15(2)(a) provides that the AEMC or AER, as the case may be, must ensure that the Rule or exercise of power:

"provide[s] an opportunity for a regulated transmission system operator to recover the efficient costs of complying with a regulatory obligation".

The use of the word "opportunity" creates substantial uncertainty as to what the Rule or decision must ensure. It can be read as requiring no more than that there is some possibility that the regulated transmission system operator could recover those costs. The TNSPs believe that if a regulatory obligation is imposed on them, they should have an entitlement to recover the efficient costs of complying with that obligation. The proposed wording of section 91(3) and section 15(2)(a) does not do this.

Similarly, section 91(3)(c) and section 15(2)(c) require only that the Rule or decision "makes allowance" for the value of network assets. No guidance is given as to the basis on which such allowance must be made or that the allowance should enable the recovery of the costs of prudent investment. The TNSPs are concerned that there is potential for a move away from the current framework for asset valuation with little guidance given as to what the preferred approach is.

The TNSPs believe it is an essential part of the "regulatory compact" to which they are subject that, if they are to be required to give access to their networks (and to augment those networks to a standard necessary to maintain appropriate service levels), they have a clear right to recover costs efficiently and prudently incurred. At present, the drafting of section 91 and section 15 means that it would be extremely difficult for the TNSPs to challenge any regulatory decision given that the discretion granted to the AEMC and AER is very broad (and hence it would be hard to challenge any exercise of that discretion on traditional judicial review grounds).

This difficulty is increased through a lack of clarity as to the relationship between the main body of the draft NEL and the provisions of Schedule 1. At present, section 15 of the draft NEL, which sets out how the AER performs its economic regulatory functions and powers, only refers to Schedule 1 in a procedural sense through section 15(1)(b) requiring that the AER must consult with regulated transmission system operators and affected Registered participants (in the manner provided for in the Rules) or in relation to the services which are the subject of regulation (in section 15(2)(b)). However, items 15 to 24 of Schedule 1 provide for the AER to make determinations on matters which are not set out in section 15 or provide for these matters to be addressed on a potentially different basis than is set out in section 15. The TNSPs consider that the matters set out in Schedule 1 are integral to the regulation of transmission revenue. As a result, it is essential that sections 15 and 91 reflect these.

For example, item 19 provides for the Rules to set out the economic framework and methodologies to be applied by the AER for the purposes of the AER's assessment of investments in transmission systems under items 18. There is no requirement that these Rules be consistent with the matters set out in section 15.

Further, item 22 provides that the AER must determine:

- (a) depreciation;
- (b) operating costs; and
- (c) an allowable rate of return.

However, there is no express reference to any of these matters in section 15 or section 91. The TNSPs consider that not only should there be consistency between Schedule 1 and sections 15 and 91, but also that they should have a clear right to recover efficient costs and the recovery of a rate of return which supports the achievement of the national electricity market objective.

The TNSPs also note that they have some concern about the difference between the overall objectives placed on the AER under section 15(1)(a) and the national electricity market objective in section 6. In the TNSPs' experience, a Court will generally assume that the use of different language into statutory provision indicates a parliamentary intention that the provisions be interpreted differently. Not only are the TNSPs not aware of any reason why there need be such a distinction drawn in these circumstances, they are also concerned that the difference in wording gives rise to significant uncertainty as to how a Court would interpret section 15(1).

4. Uncertainties in the Rule-Making Process

Under section 87(1) the AEMC is required to only make a proposed Rule if it is satisfied that the Rule "will or is likely to contribute to the achievement of the national electricity market objective".

However, it is not clear how the AEMC addresses matters which are raised in submissions made to it and the AEMC appears to have an almost unlimited discretion as to the actions it takes in considering a proposed Rule change.

Section 99(3) and 103(3) make it clear that the rule as approved by the AEMC need not be the rule which was originally proposed to the AEMC and, in the case of section 103(3), need not be the Rule which was foreshadowed in the draft Rule determination. No limitation is placed on the changes which may be made to a proposed Rule change or to the Rule change proposed in the draft Rule determination.

The discretion granted to the AEMC in this regard appears to only be constrained by the overall requirement in section 87 that the AEMC only make a Rule if it is satisfied that it will or is likely to contribute to the achievement of the national electricity market objective.

However, the test imposed by section 87 is one which requires only that the AEMC be satisfied that the Rule it proposes to make will contribute or is likely to contribute to the national electricity market objective. The AEMC is not required to determine that the proposed rule is the most appropriate way of achieving the national electricity market objective in the relevant area but only that the rule will "contribute" to that. This broad discretion gives rise to substantial difficulty in relation to the treatment of submissions made by interested parties on a proposed Rule change and allows a broad discretion to the AEMC to alter proposed Rule changes after the consultation process. Part 7 of the draft NEL does not impose any express requirement on the AEMC to take into account submissions received and it appears that the Rule change adopted by the AEMC could differ materially from that which was consulted on.

If the AEMC were to not adopt a submission which would make a proposed Rule more consistent with the national electricity market objective then it would appear that, so long as the Rule actually made satisfied the test in section 87, it would be very difficult to judicially review the AEMC's decision. Further, it would appear difficult to challenge an AEMC decision where the final Rule adopted was substantively different from the Rule consulted on.

To overcome these deficiencies, the TNSPs consider that the AEMC should be under an express duty to:

- (a) consider submissions received and to adopt those submissions if they were to aid or would be likely to aid in the achievement of the national electricity market objective (having regard to any relevant MCE statement of policy principles); and
- (b) not substantively alter proposed Rule changes between the draft and final determinations.

The TNSPs are also concerned that the broad discretion granted to the AEMC under section 87(2) to decide on what weight to give particular aspects of the national electricity market objective will increase the difficulty of reviewing decisions of the AEMC in relation to Rule changes. As discussed in section 1 above, the breadth of this discretion means that it is likely that a decision of the AEMC would only be reviewable if that decision were perverse or could otherwise be said to be unreasonable in a traditional review sense.

The TNSPs believe that imposing such a high barrier to the review of AEMC decisions will make it difficult to ensure the accountability of the AEMC in performing its Rule-making function.

5. Other Matters

(a) Definition of "*national electricity system*"

Section 2 of the draft NEL defines the "national electricity system" as:

- "(a) the generating systems and other facilities owned, controlled or operating in the participating jurisdictions connecting to the interconnected transmission and distribution system referred to in paragraph (b); and
- (b) the interconnected transmission and distribution system in the participating jurisdictions used to convey and control the conveyance of electricity that connects -
 - (i) the generating systems and other facilities referred to in paragraph (a); and
 - (ii) loads settled through the wholesale exchange operated and administered by NEMMCO under this Law and the Rules."

The TNSPs note that the manner in which load supplied by "local retailers" are settled under the Code and the draft Rules means that it is not clear whether distribution system assets which are used to supply customers which purchase electricity from the local retailer fall within subparagraph (b). This is because, in the wholesale market, the purchase of electricity for supply to these customers is settled at the point where the relevant distribution systems joins the relevant transmission network. As a result, those parts of the distribution system which supply such customers would not be used to convey electricity to a load settled through the wholesale exchange.

(b) Definition of "*national electricity market*"

Section 2 of the draft NEL defines the "national electricity market" as the national electricity system together with the "wholesale exchange operated and administered by NEMMCO under this Law and the Rules".

Given that the national electricity system is defined as the physical assets underlying the generation, transmission and supply of electricity, there appears to be some doubt as to whether the definition of "national electricity market" include matters which are not directly part of the wholesale exchange but which are necessary for the supply of electricity.

Examples of matters which could fall under this category are the procurement of ancillary services (particularly non-market ancillary services) and functions undertaken in relation to matters such as retail contestability.

(c) The relationship between definitions of "*national electricity market*" and "*national electricity system*"

As discussed above, the definition of "national electricity system" refers to the physical assets used for the generation, transmission and supply of electricity and the "national electricity market" is defined as the national electricity system plus the wholesale exchange operated and administered by NEMMCO.

Leaving aside the difficulties noted above which the reference to the "wholesale exchange" creates, the use of these 2 terms creates some difficulty in determining the functions and powers of certain Code or Rule bodies. For example, under section 37(2) the Reliability Panel is given certain functions relating to the national electricity system.

Given the definition of "national electricity system" and "national electricity market" it is unclear the extent to which the Reliability Panel can enquire into matters which relate to the "wholesale exchange" but which affect power system security and reliability. For example, matters such as the acquisition of ancillary services or the setting or reserve levels may impact significantly on power system security. However, given that these matters do not relate to the "national electricity system" it is unclear to what extent the Reliability Panel can enquire into them.

Attachment 2

TNSP Suggested Amendments to Transmission Regulation Provisions of the NEL Exposure Draft

Definition of Transmission Determination

"**transmission determination**" means a determination made by the AER under the Rules that regulates ~~,-~~

(a) ~~the revenue that an owner, controller or operator of a transmission system earns or may earn from the provision by that owner, controller or operator of services that are regulated under the Rules provide may be the subject of a transmission determination; or~~

(b) ~~the prices an owner, controller or operator of a transmission system charges, or may charge, in accordance with the Rules, in respect of services provided by that owner, controller or operator that are regulated under the Rules;~~

New definition of Transmission System

"transmission system" has the meaning given to that term in the Rules.

14 Functions and Powers of the AER

The AER has the following functions and powers-

- (a) to monitor compliance by Registered participants and other persons with this Law, the Regulations and the Rules; and
- (b) to investigate breaches or possible breaches of provisions of this Law, the Regulations or the Rules that are not offence provisions; and
- (c) to institute and conduct proceedings against relevant participants under section 60 of this Law or section 44AAG of the *Trade Practices Act 1974* of the Commonwealth and against persons under section 66 of this Law; and
- (d) to institute and conduct appeals from decisions in proceedings referred to in paragraph (c); and
- (e) exempting persons proposing to engage, or engaged, in the activity of owning controlling, or operating a transmission system or distribution system forming part of the interconnected transmission and distribution system from being registered as Registered participants; and
- (f) AER economic regulatory functions or powers; and
- (g) any other functions and powers conferred on it under this Law, the Regulations and the Rules.

15 Manner in which the AER must perform or exercise AER economic regulatory functions or powers

- (1) The AER must, in performing or exercising an AER economic regulatory function or power-

- (a) perform or exercise that function or power in a manner that promotes the long term interests of consumers of electricity national electricity market objective; and
 - (b) if the function or power performed or exercised by the AER relates to the making of a transmission determination, ensure that the regulated transmission system operator to whom the determination will apply, and any affected Registered participant, are, in accordance with the Rules-
 - (i) informed of the issues under consideration by the AER; and
 - (ii) given a reasonable opportunity to make submissions in respect of that determination before it is made.
- (2) Without limiting subsection 1(a), the AER, in making a transmission determination, must, in accordance with the Rules-
- (a) ensure that, as at the time it is made, the transmission determination will, over the period it has effect, provide ~~an opportunity~~ for a regulated transmission system operator to recover:
 - (i) the efficient costs of complying with a regulatory obligation including regulatory obligations imposed after the time the determination is made; and
 - (ii) a depreciation allowance reflecting the economic life of assets forming part of the transmission system owned, controlled or operated by the regulated transmission system operator that are used to provide services that are the subject of the transmission determination; and
 - (iii) the operating costs reasonably and efficiently incurred by the regulated transmission system operator as part of, in relation to or as a consequence of, providing services that are the subject of the transmission determination; and
 - (iv) a fair and reasonable risk-adjusted rate of return on the value of the assets used to provide services that are the subject of the transmission determination; and
 - (b) provide effective and reasonable incentives to a regulated transmission system operator to promote economic efficiency in the provision, by it, of services that are ~~regulated under the Rules~~ the subject of the transmission determination, including-
 - (i) the making of efficient investments in the transmission system owned, controlled or operated by it that are used to provide services that are the subject of the transmission determination; and
 - (ii) efficient provision by it of services that are the subject of the transmission determination ~~by it~~; and
 - (c) ~~make allowance for~~ determine the value of assets forming part of a transmission system owned, controlled or operated by a regulated transmission system operator which are used to provide services that are the subject of the transmission determination and proposed new assets to form part of that transmission system which will be used to provide such services; and

- (d) have regard to any valuation of assets forming part of a transmission system owned, controlled or operated by a regulated transmission system operator applied in any relevant determination or decision.

91 Rules in relation to transmission revenues and pricing

....

- (3) The AEMC must not make a Rule for or with respect to any matter or thing specified in items 15 to 24 of Schedule 1 unless the Rule-
 - (a) ensures, that as at the time it is made, the transmission determination will, over the period it has effect, provides ~~an opportunity~~ for a regulated transmission system operator to recover:
 - (i) the efficient costs of complying with a regulatory obligation including regulatory obligations imposed after the time the determination is made; and
 - (ii) a depreciation allowance reflecting the economic life of assets forming part of the transmission system owned, controlled or operated by the regulated transmission system operator that are used to provide services that are the subject of the transmission determination; and
 - (iii) the operating costs reasonably and efficiently incurred by the regulated transmission system operator in, in relation to or as a consequence of, providing services that are the subject of the transmission determination; and
 - (iv) a fair and reasonable risk-adjusted rate of return on the value of the assets used to provide services that are the subject of the transmission determination; and
 - (b) provides effective and reasonable incentives to a regulated transmission system operator to promote economic efficiency in the provision, by it, of services that are ~~regulated under the Rules~~ the subject of the transmission determination, including-
 - (i) the making of efficient investments in the transmission system owned, controlled or operated by it that are used to provide services that are the subject of the transmission determination; and
 - (ii) efficient provision by it of services that are the subject of the transmission determination by it; and
 - (c) requires the AER, in making a transmission determination, to ~~make allowance for~~ determine the value of assets forming part of a transmission system owned, controlled or operated by a regulated transmission system operator which are used to provide services that are the subject of the transmission determination and proposed new assets to form part of that transmission system which will be used to provide such services; and
 - (d) requires the AER to have regard to any valuation of assets forming part of a transmission system owned, controlled or operated by a regulated transmission system operator applied in any relevant determination or decision.

Schedule 1

Operation of generation, transmission and distribution systems

12. The augmentation or expansion in the capacity of transmission systems and distribution systems.
13. Access to services provided by means of transmission systems and distribution systems where the revenue which the owner, controller or operator of the transmission or distribution system can derive from providing the services, or the price which it can charge for providing those services is regulated under the Rules, or where the laws of the participating jurisdiction in which access is sought otherwise allow for access to be sought on that basis.

...

Transmission system revenues and pricing

15. The regulation of revenues earned or that may be earned by owners, controller or operators of transmission systems from the provision by them of services that are ~~regulated under the Rules~~the subject of a transmission determination.
16. The ~~methodology for the determination regulation~~ of prices charged or that may be charged, to recover the revenue provided for in a transmission determination, by owners, controllers or operators of transmission systems for the provision by them of services that are ~~regulated under the Rules~~the subject of the transmission determination, and the methodology for the determination of those prices.
17. Principles to be applied, and procedures to be followed, by the AER in exercising or performing an AER economic regulatory function or power.
18. The assessment, or treatment, by the AER, of investment in transmission systems for the purposes of making a transmission determination.
19. The economic framework and methodologies to be applied for the purposes of item 18.
20. The ~~mechanisms or methodologies for the derivation of revenue or prices~~ to be applied by the AER in making a transmission determination.
21. The valuation, for the making of a transmission determination, of assets forming part of a transmission system owned, controlled or operated by a regulated transmission system operator, and proposed new assets to form part of a transmission system owned, controlled or operated by a regulated transmission system operator.
22. The determination by the AER for the purpose of making a transmission determination of-
 - (a) a depreciation allowance ~~of for~~ a regulated transmission system operator; and
 - (b) operating costs of ~~the~~ a regulated transmission system operator in providing services which are the subject of the transmission determination; and
 - (c) an allowable rate of return on assets forming part of a transmission system owned, controlled or operated by a regulated transmission system operator and which are used to provide services which are the subject of the transmission determination.
23. Incentives for regulated transmission system operators to make efficient operating and investment decisions.
24. The procedure for the making of a transmission determination by the AER, including-
 - (a) the publication of notices by the AER; and

- (b) the making of submissions, including by the regulated system transmission operator to whom the transmission determination will apply and by affected Registered participants (within the meaning of section 15(3)); and
- (c) the publication of draft and final determinations and the giving of reasons; and
- (d) the holding of predetermination conferences.

Attachment 3

Miscellaneous Issues

(a) Definition of "jurisdictional derogation"

Sub-paragraph (b) of this definition enables the application of a provision of the Rules to be varied "in the participating jurisdiction" to which the derogation relates.

In the case of bodies performing functions under the Rules (such as the AER or AEMC) those functions may not be performed in the relevant participating jurisdiction as the relevant body may not be located there. Given that the relevant function may not be performed in the relevant jurisdiction, it is uncertain whether the Rules applying to the performance of that function in those instances would be the Rules that apply in the jurisdiction. For example, under the current Code, derogations have been introduced in a number of jurisdictions concerning the manner in which the ACCC regulates transmission pricing in that jurisdiction. It is not clear whether in regulating the relevant entity, the ACCC could be said to be performing the relevant function in the relevant jurisdiction

To avoid any possible argument that sub-paragraph (b) only applies in circumstances where the relevant function is performed in the jurisdiction in question, the TNSPs suggest that the reference to "in the participating jurisdiction" is replaced with a reference to "in, or in respect of, the participating jurisdiction".

(b) Definition of "participant derogation"

This definition is drafted in a manner such that it is arguable that it will not be possible for a participant to apply for a derogation in respect of the manner in which bodies such as the AER and AEMC exercise functions or powers in relation to that participant.

This is because the power to grant the derogation is to exempt the relevant person (or a class in which they are a member) or NEMMCO from complying with the rules or to modify the application of the Rules to that person (or a class of which they are a member) or to NEMMCO. Given that NEMMCO cannot apply for a participant derogation, it appears from the manner in which the definition is drafted that, while a participant can apply to vary the manner in which NEMMCO exercises a power or function under the rules in respect of that participant (or a class of which they are a member), it is not possible for the participant to apply in respect of other code bodies such as the AER or AEMC.

Given the need which arose to seek derogations under the Code in respect of the manner in which bodies such as the ACCC or jurisdictional regulators exercise powers, the TNSPs suggest that this should be corrected.

(c) Part 2 - Granting of Exemptions

Under Section 10, a person is required to register in respect of various activities unless that person has been granted an exemption by NEMMCO (in the case of owing, controlling or operating a generating system or purchasing electricity directly through the wholesale exchange) or the AER (in the case of owning, controlling or operating a transmission or distribution system).

From the way in which sections 10 to 13 are drafted, it appears that there is no power for NEMMCO or the AER to grant general exemptions for particular classes of activity or types of facilities.

This is because the manner in which section 13 is drafted suggests that NEMMCO's sole power to grant exemptions is that arising under section 11 and the AER's sole power to grant exemptions is that arising under section 12. Sections 11 and 12 make clear that each person

which wishes to be granted an exemption must individually apply to NEMMCO or the AER as the case may be (through referring to "a person" who wishes to engage in the relevant activity requesting NEMMCO or the AER to "exempt that person" (our emphasis) and by the power to grant the exemption being to grant "the person" the relevant exemption).

At present, there is power under the Code for exemptions to be granted to classes of persons who are otherwise become subject to the obligation to register (see for example clause 2.2.1(c) and section 2.5.1(d)).

The TNSPs consider that it would be appropriate for there to be power to exempt classes of person who would otherwise be required to register under the Rules. Examples of entities to which this may apply are the owners of what are essentially private networks such as those found in the shopping centres and caravan parks. The TNSPs suggest that this would avoid the administrative burden of numerous applications.

(d) **Section 35(3).**

The TNSPs note that, under section 35(3)(c), Regulations may be made and the AEMC is given the power to make Rules conferring functions or powers on "bodies" established in accordance with the Rules or a "person" appointed in accordance with the Rules.

Schedule 2 of the draft now defines a "person" as "including an individual or a body politic or corporate".

The reference to the ability to confer powers or functions on bodies "established under the Rules" implies that it is not possible to confer functions or powers on an entity which is not a legal person or which is not established under the Rules.

For example, it is arguable that functions or powers could not be conferred on specific government departments in participating jurisdictions (as opposed to the Crown in right of the relevant jurisdiction as a whole). As discussed below, this may prove problematic given that, at present, the entities performing what is to be referred to as a jurisdictional system security coordinator is in a number of jurisdictions a department in the relevant jurisdiction.

(e) **Section 50**

Section 50 requires NEMMCO to perform the functions referred to in section 49 efficiently and "on a full cost recovery basis".

The TNSPs note that, at NEM commencement, it was considered that there was substantial uncertainty as to whether the requirement to set fees to meet revenue requirements in respect of particular expenditure allowed for non-recurring expenditure to be recovered over a number of years.

The TNSPs suggest that, for the avoidance of future difficulties, it may be appropriate for section 50 to expressly provide that the reference to "full cost recovery" does not require that cost be recovered over any particular period or in the year in which it is incurred.

(f) **Section 76**

This provision appears to allow the AER to elect to proceed under section 60 of the NEL or section 44 AAG of the *Trade Practices Act* at any time until the end of the 6 year time period provided for under section 59 even if the AER has issued the relevant participant with an infringement notice under section 73 and that notice has been complied with.

The TNSPs consider that it is somewhat extraordinary for participants to be exposed to further proceedings if an infringement notice has been complied with (particularly in the absence of any information provided by the participant being misleading or the participant otherwise

"procuring" that the AER issue an infringement notice rather than proceeding under section 60 of or section 44AAG of the *Trade Practices Act*).

The TNSPs consider that if the AER has elected to pursue the matter by way of an infringement notice and the relevant participant has complied with this infringement notice then the AER should have no later ability to elect to pursue the matter further, in the absence of misconduct by the participant which caused the AER to issue the infringement notice as opposed to taking other steps.

(g) Section 86 - Definition of "Urgent Rule"

As a result of the manner in which this definition is drafted, an "urgent Rule" can only be made if the matter or thing imminently prejudices or threatens the effective operation of the wholesale exchange or the safety, security or reliability of the national electricity system.

The TNSPs note that in recent times, a number of the matters for which derogations have had to be sought on a relatively urgent basis have been for matters which could not be said to fit within these categories. One example of this is the derogations sought in respect of New South Wales transmission pricing.

The TNSPs consider that there should be an ability to seek urgent Rule changes in respect of matters which do not fit within the specified categories but which the AEMC reasonably considers are by their nature urgent.

The TNSPs acknowledge that the discretion which would be granted if this were to occur would be broad and that, to some extent, giving the AEMC this power can be seen as contrary to the rationale for a number of other amendments to the draft NEL suggested by the TNSPs elsewhere in this submission. The TNSPs acknowledge this, but consider that the potential disruption which could follow if an urgent Rule change were unable to be made as it fell outside the grounds specified in section 86 outweighs this. Proper governance could be maintained even if the nature of the matters which could be addressed through an urgent Rule change were broadened through the AEMC being required to seek the approval of the MCE before making an urgent Rule change, particularly if there is an objection to that change under section 96(3), or through the Rule change being of a limited duration (for example the Rule could only apply for the shorter of the duration of the "emergency" or for the period necessary for the relevant Rule change to be considered in the ordinary manner).

(h) Section 94(1)

Under section 94(1) the AEMC is required to consider whether, after receiving a Rule change, it would be acting "within the powers conferred on it under the Law" in making the Rules.

The TNSPs consider that given that the fundamental power granted to the AEMC is to make Rules which promote or are likely to promote the national electricity market objective (and conversely that the AEMC has no power to make Rules which do not meet or which are not likely to meet this objective), the requirement in section 91(1)(b) requires the AEMC to form a view as to whether or not a proposed Rule meets the national electricity market objective. The TNSP presume that, rather than this, section 91(1)(b) is intended to provide for the AEMC to determine whether or not the proposed Rule is in respect of a matter for which Rules can be made (that is, it is within the matters referred to in section 35). The TNSPs suggest this should be clarified.

(i) **Section 96(3)**

The TNSPs note that the AEMC cannot make a Rule on an urgent basis if the reasons set out in a request are not "misconceived or lacking in substance". The TNSPs have some concern that in circumstances where urgent action is required to address a particular matter, there may be disagreement as to the appropriate action to be taken. In these circumstances, substantive (and reasonable) objections may be raised but which have the effect that no action can be taken to resolve an urgent situation. The TNSPs consider that the nature of the "emergency" which gives rise to the need for the urgent Rule change may be such that taking no action would cause significant disruption.

As discussed above in relation to section 86, the TNSPs suggest that a mechanism to address this may be for the AEMC to be required to seek the approval of the MEC to such a Rule change or to only have the power to make a rule of limited duration to address an urgent problem where an objection raised under section 96(3) raises substantive issues.

(j) **Sections 100 and 101**

Section 100 grants "any person or body" the right to make a written submission or comment on a draft Rule determination.

However, section 101 grants the right to request a pre-final Rule determination hearing to an "interested person or body".

The TNSPs note that it is not clear what would constitute an "interest" for the purposes of the section, particularly given the narrower formulation of interest under section 68 relating to standing for seeking judicial review of particular decisions.

(k) **Section 109**

This section provides for a Minister of a participating jurisdiction to appoint a "person" to be the jurisdictional system security coordinator for that jurisdiction.

As discussed above, as government departments are not legal persons, it is not clear whether this would enable government departments to be directly appointed. While this matter could be overcome through the manner in which the relevant body was appointed (that is, through the Crown in right of the relevant jurisdiction acting through the particular department being appointed) it would avoid potential difficulty if the power of appointment extended to a "body" or a "body or authority".

(l) **Section 112**

Under section 112 NEMMCO and jurisdictional system security coordinators are entitled to exchange information amongst themselves and to provide information to a Minister of a participating jurisdiction where this is necessary (in broad terms) to coordinate the relevant load shedding or where otherwise provided in the Rules.

It is not clear that there is a broader ability to give such information to other entities where this is necessary to give effect to the procedures. The TNSPs note that it is likely to be necessary for some of the relevant information to be given to other entities (including the TNSPs) to give effect to the load shedding procedures.

The TNSPs suggest that section 112 is amended to make clear that it does not prevent the disclosure of this information to other entities in accordance with the Rules.