

Submission to the Ministerial Council on Energy

Re The Proposed National Electricity Law



**UNITED ENERGY
Distribution**

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HIGHLIGHTS

Best Practice Regulation

- The new National Framework for regulation should be based on best practice regulation.
- Best practice regulation has been set out by the Utility Regulators Forum, a body comprising all the utility regulators in Australia.
- The Utility Regulators Forum sets out the nine points of best practice including communication, consultation consistency, predicability, flexibility, independence, effectiveness and efficiency, accountability and transparency.
- The Ministerial Council on Energy (MCE) should adopt this best practice model to evaluate its proposals against in order to develop a best practice approach to the national market.

The National Electricity Market Objectives

- The National Electricity Market (NEM) objective is critical for the rule-making test and the proposed objective includes “safety”.
- “Safety” has not been an objective of the existing National Electricity Law (NEL) and is a state responsibility.
- The term “Safety” and “Security” should be reviewed to determine if they should be qualified to ensure they do not conflict with jurisdictional objectives.

The Net Benefit Test for the AEMC

- United Energy Distribution (UED) does not support the Standing Committee of Officials (SCO) argument that a formalised net benefit test is unnecessary due to the market objective and s.87 of the NEL.
- The net benefits test is a best practice technique to evaluate any public policy.
- Many governments in Australia use the net benefit test to apply to public policy issues. The MCE should not reject the test on the basis of complexity but rather ensure that it can be applied in different levels of complexity for different sorts of issues. Governments would not use the test if it was too complex.
- The MCE should reinstate a specific formal requirement for the net benefit test as a requirement of best practice regulation.

The AER Objective for Transmission Companies

- The MCE propose an objective for the Australian Economic Regulator (AER) as a limited version of the market objective.
- There is no reason why these objectives should not be consistent.
- The AER objectives are also inconsistent with the decisions by the Commonwealth Government on the changes to Part IIIA of the Trade Practices Act and the Productivity Commission review of the National Gas Access Regime.
- There should be a consistent application of NEL objectives with Part IIIA changes and the changes to the Gas Access Regime.

Effective Consultation

- The MCE Information Paper and the Exposure Draft only have a “reasonable” requirement for the AER to consult with interested parties in price reviews.
- This is not best practice regulation and more detailed consultation requirements should be placed on the AER.

Information Gathering

- The MCE Information Paper and the Exposure Draft propose quite onerous information gathering proposals and do not differentiate between enforcement and pricing and access decisions.
- This is not best practice regulation and such a differential should be made.
- In addition one of the MCE key requirements is to harmonise regulations between electricity and gas.
- The MCE should adopt the information gathering powers of the National Gas Code for AER price reviews.

Asset Valuation

- The MCE Information Paper and the Exposure Draft refer to the AER “having regard to” asset valuations.
- This is not best practice regulation as the term “have regard to” is subject to conflicting legal interpretations and would increase the uncertainty of the national model.
- The National Gas Code and the Victorian Essential Services Commission (the ESC) accept that there should be only an initial asset valuation and it should only be updated in later price reviews to reflect net asset changes. The Australian Competition and Consumer Commission (ACCC) has stated that they will also move electricity transmission companies to this model.
- Given all key regulators agree, the MCE should adopt this specific version of asset valuations and eliminate any uncertainties in the NEL.

Overall Consultation Process

- UED considers that the timing of the consultation and the extent of the details to be considered is not best practice regulation.
- UED reserves its right to make further submissions on the issues following more detailed legal advice and consideration of the issues.

1. Introduction

United Energy Distribution Pty Ltd (UED) is one of five electricity distribution businesses operating under licence within the State of Victoria, with assets totalling approximately \$2.0 billion. UED's network provides services to some 600,000 end-use customers in Melbourne's southern and eastern suburbs, with its area of operation confined to geographically defined boundaries set out in its Distribution Licence.

This submission comments on the Ministerial Council on Energy (MCE), Standing Committee of Officials (SCO), Information Paper on National Electricity Law (NEL) and National Electricity Rules (NER) (the Information Paper), and the Exposure Draft of the National Electricity Law (the Exposure Draft) issued in December 2004. The main body of the submission deals with UED's key comments while Appendix 1 tabulates UED's comments by NEL clause.

The Information Paper has extensively revised the Electricity Law from the current (NEL), which is a Schedule to the SA Act National Electricity Act 1996. The revised NEL implements:

- a new national electricity market definition to be the wholesale exchange, the generating systems and other facilities connected to the transmission and distribution systems, and the transmission and distribution systems;
- a new national electricity objective in the Law to "promote efficient investment in, and use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability, safety and security";
- the functions of the MCE, the AEMC and the AER with respect to transmission pricing arrangements;
- the enforcement proceedings under the NEL and the associated civil and criminal penalties; and
- new information gathering powers and search warrant powers for the AER;

While UED generally supports the national reforms it has a number of concerns with the Exposure Draft and the Information Paper that includes the:

- disappearance of the formalised requirement for a "net benefit test" in AEMC decisions;
- lack of an information gathering power for the AER that meets the Council of Australian Governments (COAG) objectives;
- problems with the market objective;
- concerns about the structure of the AER objectives;
- lack of an effective and efficient consultation arrangements for AER price reviews; and
- lack of the application of best practice regulation in a number of areas.

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UED notes that one of the key MCE objectives of national regulation reform is to address “the potential for harmonising regulatory arrangements, removing inconsistencies and integrating networks.”¹ In this light UED supports the development of a National Energy Access Code, which uses the National Gas Code (revised in line with the recommendations of the Productivity Commission) as its basis.

UED is concerned about the context in which the MCE principles have been developed and what relationship they have to broader policy development processes on third party access pricing (such as the response to the Productivity Commission *Review of the Gas Access Regime* and future work on a national energy access regime). UED would expect a statement from the MCE that the model to be used for gas and electricity distribution access and pricing would be based on the concept of best practice regulation.

At the Consultation session on 10 December 2004, UED expressed its concern about the suggestion that the access provisions of the National Electricity Rules (NER) are “square bracketed” and will be amended once a policy decision on access had been made by the MCE. UED welcomes the commitment made at the Consultation session that there will be consultation on these changes. Whilst UED understands the MCE is anxious to progress the making of the NER, the access framework is clearly a critical issue for distribution networks. Whilst not yet the focus for MCE deliberations, UED is similarly anxious to ensure any changes made to the NER in haste do not restrict the prospects for the evolution of a best practice national energy access framework for distributors.

In the MCE paper of 11 December 2003, the MCE set out a summary of COAG Review Findings that included that reforms should be undertaken to:

“Streamline and improve the quality of economic regulation across energy markets, to lower the cost and complexity of regulation facing investors, enhancing regulatory certainty and lower barriers to competition”.²

UED considers that the SCO have not met the requirements of this objective nor of the above “harmonisation objective” in many of their proposals in the Information Paper and the associated Exposure Draft.

Whilst this is a substantial submission on the NEL UED reserves it’s right to make further submission depending on MCE releases and more detailed legal advice.

¹ Ministerial Council on Energy, Report to the Council of Australian Governments, Reform of Energy Markets, 11 December 2003, p.3.

² Ibid, p. 4

2. The Net Benefit Test

2.1 Introduction

In past consultation papers including those on Streamlining of the Code Charge Process (March 2004) and the paper on the Proposed National Electricity Rule Change Process (August 2004) the net benefit test was the central component of the AEMC’s decision making process. There was also no consideration at the time that the requirement for such a test could be inferred from the market objective of the AEMC.

For example, between the August 2004 MCE Paper and the December 2004 paper the Rule Making Test of the AEMC has varied substantially without any comment by the SCO as to why the “net benefit test” can now be inferred to flow from the AEMC market objective and why a formalised test was abandoned.

Table One

Earlier Rule Making Test (August 2004)	Recent Rule Making Test (December 2004)
<p>In making a decision on a Rule Change Proposal, the AEMC will apply a net benefit test based on the achievement of the Market Objectives. A decision of the AEMC will be consistent with the Market Objectives (which are to be included in the NEL) and with any MCE Statement of Policy Principles.</p> <p>The assessment process for the net benefit test will be through a ‘with or without’ analysis. This means that the analysis will cover prospective market outcomes if the Rule Change Proposal is accepted compared to the outcomes if the Rule Change Proposal was not accepted.</p> <p>The AEMC will be required to apply a net benefit test based on the achievement of the market objectives, including the long term interests of consumers, in deciding whether to approve a rule change.³</p>	<p>Under the new NEL and Rules, in making a decision on a Rule change proposal, the AEMC may only amend the Rules if it is satisfied that the amendment will, or is likely to, contribute to the achievement of the national electricity market objective.</p> <p>The AEMC may give the various aspects of the national electricity market objective such weight as is appropriate in all the circumstances having regard to any relevant MCE statement of Policy Principles.</p> <p>If the AEMC is satisfied that a Rule will, or is likely to, contribute to the achievement of the national electricity market objective, the AEMC must make the Rule.</p> <p>The Rule making test is not dissimilar to the Code change test applied by NECA under the current Code (p. 16 Information Paper).</p>

³ Proposed National Rule Making Process, August 2004, p.12

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At the time of the August 2004 paper the broad objectives of the AER had already been determined and yet the net benefit test was set out in detail. How does the SCO and the MCE justify this change in processes?

2.2 Can a Regulatory Objective Evoke the Requirement for a Net Benefit Test

The SCO has suggested that a formal reference to a net benefit test is unnecessary as the objective of the AEMC encompasses the need for a net benefit test. This objective is:

“To promote efficient investment in, and use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability, safety and security.”⁴

In addition the requirements of s.87(1) of the new NEL require the rule making test to “only make a rule if it is satisfied that the Rule will or is likely to contribute to the achievement of the national market objective”. The SCO claims that such a requirement will leave it up to the AEMC to determine if a net benefit test should be applied to a particular rule change.

A net benefit test (or a cost benefit analysis) is a formal tool of public policy to assess the costs and benefits of any proposal to ensure that it delivers a net benefit to society and or that the proposal with the highest net benefit is chosen. The net benefit test provides an assessment criterion that is used extensively in public policy in Australia.

The net benefit test is not inherent in any objective. If the above objective was changed to “the long term net benefit to consumers” this would encompass a more direct link but even this might not be enough to evoke a net benefit test without a policy decision by the government or a legislative requirement such as under a Subordinate Legislation Act (SLA).

An objective and a criterion for implementation are, put simply, different things with different purposes.

Even if we accept that the net benefit test can be evoked from the objective to provide certainty to the regulatory model the MCE should adopt a formal requirement for the test. Nothing would be changed in terms of outcomes but the regime would be more certain. In addition, the Regulators Utility Forum (a forum for regulators of utilities) in considering best practice regulation argued that:

“Poorly designed or ineffectively implemented regulation can have a significant impact on the efficiency and competitiveness of an industry or sector”.⁵

⁴ Ministerial Council on Energy, Standing Committee of Officials, Information Paper on National Electricity Law and National Electricity Rules, December 2004, p.9

⁵ Best Practice Utility Regulation, Utility Regulators Forum Discussion Paper, Utility Regulators Forum, July 1999, p.2

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Poorly designed regulation does not meet the best practice principles on which national regulatory reform should be based.

2.3 The Net Benefit Test in Practice

Under the Westminster approach to Government, Cabinet decisions on policy and the consideration of legislation by Parliament are designed to ensure that the legislative process delivers effective government that results in a net benefit to society. If this is not the case the Government may be rejected by the public at the following election.

Thus there are various approaches where governments seek to ensure that decisions reflect a net benefit to society. While such a concept is simply expressed in practice it can be quite difficult to operationalise given measurement problems, choice of discount rates and intergenerational complexities. Governments adopt a variety of methods on which to base beneficial public policy:

- Considerations by Cabinet and Parliament;
- Evaluation by panels of experts;
- Cost efficiency studies; and
- Cost benefit studies.

A number of governments have formalised the net benefit test with the use of Subordinate Legislation Acts to require any change to regulations to be assessed in cost benefit terms. There has been no area where a cost benefit review has been undertaken without such an Act or a cabinet or ministerial decision requiring such a test. There has never been a suggestion that such a test is inherent in any regulatory or other objective.

In Victoria, the Government has established the Victorian Competition and Efficiency Commission with the objective of assessing key legislation in cost benefit terms. This has been presented in Victoria as international best practice:

“The Bracks Government will continue to lead the way in reducing the time and costs of doing business in Victoria—and the prices faced by Victorian consumers—by ensuring that Government regulation does not unduly impact on business productivity and growth. The Bracks Government will adopt international best practice in scrutinising new legislative proposals through the introduction of a Business Impact Assessment for all legislation with potentially significant effects for business and competition. This will specifically include an assessment of the impact on small business”.⁶

The Victorian Government considers that a formalised “net benefit” test applied to both regulations and legislation is international best regulatory practice and can impact significantly in a positive manner on the State’s economic growth.

⁶ Statement by the Victorian Government, Victoria leading the Way, 20 April 2004.

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In addition the Victorian Government has the Subordinate Legislation Act 1994 which requires that any change to regulations must be assessed in a formal cost benefit framework. Particular regard should be had to section 10 of that Act and the guidelines issued by the Premier under section 26 which specifies how a formal cost benefit model operates.

The Commonwealth Government also adopts a formalised net benefit test as a key requirement for its assessments of Commonwealth regulations rather than relying on the objectives to evoke a cost benefit evaluation. This approach is summarised in the Utility Regulators Forum paper on Best Practice Regulation:

“In this context the Commonwealth Government has established a mandatory process for all departments, agencies or statutory authorities that make, review or reform regulations. This process seeks to ensure that regulation is necessary, will produce net benefits to the community and is the most efficient/effective of all available alternatives. It is pursued through the development of a regulatory impact statement which provides a structured framework to guide the activities of organisations that have a regulatory function.

The formal framework for the development of a regulatory impact statement accords with the adoption of the best practice principles identified earlier. A clear understanding of the process contributes to the achievement of some of those principles, such as certainty and predicability.

The steps in the process which Commonwealth agencies must adopt in the development, review or reform of regulations are outlined below.

1. Problem or issue identification
2. Specification of the desired objective or objectives
3. Identification of the options — regulatory and non regulatory
4. Assessment of the impacts of each option in terms of costs and benefits
5. Preparation of a consultation statement
6. Conclusions and recommended options
7. Implementation and review

The advantages of the adoption of a universally understood and accepted process such as the development of a Regulatory Impact Statement are that:

- discipline is provided to the process of formulating regulation;
- rigour is provided to the extent that a range of options would be identified and a rigorous analysis of the impacts of each is required; and
- the means to achieve a number of the principles is formalised. A set of principles is easier to achieve if there is an agreed process to help to achieve them.”⁷

⁷ Best Practice Utility Regulation, Utility Regulators Forum Discussion Paper, Utility Regulators Forum, July 1999, p.9-10

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Thus governments in Australia have not relied on objectives to evoke the need for cost benefit evaluations of legislation and regulations. They have rather used either Cabinet decisions in the case of legislation in Victoria or Subordinate Legislation Acts in Victoria, the Commonwealth and other states for assessing regulations in net benefit terms. The use of such evaluation techniques has not proved an impediment to rule making in these jurisdictions but rather the technique is considered a requirement of best regulatory practice.

Therefore any concept that the objective of a legislation or regulation evokes a net benefit test is not seen in practice at State or Commonwealth levels in Australia. In addition the idea that a net benefit test is “linked” to a definition or a particular definition is insupportable as it is an effective tool of public policy which can be used to assess all public policies.

The reason why a formalised “net benefit test” is a critical component of effective public policy is that:

- appropriate discipline is provided in the process of establishing regulation;
- adequate rigour is provided to consider a range of options and a rigorous analysis of the impacts of each is required based on the net benefit test; and
- the means to achieve a number of the principles is formalised. A set of principles is easier to achieve if there is an agreed process to help to achieve them

2.4 Other Comments on the Net Benefit Regulation in Practice

The Utility Regulators Forum in their report on Best Practice Regulation stated that:

“Best practice’ aims to ensure that the community is a net beneficiary of regulation.

However, best practice is more than this. It involves the efficient and effective achievement of the stated objectives. In other words, the regulatory regime must actually achieve the stated objectives, and it must do so as quickly and inexpensively as possible.

It is desirable to identify best practice in order to improve regulation or, wherever possible, identify less burdensome ways of achieving regulatory goals”.⁸

The Utility Regulator’s Forum considers that a formalised net benefit test is a central component of best regulatory practice. In addition to this conclusion the Forum’s paper also comments favourably on the Commonwealth Government’s approach to regulatory reform (noted above).

The key economic advisory body to the Commonwealth Government, the Productivity Commission has also commented on the issue of best regulatory practice. The Chairman of the Commission, Mr. Gary Banks has stated that:

⁸ Best Practice Utility Regulation, Utility Regulators Forum Discussion Paper, Utility Regulators Forum, July 1999, p.2.

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“Many of the conceptual and practical underpinnings for better regulation are now established. But that is not enough. Bad regulation is tenacious because the governance arrangements for regulation-making are still far from perfect.

The adoption of more stringent ex ante assessment processes by regulators, together with independent verification of their use, can make a significant difference — as in the Regulatory Impact Statements required at the Commonwealth level and overseen by the Office of Regulation Review (ORR 1998). Improved transparency and independent assessment can also help provide greater discipline on regulation making.

The fact of regulatory fallibility suggests that there should be appropriate checks and balances (including merit reviews) and clear statutory guidance for regulators.

Regulators also need to consult much more widely about the potential effects of regulations (particularly compliance costs) and ensure that regulations are regularly tested for continued relevance and cost-effectiveness.”⁹

The National Competition Council also favours the use of a formalised “net benefit test” in assessing competition impacts:

“The NCP review process provides for governments to maintain legislative restrictions on competition where those restrictions are shown to be in the public interest and there is no less anticompetitive means of achieving the relevant public interest objective. For effective outcomes, there need to be objective reviews that systematically:

- specify the relevant public interest objectives to be pursued
- examine a range of means of achieving that objective, including both regulatory and other means (such as direct subsidies)
- ensure a regulatory approach that has an impact on competition actually produces a public benefit to determine that the adverse consequences of restricting competition do not impose costs that outweigh any benefit.”¹⁰

Given that the formalised “net benefit test” forms the basis of regulatory best practice and is used in a number of Australian jurisdictions UED is concerned that the SCO has effectively removed the requirement for its use in AEMC decisions.

UED Considers that a full cost benefit analysis with dollar values for all variables should not be required for all code changes. Rather the level of analysis required should be related to the impact of the Code change. Only those code changes that are of a substantial impact in terms of costs would require a full cost benefit analysis. Other minor changes should only require an identification of the costs and benefits and a more qualitative review.

Recommendation 1

UED recommends that the MCE reinstate a formalised “net benefit test” as the centrepiece of the AEMC’s regulatory assessment model.

⁹ Gary Banks, Chairman Productivity Commission, The Good, the Bad and the Ugly: Economic Perspectives on Regulation in Australia, Address to the Conference of Economists, Business Symposium, Hyatt Hotel, Canberra, 2 October, 2003, p.19.

¹⁰ National Competition Council, Annual Report 2003-2004 , Presidents Report p. xii

If it fails to do this it will fail in providing an effective and efficient national regulatory model.

3. Information Gathering Powers of the Australian Economic Regulation

Under the revised NEL the AER will have the following powers:

- to apply for, and execute, a search warrant where there are reasonable grounds for believing that there is, has been or will be a breach or possible breach of the new NEL or NER; and
- to require the provision to it of information or documents where such information or documents are relevant to the performance of the AER's functions. Persons are not required to provide information where they have a "reasonable excuse" for not doing so (for example, the person is not capable of complying with a relevant request) or if the information is subject to legal professional privilege.¹¹

UED believes there should be a fundamental difference between the enforcement powers of the AER and the information gathering powers of the AER for access pricing decisions. Unless such a distinction is made the NEL will not conform to best practice regulation in terms of harmonisation with other regulatory regimes and efficiency.

3.1 Information Gathering for Pricing and Access

Such wide ranging information gathering powers as set out above are quite different to the methodology of information gathering under the National Gas Access Regime for access pricing decisions. Given the MCE objective of harmonising regulatory arrangements the information gathering powers should be compared to those in the National Gas Regime.

The Productivity Commission considered that regulators under the National Gas Code have significant powers to collect information for access price reviews. In effect, under the National Gas Access Regime, the service provider is required to provide relevant information only at the time of, and for the purpose of, access pricing decisions. The provisions of the NEL would extend this requirement to within the regulatory period. The Productivity Commission has recently rejected such an approach. The Commission noted that at the time of a revenue submission:

The current Gas Code states that the information must (in the regulator's opinion) adequately enable users to understand how each of the elements of an access arrangement was derived (including reference tariffs), and to form an opinion on whether the access arrangement complies with the Gas Code (s.2.6). If a regulator considers the

¹¹ Ministerial Council on Energy, Standing Committee of Officials, Information Paper on National Electricity Law and National Electricity Rules, December 2004, p.25-26

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information is not adequate, then it can request that the service provider amends and resubmits the information (s.2.9).¹²

The Commission recognised that information requirements were not costless and thus recommended only minor changes to the information gathering powers under the National Gas Code. The Commission concluded that any such extensions were not warranted:

“The Commission also does not consider that the benefits of allowing regulators to obtain information between access arrangement reviews would be greater than the costs on service providers. This is consistent with the current design of the Gas Code, where the role of regulators is to vet proposed access arrangements that, once approved, generally remain in force until the end of the access arrangement period. Also the onus should be on regulators to minimise the costs of information requirements where possible.”¹³

The Utility Regulators Forum in their paper on Best Practice Regulation stated that the following principle should apply to information collection:

“Regulatory bodies must have access to information that relates to the operations of the service provider. In order to achieve efficiency, it is important that the information required should be limited to that required for them to carry out their functions. There needs to be a balance between the disclosure of information required for regulation and the need for maintenance of confidentiality of commercial information. The regulator should therefore determine the minimum levels of information needed from stakeholders to support effective reporting and the minimum number of authorities for whom reports are necessary to effectively meet obligations to the Government and the community for disclosure and compliance purposes.”¹⁴

UED considers that the information gathering powers of the AER for pricing and access should reflect the National Gas Access Regime to advance the harmonisation of regulatory arrangements between the two codes. One of the key CoAG objectives was “the potential for harmonising regulatory arrangements, removing inconsistencies and integrating networks”.¹⁵

This conclusion of the Utility Regulators Forum and the Productivity Commission both support the National Gas Code model for information gathering as it specifies the information in advance and the Productivity Commission has recently reviewed the National Gas Code powers which implies it is best practice regulation.

Recommendation 2

That the MCE adopt the National Gas Access Regime model of information gathering for pricing and access for the NEL.

¹² Productivity Commission, Inquiry Report, Review of the Gas Access Regime, No. 31, June 2004, Australian Government, p. 306-307

¹³ *ibid.*, p. 313-314

¹⁴ Utility Regulators Forum, Best practice Utility Regulation, July 1999, p.7-8.

¹⁵ Ministerial Council on Energy, Report to the Council of Australian Governments, Reform of Energy Markets, 11 December 2003, p.3

4. The Market Objective

The Information Paper states that the new overriding market objective for the NER and the NEL is:

“The national electricity market objective under the new NEL and Rules is to promote efficient investment in, and use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability, safety and security.”¹⁶

UED questions the inclusion of safety in the market objective. The NEL and NEC do not currently regulate safety and the MCE papers have referred to this function as remaining at the jurisdictional level. The MCE should explain if this is a major change of policy position and qualify it to the extent necessary so it does not conflict with jurisdictional objectives.

The MCE should not confuse the issues of load shedding with public safety – section 76 of the current NEL provides for the giving of directions for reasons of public safety but public safety has never been considered an **objective** of the national electricity market arrangements. Has the SCO fully considered the long-standing policy separation between the national efficiency and system security objectives of the electricity market and the jurisdictional objectives in relation to the electricity sector (including electricity system safety)?

Recommendation 4

That the term “safety” be reviewed in terms of whether it is required in the market objective.

That the term “security” be reviewed and qualified as necessary so as not to conflict with jurisdictional responsibilities.

5. Revised Objectives for Transmission Companies

5.1 AER Objectives

The AER appears to have a shortened version of the market objective:

“When exercising its economic regulatory functions, the AER must perform the function in a manner that promotes the long term interests of consumers of electricity and, if the function relates to the making of a transmission revenue or price determination, ensure that the regulated transmission system operator is informed of the issues being considered by the AER and has a reasonable opportunity to make submissions before the determination is made.”¹⁷

¹⁶ Ministerial Council on Energy, Standing Committee of Officials, Information Paper on National Electricity Law and National Electricity Rules, December 2004, p.9

¹⁷ Ministerial Council on Energy, Standing Committee of Officials, Information Paper on National Electricity Law and National Electricity Rules, December 2004, p.13

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In addition to this new overriding objective the Exposure Draft and the Information Paper lists the following additional objectives:

- provide an opportunity for a regulated transmission system operator to recover the efficient costs of complying with a regulatory obligation;
- provide effective incentives to a regulated transmission system operator to promote economic efficiency in the provision, by it, of services that are regulated under the Rules; including
 - the making of efficient investments in the transmission system owned, controlled or operated by it; and
 - efficient provision of services by it.
- make allowance for the value of assets forming part of the transmission system, owned, controlled or operated by a regulated transmission system operator and proposed new assets to form part of that transmission system; and
- have regard to any valuation of assets forming part of any transmission system owned, controlled or operated by a regulated transmission system operator applied in any relevant determination or decision (ie a decision by a jurisdictional regulator).

It is difficult to see why the SCO have not used the market definition for the AER given that the AER will need to consider the costs associated with reliability, quality and security arrangements in price reviews. By not including this broader objective for the AER the SCO may create some legal uncertainties about how the shortened objective should be interpreted. Such a position does not meet the best practice requirement of “effectiveness and efficiency” in the regulatory regime.

Recommendation 5

That the broader market objective be used for both the AER and the AEMC as both institutions should have the same overriding objective.

The issue of Code pricing and access objectives has undergone substantial debate and been subject to some governmental decisions, which will impact on the AER pricing and access objectives. It is important to assess the proposed AER objective against the requirements of the Commonwealth Government in relation to Part IIIA of the Trade Practices Act and the recommendations of the Productivity Commission on the Gas Access Code.

For example the Commonwealth Government has adopted new access objectives and pricing principles for Part IIIA of the Trade Practices Act. These new Part IIIA Objectives and pricing principles are:

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“The object of this Part is to:

(a) promote the economically efficient operation and use of, and investment in, essential infrastructure services, thereby promoting effective competition in upstream and downstream markets; and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.’

‘The Australian Competition and Consumer Commission (ACCC) must have regard to the following principles:

(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved.

(b) that the access price structures should:

(i) allow multi-part pricing and price discrimination when it aids efficiency; and

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.

(a) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.”

The Commonwealth Government considered that each industry access code should be consistent with the above objectives and pricing principles. Following this the Productivity Commission Report on the Gas Access Regime recommended a set of objectives and principles that are consistent with the Part IIIA requirements.

The Commission concluded that:

“The following overarching objects clause should be incorporated into the Gas

Access Regime, with the wording consistent with the Australian Government’s proposed objects clause for the national access regime:

To promote the economically efficient operation and use of, and economically efficient investment in, the services of transmission pipelines and distribution networks, thereby promoting effective competition in upstream and downstream markets.

Pricing Principles

(a) that reference tariffs should:

(i) be set so as to generate expected revenue for a reference service or services that is at least sufficient to meet the efficient costs of providing access to the reference service or services

(ii) include a return on investment commensurate with the regulatory and commercial risks involved

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(b) that reference tariff structures should:

(i) allow multi-part pricing and price discrimination when it aids efficiency

(ii) not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its associated businesses in upstream or downstream markets, except to the extent that the cost of providing access to non-associates is higher

(c) that reference tariffs should be set so as to provide incentives to reduce costs or otherwise improve productivity.”

UED considers that the current AER objectives and principles are not consistent with the changes to Part IIIA of the Trade Practices Act nor the Productivity Commission’s recommendations on the National Gas Access Code as the overriding objectives does not refer to “efficient investment”. In addition they do not meet one of the key objectives of a national approach to regulation namely the issue of harmonisation of regulatory requirements.

Recommendation 6

UED considers that the AER objective should be changed to better reflect the Part IIIA changes. The AER must perform the function in a manner that promotes:

- **the long term interests of consumers of electricity with respect to price, quality, reliability, and security; and**
- **the economically efficient operation and use of, and economically efficient investment in, the services of transmission networks, thereby promoting effective competition in upstream and downstream markets.**

UED considers that the Pricing Principles should also better reflect the above considerations. That reference prices should:

- **be set so as to generate expected revenue for a reference service or services that is at least sufficient to meet the efficient costs of providing access to the reference service or services**
- **include a return on investment commensurate with the regulatory and commercial risks involved**

UED considers that reference prices should:

- **allow multi-part pricing and price discrimination when it aids efficiency;**
- **not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its associated businesses in upstream or downstream markets, except to the extent that the cost of providing access to non-associates is higher; and**
- **that reference tariffs should be set so as to provide incentives to reduce costs or otherwise improve productivity**

6. Effective Consultation

Section 15 of the Exposure Draft also sets out the manner in which the AER must exercise its regulatory functions. The Draft states that the AER must;

“If the functions performed 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-

- informed of issues under consideration by the AER; and
- given a reasonable opportunity to make submissions in respect of that determination before it is made.”

UED does not consider that clause 15(1)(b) provides enough guidance for the AER to conduct its reviews in a best practice manner. The Utility Regulators Forum in laying down best practice consultation arrangements stated that:

“Effective and early consultation between regulators, customers and utilities is an essential component for ensuring appropriate regulatory systems are established.

Consultation assists regulators to understand the implications of their regulations on industry participants, and enables stakeholders to discuss the impact of regulation and suggest alternatives and improvements. The canvassing of all the possible alternatives is not the only outcome of consultation—consultation provides the basis to ensure that the quality of regulation is maximised.

Consultation helps regulators to be realistic in terms of the timing of the introduction of new regulations. For example, where stakeholders will not be able to change their practices immediately to comply with the new regulation, consultation should take place well in advance of the making of regulatory changes.

A spirit of openness between the regulator and industry stakeholders can go some way to addressing the issues of information imbalances between the stakeholder and the regulator. Proper consultation engenders trust and helps to avoid an adversarial relationship in which the exchange of information is restricted. Early consultation also helps to build commitment among stakeholders to the regulatory structure.”¹⁸

Such a best practice approach implies a more detailed approach to consultation by the AER instead of the one line requirement for “reasonable“ consultation. This could include the following requirements on consultation:

- the AER may produce an issues paper that stimulates debate on the issues;
- the service provider submits a proposed revenue and pricing approach and access terms;
- the AER produces a draft report which is based on a detailed examination of the service providers proposal and other submissions to determine whether the

¹⁸ Utility Regulators Forum, Best practice Utility Regulation, ACCC, July 1999, p.10.

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service providers proposal is within the range of plausible outcomes that is consistent with the overarching objective and pricing principles for the NEL;

- the AER makes available its relevant staff for consultation with the service provider and other interested parties;
- the AER exposes all written material, including consultants' reports, on which it intends to rely; and
- the AER reviews further submissions from the service provider before producing a final report that meets the objectives and pricing principles of the NEL.

Recommendation 7

That the above consultation requirements be placed on the AER in its transmission pricing decisions on the basis that it represents best practice regulation and contributes to the harmonisation of regulatory requirements between the two energy codes.

7. Meeting Best Practice Regulation

7.1 Best Practice Principles

UED considers that the MCE process should be concerned about implementing best practice regulation and that it should publicise the best practice assessment criteria that it uses to ensure best practice regulation.

Such assessment criteria can be provided by the regulators as proposed by the Utility Regulators Forum:

"The following principles are characteristic of best practice regulatory behaviour. The principles can serve as a checklist for utilities and regulators for examining current and proposed regulatory tools. They can also serve as the basis for the development of benchmarks by which regulators can monitor and compare their performance with each other. The nine principles identified were:

1. Communication
2. Consultation
3. Consistency
4. Predictability
5. Flexibility
6. Independence
7. Effectiveness and efficiency
8. Accountability
9. Transparency

The principles need to be considered as a 'package', as there must be a degree of balancing some of the principles against others. For example, the principle of flexibility (adapting regulatory approaches and tools over time and to suit circumstances) could be

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seen as contrary to the principles of consistency and predicability. The objective of maximising public benefit should be kept in mind when competing priorities are considered.

It is important for regulators to make the above principles a part of their cultures.

Processes must be put in place to ensure that stakeholders understand the basis on which decisions have been made, the nature of the information used to come to a decision and the type of analysis which has gone into the decision. The regulator should willingly subject itself to scrutiny, and accept that it will need to justify that the decisions it makes have been in the best interests of the community as a whole. If stakeholders trust the integrity of the decision-making process, and the decisions which result from that process, then acceptance of that decision will increase. This involves the making of decisions which are based on well-defined processes and rigorous analysis. Trust in the integrity of the processes will result in fewer appeals, greater effectiveness and a less adversarial climate for regulation.¹⁹

UED supports the position made by regulators in the Paper that it is important that regulators make the objectives as part of their culture. UED considers that this should also be the objective of the MCE in developing a new national regulatory model for the Australian utility industry.

Recommendation 8

That the MCE adopt the best practice principles set out above and use these to assess the new national regulatory model.

7.2 Certainty in the NEL

The Information Paper and the Exposure Draft in the area of regulatory objectives for the AER refer to the term “have regard to” (S.15, 33,34).

The drafting of section 15(2)(c) and (d), 33 and 34 is imprecise and does not meet the regulatory best practice requirements of clarity and consistency. To “make allowance for the value of assets” is ambiguous.

The authorities on the meaning of “to have regard to” establish that the expression “is capable of conveying different messages depending on its statutory context” (*Re: Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at paragraph 55, see also *Sackville J in Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389 at paragraph 54). *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 stands for the proposition that a decision maker must give weight to matter to which it must have regard as a fundamental element in a determination.

In comparison *Rathborne v Abel* (1964) 38 ALJR 293 stands for the proposition that a direction to have regard to a particular matter would usually mean no more than a

¹⁹ Best Practice Utility Regulation, Utility Regulators Forum, Discussion Paper, July 1999. P.2

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requirement to consider whether a matter should be given any, and if so what, weight (see Barwick CJ at 295).

The use of such a contradictory term does not meet best practice regulation and should be made more specific when the evidence for change is comprehensive.

Recommendation 9

That the term “to have regard to” is replaced in the NEL by terms that provide more certainty for regulated utilities.

7.3 The NEL and Asset Valuation – Best Practice Principles

The issue of the term “have regard to” also concerns asset valuations under the NEL. UED considers that the NEL should be more precise in what is required of the AER pursuant to this paragraph – can the AER re-DORC the asset base or not – as a matter of the highest principle of policy, the NEL should be clear and precise on this point and not leave the issue to be settled by the AEMC or through the courts.

The MCE should accept changes to the NEL, which promote greater certainty in regulatory practice and are based on comprehensive evidence. In terms of the harmonisation of regulatory arrangements the National Gas Code adopts the following methodology of asset valuation:

“Where an Access Arrangement has expired, the initial Capital Base at the time a new Access Arrangement is approved is the Capital Base applying at the expiry of the previous Access Arrangement adjusted to account for New Facilities Investment or the Recoverable Portion (whichever is relevant), Depreciation and Redundant Capital (as described in section 8.9) as if the previous Access Arrangement had remained in force.”
(Section 8.14)

In comparison the NEL refers to “having regard for” asset valuations.

The new draft Victorian Electricity Tariff Order, that regulates electricity distributors, in section 2.1 requires that in making *any Price Determination* by the ESC the capital base will be adjusted by:

“Where the value of the fixed assets which were allocated to a Distributor (or its predecessor in title under the allocation statements under Sections 117 and 137 of the Electricity Industry (Residual Provisions) Act 1993 is required to be taken into account, use the adjusted asset value for those assets (identified by reference to the relevant Distributor) as at 1 July 1994 determined in accordance with the table set out below, adjusted to take account inflation and depreciation on the asset values as increased by inflation since 1 July 1994 and for any disposals since 1 July 1994.”

The above approach between the Victorian Electricity Tariff Order (ETO) and the National Gas Code are consistent in that once an initial asset valuation is undertaken this becomes a historical cost for later price reviews.

In addition, the ACCC is proposing a new methodology for transmission companies where they will move away from the periodic revaluation of the capital base of transmission companies to the above approach:

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“The ACCC intends to resolve this uncertainty by locking in the asset base by accepting initial jurisdictional valuation and adding in new investment at cost. The attraction of this option is that a lock in of the jurisdictional asset base is unlikely to deter new investment and will produce a smoother price path than periodic valuations.”²⁰

Recommendation 10

That the MCE adopt the position that once one asset valuation is undertaken by any jurisdiction it should be accepted as an historical cost and only updated for net capital investments and depreciation in AER price reviews.

²⁰ Speech by Ed Willet, ACCC to the Australian Energy and Utility Summit, Sydney, 22 July 2004, p7.

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Appendix 1 - National Electricity Law exposure draft

Provision	Description	Comments
Definitional matters		<ul style="list-style-type: none"> In “electricity services”, the word “for” should be inserted after the word “necessary”. In “national electricity system”, the term “other facilities” is very broad and will have the effect of bringing within the definition all facilities, including customer’s electrical installations, connected to the networks. In “national electricity system”, “loads” are not “connected” – loads are purchased and sold at connection points, being a physical point of supply. the meaning of “interconnected transmission and distribution system” is found in clause (b) of this definition but that term is used elsewhere the NEL without this supporting elaboration (for example, clause 10(1)).
s.6	Market objective clause	<ul style="list-style-type: none"> Why is “safety” included in the objective (and as a responsibility of the Reliability Panel)? The NEL and NEC do not regulate safety. What is the policy basis for this significant change? Simply because load shedding guidelines can relate to public safety should not make safety an objective of the broader national electricity market a responsibility of the Reliability Panel – section 76 of the current NEL provides for the giving of directions for reasons of public safety but public safety has never been considered an objective of the national electricity market arrangements. Has the SCO fully considered the long standing policy separation between the national efficiency and system security objectives of the electricity market and the jurisdictional objectives in relation to the electricity sector (including electricity system safety)? Will the NEL now regulate all those matters the subject of the Electricity Safety Act 1998 (wiring rules, customer installations, management of electrical contractors)? Is it intended that “security” refer to system security or security of supply? The inclusion of an efficiency objective in relation to investment suggests the latter may be intended.
s.7	Status of MCE	<ul style="list-style-type: none"> Can the SCO explain whether the exercise of power by the MCE is subject to judicial review?

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Provision	Description	Comments
s.8	NER to have force of law	<ul style="list-style-type: none"> As delegated legislation, the NEL provides no basis for parliamentary oversight of the NEL. The Subordinate Legislation Act 1978 does not apply to the NEL (Information Paper page 9). Has the SCO considered whether the NEL amounts to an impermissible abdication of the power to legislate (see <i>Giris v Federal Commissioner of Taxation</i> (1969) 119 CLR 365 at 373)? Can the SCO explain how the AEMC process for NER change complies with the requirements of clause 5 of the Competition Principles Agreement?
s.10	Exemptions from registration as transmission or distribution network service provider	<p>The question of whether a party's conduct in the community should be regulated is, in essence, a policy decision by governments. In the case of electricity services, the NER reflects a policy that certain conduct is to be regulated. Similarly, whether a party should be exempt from a scheme of regulation is, in essence, a policy decision. Either the decision on whether to exempt should be made by a government body (in this case, the quasi government body, the AEMC) or be administered in accordance with guidelines set by the government body.</p> <p>In addition, where there is to be an exemption for a party from the requirements of the NER it may be necessary in the case of networks to establish that the exemption is feasible from a technical point of view. An example is the connection issues surrounding exempt inset distribution networks. Whilst NECA had that capacity, and so will the AEMC, the AER will not.</p> <p>If the option in the NEL is preferred (with the AER responsible for exemption), for these reasons, at the least, the guidelines to be established under clause 2.5.1(e) of the NER should be established by the AEMC. In addition, in performing this function, the AER must be subject to the national electricity market objective rather than the limited objective in section 15(1)(a).</p>
s.11	Exemption of market customers	Why has the ability for market customers to be exempt from registration been introduced? How is the inconsistency with clause 2.3.1(c) of the NER to be resolved?

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Provision	Description	Comments
s.11(6)	Conditions of registration as transmission or distribution network service provider	<p>Under section 11(6) NEMMCO can impose conditions of the registration as a transmission or distribution network service provider. There is currently no scope for conditions to be imposed on registration in these circumstances. Why has this been introduced?</p> <p>How is it that NEMMCO will impose conditions of registration, but the AER conditions of exemption from registration, as a transmission or distribution network service provider? Such a confused regulatory scheme is sub optimal.</p>
s.15 (1) (a)	Description of manner in which AER must perform its function	This provision states that the AER must exercise its powers in a way in which promotes the 'long-term interests of consumers of electricity'. This is an incomplete restatement of one element of the s6 market objective. For consistency, and to ensure all elements of the objective are given weight, the objective should be replicated in full or referenced.
s.15 (1) (b)	Description of manner in which AER must perform its function	This description of the minimum procedural requirements which the AER must fulfil in making a transmission revenue determination are insufficient to give participants full confidence that transparent and open consultations will inform regulatory decisions.

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Provision	Description	Comments
s.15 (2) (a)-(d)	Underpinning pricing principles for transmission determinations	<p>It is unclear on what basis these principles have been developed and what relationship they have to broader policy development processes on third party access pricing (such as the response to the Productivity Commission <i>Review of the Gas Access Regime</i> and future work on a national energy access regime).</p> <p>The drafting of section 15(2)(c) and (d) is imprecise. To “make allowance for the value of assets” is ambiguous- simply what is the NEL saying in this sub-section? The authorities on the meaning of “to have regard to” establish that the expression “is capable of conveying different messages depending on its statutory context” (<i>Re: Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor</i> [2002] WASCA 231 at paragraph 55, see also <i>Sackville J in Singh v Minister for Immigration and Multicultural Affairs</i> [2001] FCA 389 at paragraph 54). <i>R v Hunt; Ex parte Sean Investments Pty Ltd</i> (1979) 180 CLR 322 stands for the proposition that a decision maker must give weight to matter to which it must have regard as a fundamental element in a determination whereas <i>Rathborne v Abel</i> (1964) 38 ALJR 293 stands for the proposition that a direction to have regard to a particular matter would usually mean no more than a requirement to consider whether a matter should be given any, and if so what, weight (see Barwick CJ at 295). The NEL should be more precise in what is required of the AER pursuant to this paragraph – can the AER re-DORC the asset base or not – as a matter of the highest principle of policy, the NEL should be clear and precise on this point and not leave the issue to be settled by the AEMC or through the courts.</p>
s.33 and 34	AEMC to have regard to national electricity market objective	<p>The authorities on the meaning of “to have regard to” have been discussed above. Again, in these sections, the NEL should be more precise in what is required of the AEMC.</p> <p>For example, in section 33, is the requirement to have regard to the national electricity objective exclusive?</p> <p>In relation to section 34, can the AEMC consider but give no weight to a statement of policy principle?</p>
s.35(1)(b)	NER relating to safety	<p>Why is “safety” included in the objective? The NEL and NEC do not regulate safety. Has the SCO fully considered the long standing policy separation between the national efficiency and system security objectives of the electricity market and the jurisdictional objectives in relation to the electricity sector (including electricity system safety)?</p>
s.40 (2)	MCE directions for AEMC reviews	<p>A direction given to the AEMC to conduct a review must be complied with despite anything to the contrary in the Rules. It is unclear in what circumstances this provision would be required, and whether it is desirable.</p>

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Provision	Description	Comments
s. 41 (e)	Objectives of an MCE directed review not limited by the national electricity market objective	Unclear how or why a review of the market governed by an overarching objective should not be consistent with that objective. Conflicts with obligation in s 33 for the AEMC to have regard to the objective in performing its functions.
s.44 (2) (b), (3) and s.43 (b)	AEMC reviews	There is no requirement for public hearings or other consultative steps for AEMC reviews. This undesirably reduces the transparency of reviews which may result in a recommendation for a rule change.
s.48(1)(b) and 107(1)(b)	Confidential information	What is the basis for a discretion for the AEMC to decide information provided to it is confidential or not in circumstances where the information will not have been gathered by compulsion. Surely where information is volunteered by a participant to progress a policy review that participant should be the judge of whether the information is confidential or not. The scope for the AEMC to decide information which a submitter considers confidential will diminish the free flow of information to the AEMC.
s.49(1)(a)	Meaning of wholesale exchange	What is the wholesale exchange? Is it a wholesale exchange? Or should “wholesale exchange” be either defined or the subject of elaboration in this provision?
s.49(1)(f)	NEMMCO coordination of planning augmentations to distribution systems	NEMMCO does not currently coordinate the planning of augmentations to distribution systems. This substantial intrusion on the operation of distribution businesses, currently separately regulated through jurisdictional arrangements in Victoria, should be removed.
s.57	Definition of “Rule Dispute”	The National Electricity Code provides for Code Participants to choose to deal with private disputes under the Code (see clause 8.2.1(a)(6) and (7)). These disputes would not fall within the definition of a dispute which “must” be resolved in accordance with the Rules.

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Provision	Description	Comments
s.70	Application of Commercial Arbitration Act	<p>The reason and effect of the application of the Commercial Arbitration Act to decisions and determinations of the Dispute resolution panel are unclear. For example what is the relationship between:</p> <ul style="list-style-type: none"> ○ Part III of the Act and clause 8.2.6C of the NER, particularly section 19 of the Act and clause 8.2.6C(f) ○ clause 8.2.7 of the NER and section 20 of the Act ○ Part IV and clauses 8.2.8 - 8.2.10 of the NER; ○ Section 70(1) of the new NEL and section 38 of the Act? <p>Has the SCO conducted a detailed analysis of the effect of applying the Act? Why has the SCO seen fit to apply the Act, which seems to have no basis in public policy, but affects the commercial relationships of participants, without any consultation (there being no explanation or discussion of this change in the Information Paper).</p>
s.71(1)(2)(a)	Notice to pay	The giving of a notice under this provision should be subject to a time limit for setting the period in which to make payment (for example 14 days).
s.87 (2)	Rule making test to be applied by the AEMC – weighting of objectives	<ul style="list-style-type: none"> ● Is a “Rule” an instrument, decision or determination such that clause 21 of Schedule 2 applies? ● Under the drafting of sub-section (2), as long as the AEMC considers all aspects of the national electricity market objective it could give no weight to one or more of those aspects. Is that intended. ● What is the relationship between the last phrase of sub-section (2) and section 34(a) which may deal with the same subject matter? Is the intention of sub-section (2) that the AEMC is to ‘have regard to’ policy statements of the MCE in weighting market objectives? ● The authorities on the meaning of “to have regard to” have been discussed above. Again sub-section (2) should be more precise in what is required of the AEMC. Could the AEMC ‘have regard to’ MCE policy principles, but nonetheless weight the market objectives in a rule making test in a way which was completely inconsistent with the MCE principles?

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Provision	Description	Comments
s.88	Jurisdictional derogations	<ul style="list-style-type: none"> The authorities on the meaning of “to have regard to” have been discussed above. Is this list exclusive? This provision provides no guidance to the AEMC – are the listed matters to be regarded as desirable or not? Are these matters, in effect, conditions of the exercise of the power? The intention of this provision is not at all clear.
s.90	Initiation of making of a rule	<ul style="list-style-type: none"> What constitutes a ‘minor error’ or a ‘non-material change’ is not clear. Why is it necessary for the AEMC to be able to initiate non-material changes to the rules even where this is not directed at correcting an error in the rules? What is the difference between a ‘non-controversial’ and a ‘non-material’ change? The definition of a ‘non-controversial Rule’ directs itself to materiality, which UED would have expected was an issue going to a ‘non-material’ change, rather than directing itself to the impact on participants. The Discussion Papers have made much of the fact that the AEMC will not be able to initiate substantive rule changes. This principle is notably weakened by the possibility of the scope of AEMC initiated Rules being broadened by Regulations. If this provision is to remain the scope of the Regulation making power should be constrained.
s.91 (1)-(5)	Rules in relation to transmission revenues and pricing	<ul style="list-style-type: none"> This provision seems to have the effect of making the four generic pricing principles contained in s.15 protected provisions of the rules in perpetuity. While elements of the rules may be positive, is the NEL bill the appropriate place to be developing and establishing pricing principles to apply to one sectoral area of the energy market? See also s.15 (2) (a)-(d). [this is the ENA text with which I agree. The effect of section 91(1) and items 15 – 24 of schedule 1 is to enshrine ‘building block’ regulation contrary to the developments in the PC reviews and the ESC statements in the current EDPR.
s.116(2)	“emergency declaration”	A proclamation under Part 6 of the Electricity Industry Act 2001 (Vic) does not bring into being a “state of emergency”.

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Provision	Description	Comments
Schedule 1	Subject matter for the national electricity rules	<ul style="list-style-type: none"> • Issues 15-24 relate to the wide range of issues that arise under electricity transmission revenue determinations. Similar or identical issues of methodology and approach arise under distribution pricing regulation, yet Issues 25 and 26 do not reflect this full range of issues. • Item 25 of schedule 1 provides that the National Electricity Rules may relate to the regulation of distribution revenues for the provision of services that are regulated under the Rules. UED provides services which are regulated not under the Rules but under the Electricity Industry Act 2001 (Vic). The clause should be amended at the end to add “and other regulatory instruments”.

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Provision	Description	Comments
Regulation Making power	Scope	<ul style="list-style-type: none"> • The Subordinate Legislation Act 1978 does not apply to regulations made under the NEL (information Paper page 9). Importantly this removes the mechanism for consultation with effected parties, the process for making regulations and parliamentary oversight of the Regulations. Given the scope of the regulations (see below) UED considers this may be an impermissible abdication of the power to legislate (see <i>Giris v Federal Commissioner of Taxation</i> (1969) 119 CLR 365 at 373). • The scope of the regulatory framework, the powers of the governing institutions and the scope of the NER are effectively unfettered by scrutiny and the power of the executive to make laws uncontrolled. Matters of particular relevance that can be the subject of regulations and are without parliamentary scrutiny are: <ul style="list-style-type: none"> ○ A person can be prescribed to be a relevant participant, subject to obligations and enforcement procedures (s 2) ○ The AER can monitor and enforce substantive obligations imposed on persons (s 14) ○ Functions and powers can be conferred on the AER (s 14(g)) ○ Functions and powers can be conferred on the AEMC (s 30) ○ The rule making process can be affected (s 35) ○ Functions and powers can be conferred on the Reliability Panel (s 37) ○ Fees for AEMC services (s 47) ○ Civil penalty and rebidding civil penalty provisions are prescribed (s 57) ○ The orders which can be made by a court consequent upon a breach being proved (s 60) ○ The matters upon which the AEMC can initiate a Rule can be expanded beyond correcting minor errors or non-material changes (s 90(2)(c)) ○ The date for the AEMC to make transmission revenue rules can be extended beyond 1 July 2006 (s 91) ○ The scope of the NER can be extended to any matter or thing related to electricity (item 36 of Schedule 1) ○ Transitional matters from the current NEL and NEC to the new NEL and NER, if necessary having retrospective effect (Information Paper page 9)