

SCO Response to Key Issues Raised by Stakeholders on the Exposure draft of the National Electricity Regulations and Update of Prescribed Civil Penalty Provisions

The Ministerial Council on Energy Standing Committee of Officials (SCO) published an exposure draft of the National Electricity Regulations (proposed to be made under the *National Electricity (South Australia) Act 1996 (SA)*) on 11 February 2005. Submissions were invited on the draft by 3 March 2005.

The SCO is grateful for the comments it received on the exposure draft of the Regulations. In all, four formal submissions were received on the Regulations. Two informal submissions on the civil penalty provisions in Schedule 1 to the Regulations were also received.

Table 1 below responds to the main issues raised in the submissions and explains the rationale for why a particular submission was either accepted or rejected.

Please note, the table below, whilst extensive, does not list each and every issue raised in the submissions. Rather, the table covers every major issue raised, particularly those referred to in multiple submissions. Stakeholders are to be assured, however, that each submission was carefully considered by the SCO, even if a particular issue does not appear in the attached table.

Table 2 details amendments to the list of prescribed civil penalty provisions in Schedule 1 to the Regulations since the exposure draft of the Regulations. These changes have been made in response to submissions on the Regulations and also as a result of changes to the National Electricity Code since January 2003, that have been carried through to the National Electricity Rules.

MCE Standing Committee of Officials
June 2005

Table 1 – SCO response to submissions on the exposure draft of the National Electricity Regulations

<p>Reg 5¹ – Relevant Participants</p>	<p>Under the definition of ‘relevant participant’ in section 2 of the new NEL, it is possible for the Regulations to prescribe a Registered participant that would otherwise be a ‘relevant participant’ not to be a ‘relevant participant’. If there are going to be participants or classes of participants to whom general regulatory obligations under the Rules no longer apply, this is a matter that should undergo consultation.</p> <p>Further, under the Regulations, Metering Providers are not declared to be ‘relevant participants’ (thus subject to enforcement action). The Second Reading Speech to the NEL said ‘[the power to prescribe relevant participants by regulation] will only be used to ensure that persons who have previously been bound by contract to comply with the Code may now have the Rules enforced against them as law.’</p>	<p>The SCO has previously stated that where it is proposed to make regulations for the purposes of the new NEL, those regulations will generally be subject to consultation.</p> <p>The reason for the Regulations providing that Registered participants are not ‘relevant participants’ to the extent that they are acting in their capacity as Metering Providers is to preclude them from being subject to the enforcement regime that applies in respect of ‘relevant participants’ under the new NEL (which includes, for example, the imposition of civil penalties). Instead, Metering Providers are to be subject to the special enforcement regime in relation to Metering Providers that applied under the National Electricity Code and that continues to apply under the National Electricity Rules. Under that regime, Metering Providers may be only be subject to sanctions imposed by NEMMCO such as deregistration, suspension and constraints on operations (see clause 7.4.3).</p> <p>Further, the drafting of these provisions reflects the intention that all Metering Providers are to be treated the same irrespective of whether they are Registered participants or not.</p>
<p>Reg 14 – Liability Cap</p>	<p>Extend the current maximum civil liability provisions for a period of 2 years after 13 November 2005.</p> <p>The MCE needs to review the long term position in relation to the liability cap.</p>	<p>SCO has agreed to an extension of the current liability regime until 13 November 2007. This is reflected in Regulation 14. SCO confirms that a long term decision on the issue of the civil liability provisions will be made before the current cap expires.</p>

¹ The numbering of the regulations referred to in this document corresponds with the numbering in the final version of the new National Electricity Regulations. Please note that this numbering differs from the numbering in the first exposure draft of the Regulations. In particular, please note that in order to ensure a more smooth transition to the new NEL, the new Regulations will now be a variation of the existing Regulations, rather than a replacement set of Regulations.

Regulation		
Reg 13 – System operations functions and powers	<p>This Regulation incorrectly refers to functions or powers performed by agents engaged by NEMMCO under clause 4.3.3(a)(1) of the Rules rather than the delegation of functions by NEMMCO under section 52 of the NEL.</p> <p>As this Regulation is due to expire in line with Reg 14, the MCE should publish its proposed process for the extension of this provision and a review of this so that they can operate without the need for an annual extension.</p>	<p>In response to the submissions, clause 4.3.3(a)(1) of the Rules has been amended to recognise that NEMMCO has the power to engage persons to act as its agents or its delegates to carry out its functions under Chapter 4 of the Rules. The wording of regulation 13(2)(a) has been amended to reflect this change.</p> <p>The extension of the liability capping regime under section 119 of the new NEL (and therefore the continued operation of regulation 13) is addressed above.</p>
Schedule 1 – Civil Penalty Provisions		See Table 2 below.
Schedule 2 – Transitional and Savings provisions Items 13 & 14	<p>Regulators should not be conferred an unconfined power to amend, revoke or vary determinations. This would result if clause 20 of Sch 2 to the new NEL is applied to the Rules as currently proposed by clause 1.7.1 of the Rules. To preserve the certainty required in relation to such a determination, the determination should not be able to be revoked, amended or varied without the consent of the network operator.</p> <p>In respect of items 13(4) and 14(3):</p> <ul style="list-style-type: none"> • It is appropriate for determinations finalised under the Rules to be treated in the same way as determinations made under the Code and continuing under the Rules. • It is inappropriate for any appeal or review of determinations finalised under the Code to be determined as if the Code applied to all actions of the regulator 'unless otherwise provided in that determination or by the Rules made after the commencement date'. Actions of a regulator must be judged in light of the rules that applied at the time those actions were carried out. 	Clause 1(2) of the interpretation schedule to the NEL provides that its application may be displaced by a contrary intention appearing in the Rules. For example, clauses 6.2.4(d) and 6.10.5(e) exhibit such a contrary intention by providing the 'only' circumstances in which the AER or a jurisdictional regulator may revoke a regulatory cap determination during a regulatory control period.

Regulation		
Sch 2, item 16	<p>The Clause fails to extend to consultation under the Code, which is not required to be in accordance with the Code Consultation Procedures (eg clauses 5.6.2(f), 5.6.6(b) and 5.6.6A of the Code). Whilst it is argued that such consultation would be caught by the broad provisions of item 18, given that consultation is addressed specifically in clause 16, it would be preferable if clause 16 clearly applied to all types of consultation under the Code.</p>	<p>SCO agrees with the submission and this item has been amended accordingly.</p>
Sch 2, item 18	<p>It appears that actions taken under the Code before commencement of the Rules will become subject to the new penalty regime provided for under the NEL. The Code should remain subject to the current enforcement mechanism provided for in the Code and the operation of the new regulatory regime should be restricted to actions taken after commencement of the new regime.</p>	<p>There has never been any intention to create a retrospective enforcement regime. This is made clear by item 2 of Schedule 3 of the new NEL which provides, for example, that the repeal of the old NEL does not affect a penalty incurred in relation to an offence under the old NEL or a penalty incurred in relation to a breach of the Code.</p>

Table 2 – Update of prescribed civil penalty provisions in Schedule 1 to the Regulations

3.6.3(a)	Removed.	This provision does not impose an obligation.
3.6.3(b)	Amended.	The reference to this provision in the Schedule has been amended to refer to clause 3.6.3(b)(2)-(3) because the definition of distribution loss factors should not be a penalty provision.
3.6.3(b1)	Added.	Gazetted 2 December 2004. This provision has been included because this provision places a clear obligation on a DNSP to calculate a site-specific loss factor when the relevant generator is willing to pay for it.
3.7A(c)	Added.	Gazetted 30 January 2003. Comparable obligations to provide information to NEMMCO in clauses 3.7.3(e) & (g) are prescribed civil penalty provisions.
3.12.11(a)(3)	Removed.	This provision no longer exists in the Rules.
4.3.4(g)	Added.	Gazetted 27 March 2003. Comparable obligations on Network Service Providers in clauses 4.3.4(a)-(d) & (f) are prescribed civil penalty provisions.
4.8.5A(d)	Retained.	SCO disagrees with the submission that this provision had been incorrectly included in the Schedule. Clause 4.8.5A(d) of the Rules places an obligation on scheduled NSP's, scheduled generators and market customers to use reasonable endeavours to comply with a request for information and to provide the information to NEMMCO in the time specified. It is appropriate this is a prescribed civil penalty provision.
4.8.9(c)	Added.	The obligations contained in clauses 5.2.3(g)(6), 5.2.4(b)(6) and 5.2.5(b)(6) have been removed in the Rules on the basis that these obligations are already covered by clause 4.8.9(c). These provisions were previously prescribed civil penalty provisions. Accordingly, to retain the status quo, clause 4.8.9(c) should now be a prescribed penalty provision.
4.8.9A(b)	Amended.	SCO agrees with the submission that the reference to this clause was incorrect. The Schedule has been amended to refer more generally to clause 4.8.9A.
4.11.1(e) & (g)	Added.	Gazetted 27 March 2003. Comparable obligations in clauses 4.11.1(a)-

Civil Penalty		
		(c) are prescribed civil penalty provisions.
4.13(a) & (b)	Added.	Gazetted 27 March 2003. Comparable obligations in Chapter 4 are prescribed civil penalty provisions.
4.14(g)	Added.	Gazetted 27 March 2003. Comparable obligations in Chapter 4 are prescribed civil penalty provisions.
4.15(a), (b), (e), (f), (h)	Added.	Gazetted 27 March 2003. Comparable obligations in Chapter 4 are prescribed civil penalty provisions.
5.2.3(a1)	Removed	This provision no longer exists in the Rules.
5.2.3(a2)	Removed	This provision no longer exists in the Rules.
5.2.4(b)(6)	Removed.	This provision no longer exists in the Rules.
5.2.5(b)(6)	Removed.	This provision no longer exists in the Rules.
5.3.2(a1), (d)	Added.	Gazetted 27 March 2003. The obligations in these clauses are comparable to the obligations in clauses 5.3.2(b), which is a prescribed civil penalty provision.
5.3.4A(b), (d), (e)	Added	Gazetted 27 March 2003. Comparable obligations in Chapter 5 are prescribed civil penalty provisions.
5.3.6(b) & (b1)	Added.	This provision imposes a clear obligation on NSPs when offering to connect. Similar provisions in clause 5.3.6 are already prescribed civil penalty provisions.
5.3.6(c) & 5.3.6(c1)	Amended.	Typographical amendment to refer to 5.3.6(c)-(c1).
5.3.8(d)	Added.	Gazetted 27 March 2003. Comparable obligation in clause 5.3.8(c) is a prescribed civil penalty provision.
5.6.2(n)	Retained.	SCO does not agree with the submission that this clause has been incorrectly listed. Clause 5.6.2(n) provides an obligation on the Network Service Provider for which the clause applies to prepare a report and provide a copy to NEMMCO, the Registered participant requesting the report and, on request, any other Registered participant.
5.7.4(a1), (a3)	Added.	Gazetted 27 March 2003. Comparable obligations in Chapter 5 are prescribed civil penalty provisions.
5.7.7(j), (m), (u), (v), (y), (z), (aa), (ae)	Added.	Gazetted 8 April 2004. The obligations imposed in these clauses are encapsulated by the old clause 5.7.7(g), which was a prescribed civil penalty provision.

Civil Penalty		
7.3.1(a)(8)-(9) & 7.3.1(a)(10)-(12)	Amended.	The current Schedule to the Regulations imposes a civil penalty of varying classes on clauses 7.3.1(a)(1)-(4), 7.3.1(a)(5)-(7) and 7.3.1(a)(8)-(12). As it is the intention to retain the status quo in respect of existing penalties, this will be amended to refer to clauses 7.3.1(a)(1)-(12).
Schedule 9A1.1	Removed.	This Schedule has been removed from the Rules.