

# **National Electricity Amendment Bill – Smart Meters**

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**MCE Standing Committee of Officials Policy Response**

**June 2009**

Please read before the second exposure draft of amendments to  
the NEL

## Introduction

This document presents the Ministerial Council on Energy (MCE) Standing Committee of Officials' (SCO) policy response to the submissions received on the National Electricity Amendment Bill – Smart Meters and its associated explanatory note.

The proposed amendments to the National Electricity Law (NEL) are intended to provide heads of power for state and territory energy ministers to mandate pilots and roll-outs of smart meters. These legislative changes support the Council of Australian Governments' (COAG) commitment to a staged national mandated roll-out of electricity smart meters to areas where benefits outweigh costs.

The initial proposed amendments to the NEL along with the associated explanatory note were released for consultation from 23 December 2008 to 6 February 2009. SCO received written submissions to the exposure draft, and held a stakeholder forum in February 2009. This SCO policy response addresses issues raised by stakeholders. This response should be read in conjunction with the second draft of the proposed legislative amendments to the NEL.

## **Background**

In April 2007, COAG endorsed a staged approach for a national mandated roll-out of electricity smart meters, to areas where benefits outweigh costs under the auspice of the MCE.

In December 2007, MCE reviewed the first stage of a smart meter cost benefit analysis (CBA) and subsequently agreed to a national minimum functionality for smart meters. In June 2008, MCE reviewed the second stage of the CBA and noted a wide range of potential net benefits, but that benefits and costs were not certain in all jurisdictions. On this basis, MCE supported the development of a national smart metering framework and smart meter deployments in Victoria and New South Wales. MCE agreed to extensive pilots and business cases in most jurisdictions to confirm benefits, costs and risks. MCE also agreed to consider further deployment timelines and any requirement for further analysis by June 2012, based on the findings of the pilots at that time.

MCE also noted the formation of the National Stakeholder Steering Committee (NSSC) and its role as a representative body for consumers and electricity industry stakeholders in the development of the technical and operational aspects of the smart metering framework. The NSSC is also expected to build on the national CBA to inform future MCE decisions.

Regulatory arrangements for cost recovery, customer protection measures and safety standards for smart metering are being developed by MCE as part of the national framework in consultation with stakeholders. The NEL amendments are the first stage of the national legislative framework. The following document represents SCO's policy position regarding the national smart metering framework including the NEL amendments and issues raised by stakeholders following the initial exposure draft.

### **Second Exposure Draft**

SCO has approved for public exposure and consultation the second exposure draft of amendments to the NEL to support the accelerated roll-out, pilot and trials of smart meters in participating jurisdictions.

The NEL amendments contain proposed legislative provisions implementing MCE's policy decisions on the legal architecture of the national smart meter framework. These proposed NEL amendments are intended to define roll-out responsibilities and provide high level guidance on the scope of the roll-out. The NEL amendments are to specify the mechanism facilitating an obligation to roll out or trial smart meters in a jurisdiction and to outline the concept of smart metering for this purpose. This is then to be supported through technical and operational details for smart meters to be included in the rules and subsidiary instruments.

These provisions are to work alongside, rather than replace existing Victorian roll-out arrangements. Whilst the Victorian roll-out arrangements will not drive the development of the national framework, they will play an important part in the development of an optimal national framework. Work is continuing to ensure that the

Victorian project can transition at the earliest possible opportunity in a manner that does not compromise efficient investments in that state.

This SCO policy response to submissions on the first exposure draft is intended to explain the changes that have been made to the initial NEL amendments released in December 2008. This paper outlines each issue raised by stakeholders, provides a response and describes what action has been taken in respect of changes to the draft NEL amendments.

## Table of Contents

Issues, Responses and Actions.....	6
Legal Issues.....	6
1) Issue: Location of provisions between the Law and Rules .....	6
2) Issue: Whether a Ministerial determination constitutes a pass through event for the purpose of cost recovery .....	8
3) Issue: Determination to operate where existing contracts are in place .....	9
4) Issue: Ministerial determination may incorporate documents, etc (118E) .....	10
5) Issue: Lack of requirement for consultation.....	11
6) Issue: Publication of a Ministerial determination .....	12
7) Issue: Cross border terminology .....	13
8) Issue: Exclusivity and contestability.....	14
9) Issue: Standard control services and alternative control services and economic regulation.....	17
10) Issue: End date of amendments.....	18
Pilots Specific Issues.....	19
11) Issue: Requirement for information sharing .....	19
12) Issue: Widening of AER's functions .....	22
13) Issue: Pilot cost materiality .....	23
14) Issue: Retailer cost recovery - pilots .....	24
Roll-out Specific Issues .....	25
15) Issue: Ministerial discretion in specifying smart metering services .....	25
16) Issue: Retailer economic regulation – roll-out.....	26
17) Issue; Delaying NEL amendments to allow further consideration. ....	27
Economic Regulation Review.....	28
18) Issue: Which body should conduct the review of Chapter 6 of the Rules. ....	28
19) Issue: Current economic regulation framework.....	29
Acronyms.....	30

# Issues, Responses and Actions

## Legal Issues

### 1) *Issue: Location of provisions between the Law and Rules*

Many submissions referred to the architectural decision to place a head of power in the NEL, with half the submissions supporting the proposed framework and the split of details between the NEL and the National Electricity Rules (NER). For example, the Ethnic Communities' Council of NSW Inc stated it:

“...considers the intended framework and proposed NEL changes an appropriate implementation of MCE’s policy principles for accelerated smart meter roll-outs...”

Energex also:

“...generally supports the proposed legislative amendments to the NEL which provide heads of power for jurisdictional Energy Ministers to mandate the roll-out of smart meters and related pilots and trials.”

In contrast, Energy Australia suggested that provision for Ministerial metering determinations should be placed in the NER rather than the Law:

"The NEL amendments to implement smart meter trials and rollouts could be confined to authorising a one-off Rule change to provide for Ministerial Metering determinations. The balance of the provisions proposed for the NEL could be included in the authorised Rule Change."

## *Response*

On balance SCO considers the architecture described in the original provisions remains appropriate. It notes these are the first steps in the implementation of MCE’s national smart metering legislative framework. SCO considers that providing heads of power for the mandate of smart metering roll-outs in the NEL is appropriate. This approach provides for an overarching national regulatory framework, whilst allowing jurisdictional governments to decide on the application and timing of smart meter roll-outs and the form of pilots.

SCO also considers it appropriate that further details of the economic and technical aspects of the roll-out to be addressed in the NER.

SCO also notes this decision to be consistent with policy direction provide by MCE in June 2008 decision where it outlined the legislative framework for smart meters:

"the underlying regulatory arrangements for National Energy Market jurisdictions will remain within a consistent national framework...Legislative support for the roll-out is to be included in the NEL, including the obligation

to roll-out smart meters on the distribution businesses where a jurisdictional implementation date has been set...This will include any legislative support necessary to ensure appropriate cost recovery, as well as proposed supporting Rules as necessary"<sup>1</sup>.

*Action*

Provisions enabling Ministers to make a determination requiring smart meter roll-outs and pilots will remain in the NEL. Relevant supporting provisions will be included in the NER at a future time and in co-ordination with the outcomes of the work being conducted by the NSSC.

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<sup>1</sup> [Smart Meter Decision Paper MCE 13 June 2008](#)

**2) Issue: Whether a Ministerial determination constitutes a pass through event for the purpose of cost recovery**

Concern was raised that a Ministerial determination may not meet the policy intent of creating a "regulatory obligation or requirement", as expressed in the pass through provisions of the NER (Chapter 6.6.1), for the following reasons:

- while an obligation appearing in the NEL would constitute a regulatory change event, it is not clear that an administrative instrument given power under the NEL would create the same legal obligation; and
- a Ministerial determination appears to be a "new" obligation, rather than a "change" in obligation which is the precise wording of the criteria for cost pass through.

If a Ministerial determination does not result in the required "change" in obligation it could hamper the ability for Distribution businesses to receive cost recovery.

**Response**

Chapter 10 of the NER defines a pass through event as:

- “(a) a regulatory change event;
- (b) a service standard event;
- (c) a tax change event;
- (d) a terrorism event.”

SCO considers that an obligation created by a Minister under the proposed NEL amendments triggers the definition of a changed regulatory obligation or requirement, given that:

- clause 118D requires "Compliance with Ministerial pilot metering determinations";
- clause 118G states that "A regulated distribution system operator must provide the smart metering services required to be provided under a Ministerial smart meter roll-out determination".

The above clauses make it clear that a distributor must comply with a determination, giving it the necessary legal standing. The determinations require actions that were not previously required, so the distribution system operator is subject to changed regulatory requirements.

**Action**

No change is required as the existing proposed NEL amendments create the necessary change obligation required.

### **3) *Issue: Determination to operate where existing contracts are in place***

There was a concern as to whether a determination can countermand contracts and agreements as outlined in 118C(5) of the initial draft unless the determination is written directly in the law, rather than being an administrative instrument issued under the law.

Some submissions also raised concern that clause 118C(5) could create uncertainty for investment if existing contracts could be overridden by a Ministerial determination. It was suggested that there should be a requirement for the Minister to take account of any existing contracts that might be in place at the time of developing a determination. It was also suggested that transitional arrangements for existing contracts might be appropriate.

#### ***Response***

It is not intended that Ministers be able to list particular contracts in a determination and override them. SCO's intention is to make clear that a distributor must comply with the determination, regardless of contractual obligations. SCO considers that the inclusion of clause 118(C)(5) gives sufficient legal effect to this intention.

In an effort to minimise any risks associated with existing agreements SCO proposes that the Minister be required to have regard to the National Electricity Objective (NEO) when making a determination, guiding Ministers to avoid unnecessary costs in setting roll out schedules. The NEO promotes efficient investment, operation and use of electricity services for the long term interests of consumers and can be found on the Australian Energy Market Commission (AEMC) website.

The new requirements for consultation (as outlined in Issue 5) ensure that stakeholders will have an opportunity to bring such issues to the Ministers attention at the time of making a determination.

#### ***Action***

Legally clause 118C(5) at initial draft, now 118E(5) creates the necessary ability to require compliance with a determination regardless of contracts to the contrary. Consequently this clause will not be changed. 118E(2)(a) requires Ministers to have regard for the NEO in making a Ministerial determination, SCO believes that this will assist in minimising risks associated with the ability to countermand existing contracts and as such no other changes are needed.

**4) Issue: Ministerial determination may incorporate documents, etc (118E)**

Some stakeholders interpreted clause 118E of the NEL amendments, which referred to the incorporation of documents as providing a Minister with the ability to apply standards in relation to smart metering infrastructure that are different from, or in addition to those prescribed by the NER. It was suggested that this could undermine the objective of the national framework.

***Response***

The intent of this section was to allow Ministers to make reference to documentation where relevant, not to provide a Minister with the ability to apply standards different to those in the NER. Upon review it was noted the NEL already includes such a provision and as a result clause 118E has been removed.

Item 21 of Schedule 2 of the NEL contains provisions allowing an instrument, in this case a Ministerial metering determination, to:

“...make provision for the matter by applying, adopting or incorporating (with or without modification the provisions of –  
(a) an Act or statutory instrument; or  
(b) another document (whether of the same or a different kind),  
as in force at a particular time or as in force from time to time.”<sup>2</sup>”

In the absence of such a provision there would be no capacity for a pilot determination to reference documents such as Australian or international standards for metering equipment, or for a roll-out determination to reference the rules as they exist from time to time.

***Action***

Given item 21 of Schedule 2 of the NEL, clause 118E of the initial draft is redundant and has been removed.

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<sup>2</sup> [National Electricity \(South Australia\) Act 1996](#)

## 5) *Issue: Lack of requirement for consultation*

There was general concern that there was no requirement on Ministers to consult before making a *pilot* determination. Distribution businesses generally considered that distributors are best placed to advise on required pilots and trials and Ministers should consult before making a pilot determination. For example, Energy Networks Association (ENA) stated that distributors

"are best placed to define and propose the trials, assessments and pilots that best suit their circumstances and that can be tailored to provide Ministers with the information MCE needs in a manner that is technically and commercially appropriate."

Similarly, there was a concern that there is no requirement for Ministers to consult before issuing a *roll-out* determination. All submissions considered it important that distributors (and stakeholders more generally) have an opportunity to review and comment on a draft of a Ministerial determination before it is formally issued.

Some stakeholders acknowledged that generic jurisdictional consultation protocols relating to legislation or regulation proposals may apply. However, the requirements for consultation vary, with some jurisdictions having no formal requirements.

### ***Response***

SCO expects that Ministers would consult before issuing either a pilot or roll-out determination, consistent with good practice. It is proposed the Minister be required to consult with persons who in the Minister's opinion are interested in the determination before issuing a pilot determination. SCO considers that consultation is essential to the success of a roll-out, and recommends that Ministers be required to conduct public consultation.

### ***Action***

Provisions have been added to the proposed NEL amendments relating to both pilots and roll-outs requiring Ministers to undertake consultation. Clause 118C requires Ministers to consult with persons who, in the Minister's opinion, have an interest in the determination. Clause 118F requires when making a Ministerial roll-out determination Ministers must conduct public consultation.

**6) Issue: Publication of a Ministerial determination**

Some stakeholders argued that the notification and publication outlined in clauses 118G and 118I were insufficient. Clause 118M outlines publication and distribution requirements of a Ministerial determination while clause 118O requires a Ministerial determination be published on the AEMC website.

It was suggested that Ministerial determinations be required to be published in a jurisdiction in the same manner as retail prices for that jurisdiction.

***Response***

Regulated retail prices are gazetted and/or published by the relevant regulator in each jurisdiction. The AEMC is the national rule-making body for the National Electricity Market (NEM) and publication on its website is considered sufficient, and consistent with the location of the rules and access to the law.

In line with the requirement of the AEMC to publish rules, as made, in the South Australian Government Gazette SCO notes that it is appropriate to publish a Ministerial determination in the South Australian Government Gazette.

In addition, the consultation provisions noted in Issue 5 will generally improve the transparency of the use of such Ministerial determination.

***Action***

No change to the publication requirements as stated in the initial NEL amendments is proposed.

## 7) *Issue: Cross border terminology*

There was some confusion around the use of the term “adjacent jurisdiction” and whether it appropriately addressed the policy intent that a single Ministerial determination should have effect for a single distributor, even where that distributor’s network extends across a state or territory boundary.

### *Response*

Although SCO believes the provisions as drafted would work, SCO considers that the questions raised by stakeholders highlight that the terminology is confusing and that a simpler solution is preferable. The provisions have therefore been redrafted so that the law allows a determination to be made by a Minister in whose jurisdiction a distribution network operator earns most of its revenue from the provision of electricity network services provided by a distribution business situated partly or wholly in that participating jurisdiction as reflected in 118B and 118E.

These redrafted amendments allow Ministers to make determinations for businesses that are situated wholly or predominately in their jurisdiction. An example of this would be Country Energy, whose network is located predominantly in NSW and partly located in Queensland, with it earning most of its revenue from the provision of electricity network services in NSW. The provisions have the effect that the NSW Minister would be responsible for smart metering determinations involving Country Energy’s network business.

Clause 118H of the amendments requires Ministers to consult with other participating Ministers of the NEM as is appropriate for such an instrument. Section 91 (3) of the NEL has similar requirements for consultation between participating Ministers when a Minister requests the making of a jurisdictional derogation. The requirement for Ministers to consult each other allows any cross-jurisdictional issues to be resolved before a determination is made – including any issues relating to a network that operates in more than one jurisdiction.

### *Action*

Changes have been made to the appropriate clauses of the NEL amendments as outlined above. Consequently, the term “adjacent jurisdiction” has been removed throughout.

## 8) *Issue: Exclusivity and contestability*

Submissions noted that the issue of exclusivity and the return to a contestable market were not addressed in the proposed amendments or explanatory information. Several submissions indicated a preference that the issue of exclusivity and contestability be addressed in the NER. Distributors generally endorse the aspect of MCE's decision that gives them exclusivity as expressed by Ergon Energy who:

"... distributors will be exclusively responsible for mandated smart metering roll-outs, at least for the roll-out period. Ergon Energy expects that such provisions will be placed in the rules through Rule changes approved by the AEMC and guided by MCE's Statement of Policy Principles."

Retailer submissions generally endorsed those aspects of the June 2008 MCE decision in relation to a return to a contestable market as stated by the Energy Retailers Association of Australia (ERAA) which:

".... strongly supports the MCE objectives of transitioning to a contestable metering market once a rollout is completed. The ERAA considers that a competitive metering market is fundamental to the long-term involvement of retailers developing products related to the meters which meet the needs of the customer. The proposed amendments to the NEL fail to address this issue. The ERAA believes that any jurisdictional determination must make allowance for the transition to contestable metering market at the end of the rollout."

The issue of who is the responsible person needs to be considered not only for a mandated distributor lead roll-out but also for the post roll-out period and for jurisdictions where there may not be a mandate.

### ***Response***

SCO did not address the issue of exclusivity and return to a contestable market in the draft amendments as these topics are currently covered in the NER, and SCO considers the NER continue to be the appropriate legal instrument for addressing this matter. MCE has released a Statement of Policy Principles to guide the development of appropriate rules in support of smart meter roll-outs. The Statement of Policy Principles states: -

"A distribution network service provider who is obliged to roll out smart meters should have exclusivity over meter provision and responsibility for related metering data provision in respect of the customers covered by the mandate during the period in which the distribution network service provider must complete that mandate.<sup>3</sup>"

Translating the policy principles into the NEL would require including the definition of a number of roles and responsibilities in the NEL limiting the future development

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<sup>3</sup> [Ministerial Council on Energy Statement of Policy Principles](#)

of these roles and responsibilities. Consequently, SCO considers that it is appropriate for the definition of the responsible person to remain in the NER, preserving the current architecture.

An MCE initial rule covering exclusivity for the period of the roll-out will be inserted in Chapter 11 of the NER and the NEL amendments will include the necessary head of power to enable this provision. The initial rule will give distribution businesses exclusive responsibility for meter provision and meter data services for the period of the rollout specified in a Ministerial roll-out determinations. The coverage of the initial rule would be similar to the Victorian derogation, in that it operates in the context of the existing definitions of metering services (meter provision, installation and maintenance, and meter data services). The MCE initial rule has also been released for consultation.

There are currently a small number of meters with advanced capabilities being installed for small customers by meter providers other than distributors. While this may not result in the large economic benefits available in some jurisdictions from accelerated roll-outs, it is recognised that these provide a benefit to the parties involved. For this reason, and because in some jurisdictions mandates are not expected to be in place for some years, the technical and operational aspects (to be dealt with in the NER and procedures) of the national framework will need to allow for such smaller-scale activity to continue. The NSSC has been tasked with proposing supporting rules which would cover the need for multiparty access.

Significant analysis is required to define smart metering services and the long run responsible person for these services. SCO expects the NSSC to define smart metering services, roles and responsibilities, and draft possible rules. These rules are expected to cover the following scenarios: where there is a mandate; after a mandate; and where there is no mandate. The proposed rule changes will be considered by SCO and MCE and then submitted to the AEMC via an MCE rule change proposal.

When assessing the proposed rule changes the AEMC will have regard to the MCE Statement of Policy principles but the ultimate guiding principle will remain the National Electricity Objective (NEO), ensuring the long term interests of consumers. The standard rule making process will be followed which will include public consultation on the proposed rule changes.

Once this process is complete it may be necessary to request a subsequent review of who should be the responsible party for specific services in the long run and the development of any necessary transitional rules.

This course of action will facilitate MCE's desire for future flexibility in this area as stated in the June 2008 Decision paper:

“MCE remains open to further expansion of contestable metering beyond the roll-out period and as technology and retail competition matures to support this. Regulatory and operational arrangements in the national framework should be designed with future flexibility on this matter in mind.”

### *Action*

To enable MCE's policy decision a head of power will be placed in the NEL allowing an initial rule to be submitted into Chapter 11 of the NER. This will give distribution businesses exclusive responsibility for meter provision and meter data services for the period of the rollout specified in a Ministerial roll-out determination.

The NSSC will define smart metering services, roles and responsibilities, and draft possible rules. These rules are expected to cover where there is a mandate, after a mandate and where there is no mandate, these proposed rule changes will be submitted to the AEMC via an MCE rule change request.

**9) Issue: Standard control services and alternative control services and economic regulation**

Stakeholders noted that pass-through provisions in Chapter 6 only apply to standard control services. Pass-through events for alternative control services only apply if pass-throughs have been explicitly included in the form of control for that service.

***Response***

The scope for pass through events for alternative control services is determined when the distribution determination is made, consistent with the design of allowing a form of control that is specific to a particular service. Given that elements of metering services delivered by some businesses are regulated under alternative forms of control, SCO agrees that this issue needs to be addressed.

The classification and treatment of metering services will be considered as part of the request for AEMC advice on smart metering economic regulation. The policy intention as stated in the June 2008 MCE Decision Paper is to ensure that cost recovery will be possible for all meters rolled out under a mandate, regardless of how these services are classified.

As the pass through, classification of services and economic regulation provisions are all in the NER, the AEMC advice is the appropriate place to address these issues.

***Action***

The issue of cost pass through for alternative control services will be included in the request for advice to the AEMC on smart metering economic regulation.

**10) Issue: End date of amendments**

Stakeholders consider that the proposed NEL amendments have a specific and limited purpose and as such the NEL provisions for smart meter trials and roll-outs should be subject to either a sunset date or a Ministerial review following expiry of the roll-out period.

***Response***

Different jurisdictions will roll-out smart meters over different periods and at different times as the costs and benefits become clearer for each jurisdiction. This makes it difficult to predict an end date however SCO recognises that these amendments are specific to the mandate of smart meters and such should not remain as the law in perpetuity. SCO will request MCE to commit to a review of the NEL amendments by 2020.

In 2012 the MCE will review the smart meter cost benefit analysis in light of the results of pilots and trials, at which time Ministers will make a decision about the mandatory roll-out of smart meters in their jurisdiction. The proposed 2020 review date provides Ministers with the necessary time to investigate roll-out costs and benefits, develop a roll-out determination, and for it to take effect while ensuring these Laws are reviewed in a timely manner.

***Action***

SCO will recommend that MCE agree to review the smart meter NEL provisions in 2020.

## Pilots Specific Issues

### 11) *Issue: Requirement for information sharing*

Stakeholders understand the benefits of sharing information, however they believe the obligation needs to be considered in the context of existing regulatory requirements (such as confidentiality clauses) on participants in relation to the protection and privacy of information. Stakeholders indicated that a Ministerial pilot metering determination should not require disclosure of information that is inconsistent with the above obligations, or alternatively that there should be a statutory excuse for non-compliance.

### *Response*

The sharing of information obtained from smart meter pilots and assessments is essential in the confirmation of costs and benefits of smart meters in specific jurisdictions. Ministers will be relying on this information to inform whether a roll-out should proceed, and to assist in the development of roll-out implementation plans to maximise benefits.

SCO recognises that businesses are already sharing existing experience with smart meters through the NSSC Pilots and Trials Working Group. SCO notes that a Ministerial pilot determination may or may not include an information sharing requirement; however SCO considers it appropriate to retain the power in the draft amendments.

SCO recognises businesses concerns around the sharing of commercially sensitive information. SCO considers those concerns are addressed by the requirement for Ministers to have regard to the National Electricity Objective (NEO) at clause 118B(2)(a) and clause 118B(5)(c), allows the Minister to require that information be made available in a way that does not identify the person to whom the information relates.

Proposed 118B(2)(a) requires Ministers to have regard to the NEO when making a determination, including in setting the terms on which and persons to whom information will be required to be disclosed. In the 2005 amendments to the National Electricity Law the national electricity market objective replaced the list of “Market objectives” and “Code objectives” under the previous electricity Code. The intent of the NEO is to provide a more legally robust and economically testable statement of the objective than specific listed objectives.

The *Second Reading Speech* on the introduction of the *National Electricity (South Australia) (New National Electricity Law) Amendment Bill* (*South Australian House of Assembly Hansard*, 9 February 2005, p 1451) states (at p 1452):

“The market objective is an economic concept and should be interpreted as such ... The long term interest of consumers of electricity requires the economic welfare of consumers, over the long term, to be maximised ...

Applying an objective of economic efficiency recognises that, in a general sense, the national electricity market should be competitive...”

In the 2007 amendments to the NEL, consistent with advice from the Expert Panel<sup>4</sup>, the NEO was expanded to become the objective of the NEL. In its report the Expert Panel noted that ‘one of the perceived benefits of an overriding statement of objectives is that it provides a uniform guiding principle in relation to all aspects of the regime where discretions are required to be exercised or interpretations to be made. This includes the application of the regime by regulators, administrative bodies (including *Ministers*) the courts and other appeal bodies’ [at p 30].

The issue is what it means for the Minister to be required to have regard to the national electricity objective when the Minister is considering the persons to whom smart meter trial and assessment information should be disclosed and any conditions which should attach to the disclosure. SCO considers this requirement is likely to require the Minister to consider whether the disclosure will or is likely to inform how smart meter services might be supplied in the long run delivering the greatest benefit at least cost, while providing potential for innovation in the services being offered to meet consumer needs.

The fact that the Minister will be required to have regard to the NEO drives the Minister to assess the benefits of sharing this information against the potential costs including revealing commercially sensitive information on the business and any possible implications for the competitive viability of the business and, it follows, the process of competition for the provision of electricity services for the long term interests of consumers. In the terms of section 7 of the NEL, the requirement to disclose information must be assessed against any possible implications for efficient investment in, and efficient operation and use of, electricity services for the long term interest of consumers of electricity. The requirement for a decision maker to ‘have regard to’ the NEO requires the Minister to take the NEO into account and to give weight to it as a fundamental element in making his or her determination<sup>5</sup>.

An added protection for business is the ability, when requiring information be disclosed, to require that the information does not identify the person to whom the information relates. This clause relates to the businesses involved in smart meter pilots and assessments rather than individual customers. Privacy principles that protect individual customers will still apply.

SCO proposes that the Minister’s second reading speech to the amendments to the NEL should set out this explanation of the implications of the Minister being required to have regard to the NEO.

Clause 118D(2) provides the statutory excuse to ensure that a person should not incur liability for breach of contract, breach of confidence or any other civil wrong for providing or publishing the information in accordance with the determination.

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<sup>4</sup> [Expert Panel on Energy Access Pricing](#)

<sup>5</sup> *R v. Hunt; Ex part Sean Investments Pty Ltd* (1979) 180 CLR 322.

***Action***

The addition of 118B(2)(a) requires Ministers, when make a determination including in setting the terms on which and persons to whom information will be required to be disclosed, to have regard to the NEO.

SCO has requested the added protection for business through Ministers having the ability to require information be provided in a manner that does not identify the person to whom the information relates.

Clause 118D(2) has been added to provide a statutory excuse to ensure that a person should not incur liability for breach of contract, breach of confidence or any other civil wrong for providing or publishing the information as a direct consequence of meeting the requirements of the determination

## ***12) Issue: Widening of AER's functions***

Clause 118B(5) of the initial draft was intended to allow Ministers to confer powers to the AER when making a Ministerial pilot metering determination with the intent that the AER could provide guidelines to businesses outlining how pilots might be developed in a manner to ensure cost recovery. Stakeholders believe there is no need to widen the AER's functions and powers. It was suggested that in keeping with the current regulatory framework, any decision or direction of the AER should be limited to matters of economic regulation or compliance with the NER and accordingly, clause 118B(5) should be removed.

### ***Response***

SCO recognises the role of the AER is to regulate:

"... the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks in the national electricity market.<sup>6</sup>"

As such SCO agrees that clause 118B(5) and 118J(2) of the initial draft should be removed. The AER will still be involved in the development of the national framework through ongoing consultation, and in the application of its economic regulatory functions to ministerial determinations.

### ***Action***

Clauses 118B(5) and 118J(2) of the initial draft have been removed to reflect the current role of the AER as an economic regulator rather than a program developer.

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<sup>6</sup> [Australian Energy Regulator](#)

### **13) Issue: Pilot cost materiality**

Submissions noted that cost recovery for some mandated pilots may not meet the materiality threshold of 1 per cent of regulated revenue required to be considered as a pass through event.

#### ***Response***

SCO acknowledges the importance of pilots and trials to further assess the costs and benefits of a smart meter roll-out and recognises Distribution Businesses' concerns surrounding the materiality of pilots. Some businesses in NSW and ACT are already putting forward pilot costs as part of their determination, in particular ENA notes that:

"NSW and ACT [Distribution Businesses] are using the existing Chapter 6 framework (including the cost pass-through provisions) to gain AER approval for pilot/trials cost recovery during 2010-12 as part of their regulatory resets for the period 2009-14.

If it becomes apparent after the regulatory resets that pilots and trials are justified, a [Distribution Business] would need a workable cost pass through mechanism."

The NER does not define what constitutes a material cost eligible for consideration of a cost pass through, however SCO understands 1 per cent of regulated revenue is a widely accepted convention used by regulators. However the fact that businesses may be mandated to conduct smart meter trials or pilots may be enough for the costs to be considered material by the AER. In recognition of this issue MCE will request the AEMC investigate how to deal with cost recovery for pilots that do not meet the materiality threshold. The AEMC will be consulting with the AER during the development of this advice.

#### ***Action***

MCE will ask the AEMC to investigate and provide advice on the ability for the AER to assess the implications of Ministerial pilot determinations for distributor revenue in the context of materiality.

#### **14) Issue: Retailer cost recovery - pilots**

Stakeholders noted that the initial draft NEL amendments and explanatory note dealt with how a Ministerial pilot metering determination enables cost recovery of pilots for distributors, but neglected retailer cost recovery. There is a concern that retailers will be reluctant to participate in trials/pilots of smart metering if the costs they incur cannot be recovered. This is reflected in the NSSC submission which states:

“As well as increased distributor charges, retailers will incur costs participating in trials, amending systems to accommodate [smart metering infrastructure] and in data processing. Equity requires that the NEL framework also provide legislative support for the recovery by retailers of these costs and charges.”

The NSSC suggested when making pilot meter determinations Ministers should consider retailer cost recovery, stating retail business should be able to:

“...recover costs incurred directly and indirectly (including through payments to distributors) by retailers during both trials and roll-out. This is a separate issue to distributor cost recovery and is likely to require a different mechanism to that implemented to allow distributors to recover their costs.”

#### **Response**

SCO does not consider that making explicit provision for retail cost recovery in the NEL is appropriate, as jurisdictions are responsible for retail price regulation (see attachment A). However, SCO understands that there may be a need for retailers to provide the customer-facing aspects of pilots (such as customer billing), that there will be costs associated with this, and that these costs should be able to be recovered. SCO considers that an appropriate model for pilots is for distributors to contract a retailer to provide necessary services/infrastructure for a pilot.

When requesting AEMC to advise on the effectiveness of Chapter 6 of the Rules in the context of Ministerial pilot determinations, MCE will include a request to investigate if likely costs incurred by distributors for procuring these services from a retailer could be considered in a cost pass through event following a Ministerial pilot determination.

#### **Action**

SCO will recommend that the MCE request the AEMC, in its review of cost-recovery arrangements pertaining to pilots, assess the ability of a distributor to contract a retailer to assist with the delivery of a pilot and for costs to be recovered from customers through distribution charges.

## **Roll-out Specific Issues**

### ***15) Issue: Ministerial discretion in specifying smart metering services***

There were general concerns relating to the level of discretion given to Ministers which allowed Ministers to specify required smart metering services. It was thought that this would dilute the national smart metering framework to be developed. Clause 118C(3)(c) gives the Minister the ability to:

"specify the smart metering services, or class of smart metering services, that must or need not be provided by the relevant operator or relevant operators."

Giving Ministers powers that allow deviation from the rules was seen by some to undermine the national framework.

### ***Response***

SCO recognises these concerns and clause 118C(3)(c) of the initial draft has been removed. This will ensure that smart meter requirements are consistent under the national framework rather than specified by individual Ministers. However there is a need for flexibility to allow the Ministerial determination to stage the functionalities activated over the period of the roll-out with the intent that by the end of the roll-out period all the smart metering services specified in the NER would be activated. To achieve this 118D(4)(a) and (b) have been added. These clauses enable Ministers to specify a time line for functionality activation rather than choosing functionalities that need to be activated.

### ***Action***

The draft legislation has been amended to reflect the above policy intent. Clause 118C(3)(c) of the initial draft has been removed and clauses 118D(4)(a) and (b) have been added to increase flexibility for a staged smart meter roll-out.

**16) Issue: Retailer economic regulation – roll-out**

Some submissions are concerned about the lack of provisions for retailer cost recovery in the event of a roll-out. They state that retailers will face significant additional costs as a result of a roll-out of smart meters and believe it is essential that retailers have the ability to pass through these costs to end customers.

***Response***

Retail price regulation remains the responsibility of jurisdictional authorities, as agreed in the Australian Energy Market Agreement, therefore retailer costs resulting from a smart meter roll-out should be considered by the relevant jurisdictional authority at the appropriate time. This determination will depend on a number of factors such as the timing of the roll-out and existing regulatory practices.

SCO recognises that retailer economic regulation is a jurisdictional issue and as such should be addressed at that level. (Attachment A) provides an outline of how each jurisdiction within the NEM expects to address retailer economic regulation.

***Action***

Retail price regulation and therefore smart metering economic regulation is a jurisdictional issue, thus no change to the NEL amendments is proposed.

**17) Issue: Delaying NEL amendments to allow further consideration.**

Stakeholders proposed that the NEL provisions relating to the rollout be deferred until other areas of the framework such as metering functionality, performance and service levels and supporting rule changes be developed. It was also suggested that the roll-out provisions be deferred until 2012 when pilot results would be available.

***Response***

SCO recognises the benefit of deferring the tabling of the NEL amendments in the South Australian Parliament to allow further examination and consultation in relation to development of the national framework.

SCO does not believe that it is necessary to delay the NEL provisions until after pilots are complete as the NEL amendments have a discrete purpose in providing heads of power allowing Ministers to mandate pilots and roll-outs once the results of pilots have been assessed. It is not expected that these provisions will affect or impose limitations on the development of the national framework elements to be included in the NER. SCO considers that pilot outcomes will inform the development of those elements of the national framework expressed in the NER.

***Action***

SCO decided it is be appropriate that the smart meters package be delayed to the September 2009 sitting of the SA Parliament.

## **Economic Regulation Review**

### ***18) Issue: Which body should conduct the review of Chapter 6 of the Rules***

In some submissions stakeholders indicated a preference for the NSSC to conduct the review of the NER as it is a stakeholder consultative body consisting of distributors, retailers, and consumers and with the necessary expertise to carry out such a review.

#### ***Response***

SCO recognises the importance of consulting with the NSSC in the development of advice relating to economic regulation. However SCO considers it is appropriate for the AEMC to provide this advice to MCE as it is the body responsible for rule-making, market development and policy advice concerning the NEM.

To ensure stakeholder involvement SCO will recommend to MCE that they request the AEMC consult with key stakeholders including the NSSC when developing the statement of approach for the development of its advice and undertake public consultation on the draft advice.

#### ***Action***

SCO will recommend MCE request the AEMC provide advice on Chapter 6 of the Rule in relation to smart meters. In developing this advice MCE will request the AEMC consult with key stakeholders including the NSSC.

### **19) Issue: Current economic regulation framework**

Some stakeholders felt that the current cost recovery regime is satisfactory to deal with pilots and the roll-out of smart meters. ENA stated that the:

".....Chapter 6 framework already provides provisions for the recovery of efficient costs which must be justified against the Objectives, Factors & Criteria in the Rules. [Distribution Businesses] see that the current regime already has many of the elements and can allow for appropriate cost recovery. The NEL/NER pricing principles already include recognition of risk and efficiency.."

Many submissions raised concerns about some aspects of the economic framework including the materiality of pilots, the classification of smart meter services, and retailer cost recovery for pilots suggesting the need for further assessment of the Chapter 6 framework.

#### ***Response***

SCO considers it necessary to confirm the arrangements in Chapter 6 of the Rules provide adequate coverage for cost recovery of smart metering roll-outs and pilots. SCO will recommend MCE request advice from the AEMC.

SCO acknowledges Chapter 6 of the rules provides the economic regulation arrangements applying to a distributor including provisions for the recovery of efficient costs and does not wish to weaken this aspect of the framework. Consequently the MCE request for advice to the AEMC will ask the AEMC to assess Chapter 6 of the NER in relation to a mandated roll-out of smart meters and pilots. To ensure robust assessment the AEMC will be required to consult with stakeholders. The recommendations from the review will include proposed rule changes, which will then be reviewed by MCE and submitted to the AEMC via the public rule change process.

As the economic regulator the AER in its submission has stated its intent to engage in the process.

#### ***Action***

Recommend that MCE request advice from the AEMC about whether the existing provisions in the NER relating to economic regulation would work effectively with Ministerial roll-out or pilot determinations made under the proposed NEL amendments.

## Acronyms

AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
DB	Distribution Business
CBA	Cost benefit Analysis
MCE	Ministerial Council on Energy
NEO	National Electricity Objective
NEM	National Electricity Market
NEL	National Electricity Law
NER	National Electricity Rules
NSSC	National Stakeholder Steering Committee
SCO	Ministerial Council on Energy Standing Committee of Officials

## ***Retailer economic regulation – jurisdictional outline***

Retail price regulation is the responsibility of jurisdictional authorities, as agreed in the Australian Energy Market Agreement, jurisdictional arrangements and the way smart meters will be considered is outlined below.

### **South Australia:**

Current energy retail price determinations allow for the pass-through of any material costs associated with the imposition of a new service standard, subject to the assessment processes and procedures set out in each determination.

A Retail Standing Contract Price Determination is made by the Essential Services Commission of South Australia under Part 3 of the [Essential Services Commission Act 2002](#), as authorised by sections 36AA and 35A(1)(a) of the [Electricity Act 1996](#).

The standing contract prices set under this Standing Contract Price Determination are comprised of the prescribed distribution service tariff; the applicable retailer tariff charges; and any pass through amounts approved by ESCOSA.

The most recent retail price determination states that a relevant pass through event is a:

- (a) change in taxes event; or
- (b) regulatory reset event; or
- (c) reserve trader event; or
- (d) NEMMCO directions event.

Retailers wishing to pass through the costs of a mandated smart meter rollout will need to apply to ESCOSA for approval to apply these costs to customers.

It is likely that the consideration of any costs associated with a mandated smart meter roll-out would be considered under a regulatory reset event.

### **Tasmania:**

In Tasmania, the retail sale of electricity to non-contestable customers is a declared electrical service. As such, the Regulator must conduct an investigation into the pricing policies of the relevant retailer (see [Electricity Supply Industry Price Control Regulations 2003, Part 3](#)) followed by a pricing determination. This is conducted every three years, the determination sets, for the retail component of prices, the retailer's cost to serve each customer and the retail margin.

The retailer is required to make a submission to the Regulator detailing its proposed cost to serve and retail margin, including its reasons. At this stage the retailer has the

capacity to include costs that it will incur as a result of a smart meter roll-out in its proposal.

The Regulator can either accept the proposal or substitute its own recommendations on the basis of its investigation in making a pricing determination. In making a declared electrical service price determination the Regulator is to consider (amongst other matters) ‘the cost of providing the declared electrical service’ (see s35(2)(a) of above regulations) and any other matter the regulator considers relevant (see s35(2)(p) of above regulations) .

While the Regulator is not required to explicitly consider costs that the retailer will incur as a result of a smart meter roll-out, it is clear that all costs incurred in providing a declared electrical service are to be considered by the Regulator. However, how this is achieved is at the discretion of the Regulator.

In assessing the pass through of costs during mid determination, the Regulator is to allow pass through of costs for the following specified matters (see s31 of above regulations):

- a tax event;
- NEMMCO charges attributable to the non-contestable customer base; the change in costs of purchasing RECs; and
- a vesting agreement adjustment (the vesting agreement is the contract between Aurora Energy and Hydro Tasmania that covers the electricity supplied by Hydro Tas for sale to Aurora’s non-contestable).

The costs incurred by a retailer as a result of a smart meter rollout are not a specified pass through under the regulations.

Any amended tariff must be consistent with the pricing determination, and as such, if the costs incurred by a retailer as a result of a smart meter rollout have not been considered and allowed for in the maximum allowable revenue set in the pricing determination, they cannot be considered within the determination period for the purposes of a tariff adjustment mid determination.

While the unavoidable cost of a smart meter roll-out would not be able to be passed through mid determination as this is not a specified pass through event they would be able to considered in the 3 yearly pricing determination submitted by the retailer.

### **New South Wales:**

Electricity retail prices are regulated by the NSW Independent Pricing and Regulatory Tribunal (IPART) as provided by the [\*Electricity Supply Act 1995 \(NSW\)\*](#).

The symmetrical pass-through mechanism applies to events that result in retailers incurring material costs (or cost savings) in the period 1 July 2007 to 30 June 2010. The pass-through mechanism assessed by [IPART](#) will allow retailers to pass through costs (or cost savings) associated with:

- Regulatory events, including:
  - Meeting additional obligations related to green energy schemes (existing and future)

- A retailer of last resort (ROLR) event
- Meeting additional obligations related to Government-imposed energy hardship policies
- One-off NEMMCO charges (such as reserve trader or direction events)
- Certain new taxation events.

Retailers seeking to pass through costs associated with a regulatory or taxation change event will need to apply for approval of these costs. The pass-through mechanism is intended to capture only those costs that are incremental, efficient and a direct result of the pass-through event. Retailers wishing to pass through the costs of a mandated smart meter rollout will need to apply to IPART for approval to apply these costs to customers.

In applying to pass through the costs, retailers will be required to provide evidence of the nature of the pass-through event and the actual and likely costs, and to demonstrate that the costs represent the efficient and incremental costs associated with the pass-through event. IPART's approval process will involve it consulting with stakeholders on matters that it considers appropriate.

### **Queensland:**

The [\*Electricity \(Queensland\) Act 1994\*](#) provides the methodology which the pricing entity (currently the Queensland Competition Authority (QCA)) must use to calculate the electricity price that a retailer may charge its non-market customers for the relevant year. The prices fixed under the methodology, are, for a retail entity, called the *notified prices*.

The notified price is calculated using a Benchmarked Retail Cost Index methodology which is the estimated total cost of supplying customers in the State during that year, as worked out by the QCA. The total cost to supply is the total of the following:

- (a) the cost of energy;
- (b) network costs;
- (c) retail costs; and
- (d) any other relevant costs the QCA considers relevant.

Retail costs relate to the services provided by the retailer to its customers. The legislation requires that the retail costs are to reflect the likely cost of providing customer retail services to Queensland customers connected to the national grid, based on an efficient retailer carrying on an electricity retail business. Accordingly, the QCA would be required to consider the unavoidable costs to a retailer associated with retailer services relating to a mandated roll-out of smart meters.

### **Victoria:**

Victoria is already rolling out smart meters and they have a deregulated market with no regulatory setting of retail prices, and as such all relevant costs may be passed through by retailers.

Note that oversight of standing offers for small business customers was removed on 1 January 2008, and oversight of standing offers for residential customers was removed on 1 January 2009.

Competitive tensions between the 13 retailers operating in Victoria will maintain a downwards pressure on retailer cost increases, helping to minimise cost transfers to Victorian customers from pilots and trials undertaken interstate by retailers operating in Victoria.

However if at any time, the AEMC forms the view that retail competition is no longer operating effectively in Victoria, the Victorian government can act on an AEMC recommendation to re-institute retail electricity and gas price oversight.

As outline above jurisdictions have provided the means by which retailers in the NEM would have unavoidable costs assessed and passed on to consumers. SCO does not consider that making explicit provision for retail cost recovery in the NEL is necessary or appropriate.